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Notes and Comments

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Spouse Gets Confirmation From the Federal Courts That Permits Her to Retain Fraudulently Obtained Marital Asset by Her Husband

If any practitioner had doubts whether a spouse could retain ill-gotten marital assets fraudulently acquired by one's spouse and later divided by the martial settlement agreement, it should be dispelled by the decision and order of Judge George B. Daniels of the U.S. District Court in *Commodity Futures Trading Commission v. Stephen Walsh and Janet Walsh, et al. and Securities and Exchange Commission v. Janet Walsh, et al.*[1]

Judge Daniels found that Janet Walsh (now by marriage Janet Schaberg) could retain millions of dollars of marital funds acquired by her husband through a Ponzi scheme that amounted to about $554,000,000 in fraudulently obtained investments from his clients. By comparison to the Madoff caper, it was less than a blip on a radar screen, but nevertheless significant.

Procedural History

It is interesting that the initial litigation began in the federal courts, and not in the Supreme Court matrimonial part. The fight began in 2009, some three years after the parties entered into a valid separation agreement that was incorporated into a divorce decree. Essentially the wife received a lump sum payment of $12.5 million that was to be paid to her in bi-annual installments for fourteen years, while the husband retained another $5 million in various bank accounts, as well as his business assets. In addition, the wife retained ownership of two condominiums—one in Florida and the other in New York City. The parties waived any further equitable distribution, maintenance and inheritance from each other. Both the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) commenced actions against Janet Schaberg and her former husband Stephen Walsh to disgorge any monies from either or both of them obtained by Walsh and his business partner swindling their investors. At the time of the suits, the Walshs had been divorced for several years following a twenty-five year marriage.

There is no consensus in other states as to whether an innocent purchaser for value can retain funds acquired from a thief. States differ whether an innocent purchaser

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of the ill gotten funds can retain such monies or would have to give them up when a lawsuit was started and a verdict in their favor was obtained. This case touches upon this issue and makes clear that at least in New York, an innocent spouse with no knowledge of the fraud, and for fair consideration, can withstand any attempts to disgorge such assets.

When both the SEC and CFTC commenced the disgorgement suit, they sought and obtained ex parte restraining orders and later a preliminary injunction that froze the Walshs' ability to transfer or dispose of any assets without prior approval of the court. It was then that the wife appealed to the Second Circuit Court of Appeals that apparently tussled with the law regarding the right of a spouse to retain stolen property in New York. As a result, and before deciding the case, the court certified two questions to the New York State Court of Appeals.[2] The first was whether the proceeds of a fraudulent transaction can constitute marital property. The other, whether relinquishing a claim to the proceeds of fraud can constitute the payment of fair consideration. Matrimonial attorneys following the case were deeply perplexed as to how our high court would decide these certified questions.

The State Court of Appeals ruled that the proceeds of fraud can constitute marital property and, with regard to the latter issue, held that the question of whether fair consideration was paid by the wife was not precluded where all or part of the marital estate consists of the proceeds of fraud.[3] When it received the decision of the State Court of Appeals answering the certified questions, the Second Circuit vacated the preliminary injunction issued by the district court and remanded the case to the Federal District Court to determine whether the wife provided fair consideration when she obtained these funds pursuant to the parties' separation agreement.[4] Extensive discovery followed, and the wife, believing there were no further issues to be determined, moved for summary judgment dismissing both agencies' suit against her. On remand to, Judge Daniels, after reviewing the entire history of the case, and the full decision of the Court of Appeals, granted the motion. To fully grasp the facts of the case and why it is important to the matrimonial practitioner, the reader is recommended to read the decisions in detail.

The State Court of Appeals, in answering the certified questions of the federal court held that an innocent spouse can retain such status and the money she obtained—provided *she acted in good faith and without the knowledge of the fraud and gave fair consideration for the transferred property.* In other words, as long as she was an innocent purchaser for value, she could retain the tainted assets. The state high court first reviewed the facts and noted that neither the SEC nor the CFTC alleged that the wife was aware of or participated in the fraud, but argued that a sizable portion of such funds went into her possession pursuant to a separation agreement made between the husband and wife, the terms of which were incorporated into a divorce decree.

The Second Circuit Court of Appeals, in order for it to determine whether the wife has a legitimate claim to retain those funds and therefore prevent the governmental agencies from obtaining disgorgement from her, proffered the certified questions to the New York Court of Appeals.[5] To answer these questions, the state court had to decide if either the Domestic Relations Law or Debtor and Creditor Law or a public policy consideration would prevent disgorgement by the agencies.

The Underlying Factual History

The Walshs had been married for 25 years and had two children. The husband during the marriage obtained substantial interests in a number of highly successful businesses. The couple acquired a home in Port Washington as well as condominiums in Florida and New York City. They separated in 2004, and executed a separation agreement in 2006. Under its terms the wife conveyed to the husband her ownership to the marital residence valued at $7.5 million and received sole ownership of their two condos with an alleged value of $6.7 million. In addition, the wife waived all claims to the husband's business interest and spousal support, apparently in exchange for $5,000,000 in various bank accounts and a distributive award of $12.5 million in bi-annual installments through 2020—approximately fourteen years. The wife moved to Florida and married Schaberg two years later. Two years after the wife's remarriage, the SEC and CFTC filed a disgorgement suit against the Walshs (named a "relief defendant") alleging the perpetration of a large-scale fraud by the husband and the main defendants, seeking monetary damages from them. A disgorgement claim was asserted against the wife who was alleged to be in possession of the proceeds from the fraudulent securities scheme. The District Court (Daniels, J.) initially granted a preliminary injunction freezing the wife's brokerage and bank accounts valued at $7.6 million and restrained her from transferring any real property, jewelry, or artwork without court approval. The wife appealed, arguing that the injunction was wrongfully granted because the property restrained was not subject to disgorgement, alleging that because she obtained these monies and assets pursuant to a valid separation agreement she was a good faith purchaser for value. The Second Circuit Court of Appeals also acknowledged that the district courts have the power to direct disgorgement from a relief defendant provided that the party is in possession of ill-gotten funds and also lacks a legitimate claim to those funds. In this case the pivotal issue was whether as a matter of law the wife lacked a legitimate claim to those funds, and to determine this issue it needed to forward the two questions to the State Court of Appeals, which were set forth above.

The New York State Court of Appeals' Analysis of the Certified Questions

In deciding the first question—whether assets obtained from fraud constitute "marital property"—the Court of Appeals looked to the wife's contention that because she obtained the tainted property pursuant to a separation agreement she became a good faith purchaser for value, and the Agencies' argument that monies derived from securities fraud could not be part of the marital estate nor could it be retained or transferred through equitable distribution pursuant to Domestic Relations Law Section 236. The high court noted that these respective legal arguments "raise difficult policy questions, requiring us to weigh the competing interests of the original owners of funds stolen in a fraudulent scheme against the innocent former spouse of the defrauder." This statement is particularly interesting and one cannot resist questioning why the court used the phrase "innocent former spouse" rather than an innocent purchaser for value. Was this a way to accord to an innocent *spouse* a preferred status as to other innocent purchasers for value?

It took the Court several pages of its decision to conclude that monies obtained through fraud cannot be followed by the original owner into the hands of an innocent *spouse* that obtains such property in good faith and without knowledge of the fraud and gave "fair consideration" for the property acquired pursuant to the terms of their separation agreement. The Agencies' argument that (1) a victim of embezzlement and not a mere creditor had an absolute right to disgorgement, and (2) the issue of whether fair consideration had been given, was irrelevant. It acknowledged that such contentions have appeal, but held that it was unable to approve such a rule. It went on to discuss the second question that requires fair consideration to be given in order to sustain the status of innocent spouse.

The wife argued that she provided fair consideration and thereby became a good faith purchaser for value by executing an arm's length separation agreement. She also argued that she had no knowledge of her husband's illegal actions, pointing out that he had a history of being a respected and successful entrepreneur and securities trader and did not engage in collusion with her husband to deprive defrauded customers recovery of their moneys. The Agencies' counter-argument was that the wife as a matter of law could not have given fair consideration because in exchange for acquiring marital assets which were later determined to be the product of fraud, she only released a claim to a larger portion of the marital estate, which also included the husband's proceeds of his fraud—accordingly her consideration had to be viewed as illusory. The court once again noted that both parties raised compelling arguments.

In deciding whose argument was more compelling and perhaps recalling the famous quote from Orwell's *Animal Farm* that "all animals are equal, but some animals are more equal than others," the Court turned to an analysis of Debtor and Creditor Law Sections 272 and 278. Pointing out that a defrauded creditor can have a fraudulent conveyance set aside against anyone but a good faith purchase for value—defined as a "a purchaser for fair consideration without knowledge of the fraud"—the court then explains that fair consideration is given when property obtained is exchanged for a fair equivalent of remaining assets, and the property is conveyed in good faith, citing DCL § 272 [a]. Of course, the resolution depends upon the peculiar facts of each case. The Court then held that to determine whether a spouse paid fair consideration in the context of a separation agreement a court must first determine whether the spouse gave up and waived any rights to any untainted assets in the marital estate. If she did, this alone would constitute fair consideration. It then went on to another aspect of fair consideration which could include spousal contribution to the marriage, release of maintenance or child support payments as well as the waiver of inheritance and other rights or remedies conferred by law. In addition, it mentioned that concessions made as to custody or visitation are other examples of valid consideration, and cited cases that hold that transfers made pursuant to a separation agreement are presumed to be made for fair considerations.[6] The State Court of Appeals found that the Second Circuit erred in presuming that the only consideration the wife could have given for obtainment of the tainted property was her release of a claim to other proceeds of the fraud, which would make her claim illusory. Since the Court already determined that there were other forms of valid consideration that are relevant to the determination of whether what the wife gave up could be considered having paid a fair consideration, a further determination was unnecessary. It then noted that the Second Circuit's assumption that the marital estate consisted of almost entirely the proceeds of fraud must be accepted in deciding the issue. The state Court therefore reformulated the certified question to "Is a determination that a spouse paid fair consideration according to the terms of the…Debtor and Creditor Law Section 272 precluded, as a matter of law, where part or all of the marital estate consists of the proceeds obtained from fraud?" Finally the court held that based upon its analysis, the reformulated question had to be decided in the negative—leaving the door open for the wife to defeat the disgorgement action. It also acknowledged that the determination of whether the wife gave fair consideration pursuant to DCL § 272, under all of the facts and circumstances, was a matter to be decided by the federal courts.

In dictum, though, the Court took pains to recite facts which it believed to be controlling, without saying so in so many words. It noted that the wife contended she surrendered more than her right to claim through equitable distribution a greater portion of fraudulently obtained funds constituting the marital estate. She also included the waiver of maintenance, which can be based on a variety of considerations including her rights of inheritance, the length of the marriage, and the marital residence she

claimed was obtained with separate funds not part of the fraud. The Court added, "Furthermore, even where a spouse does not relinquish a fair equivalent for the aggregate of assets, it is possible that fair consideration may be exchanged for at least some of the asset."[7]

Again the Court commented, perhaps a little insecure of this holding after its analysis, "…we are not unsympathetic to the interest of the parties who were fraudulently deprived of their investments and who, understandably, seek the return of a portion of their stolen monies." It went on to explain that victims of fraud were free to pursue disgorgement proceedings when it is shown that the spouse who received these fraudulently obtained funds was aware of or participated in the fraud or failed to act in good faith. It postulated that an example would be two spouses who enter into a collusive divorce agreement in an effort to conceal stolen assets from their rightful owners. It then reminded us that even though a spouse was blameless and entered into the agreement in good faith and without any knowledge of the fraud, the defrauded parties could nevertheless recover these funds if the spouse did not give fair consideration pursuant to DCL § 272. Accordingly, an innocent spouse should prevail over the rightful owners "…consistent with this State's strong public policy of ensuring finality in divorce proceedings," where it is determined that he or she provided fair consideration. The case was remanded to the district court to make the factual determination of whether she paid fair consideration by waiving, in good faith, a claim to the proceeds of the unknown fraud.

Judge Eugene Pigott dissented in part because he believed that DCL § 278 required the wife to prove that the consideration she gave to obtain her property pursuant to their separation agreement was a fair equivalent to what she had obtained. He explained that "One cannot reasonably argue that a spouse—even an innocent one with no knowledge of her husband's fraud—could be said to have given 'fair equivalent' value by giving up future claims to the equitable distribution of proceeds in which she has no legitimate interest." In such a case, the innocent spouse "has not given value for the misappropriated property, but rather has gained an interest in the property **simply by virtue of being married to the person who misappropriated" such funds** (emphasis supplied).

This dissent created a new test, not recognized by the majority, that would prevent an innocent spouse from retaining the property she received pursuant to the separation agreement. This dissenting opinion was concurred in by Judge Robert Smith.

The Federal Court Determination

These differing views were returned to the Circuit Court of Appeals which in turn remanded it to the federal district court for its final determination of the factual question of fair consideration. It was then that Mrs. Schaberg moved for and obtained summary judgment to dismiss the pending disgorgement proceeding as a matter of law, arguing that she obtained her share of marital assets in good faith and for fair consideration—specifically that she had conveyed her interest in the marital residence valued at $7.5 million and waiving her claim for inheritance and maintenance which constitutes fair equivalent value. As such, to survive summary judgment the Agencies had to show, by probative evidence, that the wife did not pay fair consideration to obtain her share of the marital estate, which is presumed to be made for a fair consideration, when transfers were made pursuant to a valid separation agreement. The court held that the Agencies failed to meet this standard, and granted the wife summary judgment, also pointing out that New York's public policy of ensuring finality to divorce cases should also be applied because the alleged fraud of the husband did not occur until three years following the execution of their separation agreement and after the wife moved to Florida and remarried.

A Matter of Equity

Whether an appeal will be sought by the Agencies remains to be seen. But it seems clear to me that the principles of equity had to be leaned upon, and an innocent spouse given a superior status, to other unmarried persons or entities when disgorgement is sought in other fraudulent situations. Perhaps also, the fact that the Receiver appointed in this Ponzi scheme had already recovered and paid out 94.3% of investors' claims entered into the equation—allowing the spouse to retain these tainted assets. We welcome readers' reaction to this result and any contrary views.

Endnotes

1. 2014 WL 847900 (S.D.N.Y. Feb. 28, 2014).
2. 618 F.3d 218 (2d Cir. 2010).
3. 17 N.Y.3d 162 (2011).
4. 658 F.3d 194 (2d Cir. 2011).
5. See endnote 2.
6. 17 N.Y.3d 162, 174-76 (2011).
7. 17 N.Y.3d at 176-77.

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A "Sweet 16" Primer on the "SUNY Cap"

By Hon. Richard A. Dollinger and Hillary E. Panek

The Sweet 16: every college basketball coach's dream.

But, there's another "Sweet 16" for divorcing parents of college-bound students—the "Sweet 16 Steps" to better use of the often-uttered, seldom artfully utilized or thoroughly understood "SUNY cap."

The phrase, well-familiar to matrimonial practitioners, refers to the attempt to limit a parent's college education contributions to the amount of costs charged at the State University of New York (SUNY). Although frequently suggested by counsel, the concept has pitfalls aplenty for clients and attorneys alike.

The Courts' "Pro-Child" Approach to College Obligations

While parental funding of a child's college education is not mandatory in New York, the courts have, nonetheless, transformed the state's broad child support obligations into a child-friendly approach to parental obligations to finance a college education. The Legislature has directed courts to order a parent to contribute to a child's college education, dependent on the circumstances of the case and abiding by the child's best interest.[1] In implementing this Legislative command, the courts, as demonstrated in *Tishman v. Bogatin*,[2] have even ordered parents to cover the costs of expensive private colleges, if justified by the parent's background and resources.

In the face of this expansive pro-child approach, parents often seek to define their own obligations for college education costs by invoking the "SUNY cap" in agreements or stipulations. The "cap" sets an upward limit on the total combined contribution of parents to each child's college costs. Some rules of thumb are then essential.

The "Sweet-16" Steps

1. An ill-defined reference to the "cap" can cause complications. The tuitions—and other costs—at New York's public universities varied significantly in 2013: the tuitions at the University at Buffalo, SUNY Geneseo, and SUNY Oswego were $10,182.75, $2,935, and $4,315.50, respectively.[3] Therefore, the "cap," if inserted into a separation agreement, should specify the exact SUNY college to which the cap will be referenced.
2. Practitioners should specify whether the "cap" applies to tuition at the time of the agreement or at the time the child applies: with escalating tuitions, even in the state system, the future consequences for parents could be substantial.
3. Parents need to understand that if the cap is merely tuition, then neither parent will be obligated to contribute anything to room and board, fees and other college costs, which, in the state system, can escalate as fast as tuition.
4. If parents choose the SUNY cap in their agreement, there is no case law suggesting that a court could override that provision and impose a more expensive financing option on the parents. New York courts have enforced the agreed SUNY cap, even after the child has enrolled in a higher cost college.[4] The appellate divisions have also imposed SUNY caps, on appeal, when lower courts, without reliance on an agreement, declined to cap college costs.[5] But, practitioners who blithely insert language leaving the question to "another day" or stating that the couple will pay "according to their means," may find that a future court orders a parental contribution to college costs in excess of the SUNY cap. There is no judicial rule favoring a SUNY cap, and the Second Department has held that any presumption of its applicability is inconsistent with the broad "parents-should-pay-tuition" concept enshrined in the Domestic Relations Law and the common law of New York.[6]
5. Any parent, under an agreement with a broad command to "pay college costs," who seeks to impose a SUNY cap on his or her soon-to-be college student, should seek court intervention well in advance of the student's enrollment. When the child is already enrolled at a private college, a parent may find it impossible to have a court interpret general college support language to limit expenses to a SUNY cap.[7]
6. Parents may often fund Uniform Gift to Minor Act accounts or other tax-deferred college accounts (e.g., state 529 accounts) for their children and seek to use those available funds to cover their contributions to the SUNY cap. However, at least one court held that, unless the agreement "unambiguously" provided that the already accumulated funds could be credited against the parental contribution, the parental contribution could not be reduced by these already funded accounts.[8] Any parent who already has these accounts created at the time of the divorce, or who seeks to fund such tax-deferred accounts after the divorce, should carefully review the scope of the language in any judgment or separation agreement before utilizing these devices, as absent specific language sanctioning the use of these tax-deferred funds to reduce parental out-of-pocket costs, these accounts will likely inure solely to the benefit of the child.
7. Parents should also specify whether student loans reduce the parental contributions to the SUNY cap. Numerous New York courts have required parents who undertake a general obligation to "pay according to their means" or "their then ability" to pay for loans incurred by a student, even though the underlying agreement never required it.[9] Any ambiguous

language describing the allocation of student loans in an agreement will, in New York's pro-child environment, be interpreted against the parent and result in the parent covering their child's loan obligations.

8. Practitioners should be alert to a lack of specific language on pre-college expenses under the SUNY cap—the ever present fees, application costs and testing fees for college entrance. These fees, which can be sizable, can easily be read into a broad agreement to "pay college costs," and the parents may face additional costs even before the child is admitted to college.[10] If parents seek to curb their contributions to these costs, the courts will need specific language to justify excluding them.

9. Parents in their agreement must exactingly specify whether gifts or scholarships inure to the benefit of the child or reduce the parental contribution. This court recently held that a tuition benefit, obtained through the father's second wife, inured solely to the benefit of the child and did not offset either parent's obligation to finance college expenses when they had agreed to a SUNY cap.[11]

10. In considering the SUNY cap, the parents and practitioners should be alert to a potential "*Rohrs*" credit, which may permit the parent paying support to a dollar-for-dollar reduction in child support payments equivalent to the room and board expenses paid by him for each child residing away from home while attending college.[12] The credits are optional and only applied to a parent's out-of-pocket costs.[13] The parents could agree that the payor spouse is entirely responsible for the room and board expenses, up to his share of the SUNY cap, an allocation which could maximize the payor's "*Rohrs"* credit. The "Rohrs" credit is not unlimited: even if the credit is granted, the reduction in support should not drop below the floor of support for any remaining non-college children or children who are not yet emancipated.

11. Failure to provide for a "Rohrs" room and board credit against the child support obligation in the parties' Agreement will prohibit a later claim by the payor that the credit should be awarded.[14]

12. In many cases, costs under the SUNY cap are often divided *pro rata* between the parents.[15] Calculating the *pro rata* contribution—if it is the only descriptive language in an agreement—can cause complications. Some courts have favored an "income only" approach to pro rata contributions.[16] While parties may choose phrases like "available means" or "then current resources" to describe how the "pro rata" contribution is calculated under the cap, these ambiguous phrases can require extensive review of household incomes, assets and liabilities, incomes or assets of new spouses, and contributions to or borrowings against retirement accounts to determine "available" resources.[17] To avoid these complications, practitioners should better define what assets or whose income will be considered in the pro rata calculation.

13. Parents should be alert to other anticipated costs impacting the SUNY cap: summer school may not be covered by a general college costs obligation.[18] The now seemingly universal "semester abroad"—with its added travel and accommodation costs—may be covered, even though there is no New York precedent on this issue.[19]

14. The parents' obligation to finance any college expenses ends when the child turns 21, unless there is evidence of an agreement to extend the college obligation beyond that date.[20] If the parents agree, however, to a SUNY cap for "four years after high school," the obligation exists even if the child turns 21.[21] If a child transfers for valid reasons or defers education, the obligation to pay a SUNY-capped cost to make the child eligible for graduation may still exist after 21.[22] If the parties agree to finance "college education costs," then a party seeking to stop paying at age 21, even though the child has not graduated, may have the burden to prove, by parol evidence or express language, that the parents sought to limit college costs to something short of graduation.[23] If parents have taken steps to plan for financing college costs—e.g., funding savings plans—the courts will likely find an obligation to spend accrued funds for college and a further obligation to supplement those funds, even if there is no agreement.[24]

15. Regardless of whether the SUNY cap is utilized, practitioners should never allow anyone to guarantee paying education costs "beyond the high school level." One parent agreed to that language in his separation agreement. When he tried to introduce parol evidence that he never intended to fund his child's graduate school and medical school costs, the court would not hear the evidence and told him to start writing checks.[25]

16. Federal tax credits should be a factor in allocating college costs even under a SUNY cap. Section 25 (A) of the Internal Revenue Code (26 U.S.C. § 25A) provides for two different higher education tax credits—the "Hope Scholarship Credit" under Section 25(A)(b) and the "Lifetime Learning Credit" under Section 25(A)(c).[26] These college tax credits generally go to the primary residential parent but if the non-residential parent is paying the substantial portion of college costs, an agreement should consider allocating the dependency exemption—and the tax credits to the extent permitted by the Internal Revenue Code—to the non-residential parent during the child's college years, or at least divide the benefit of those credits between the two parents.

Conclusion

The SUNY "cap," thoroughly considered, is a "slam dunk" way to cap college expenses for cost-conscious parents facing divorce. Practitioners would be well advised to "pick" the cap and "roll" it, thoughtfully, into their separation agreements to shelter their clients from increased college costs in the future.

Endnotes

1. DRL §240 (1-b)(c)(7); *see Tishman v. Bogatin*, 94 A.D.3d 621 (1st Dept 2012) (requiring a parent to finance a private college based the parent's educational background, his or her financial ability, the type of college that is best suitable for the child, and the child's academic ability and endeavors).
2. *Id.* at endnote 1.
3. The tuition costs are available on the college websites. *See* http://studentaccounts.buffalo.edu/tuition/fall.php http://www.geneseo.edu/student_accounts/tuition_fees; http://www.oswego.edu/administration/student_accounts/tuition_and_fees.html.
4. *Fersh v. Fersh*, 30 A.D.3d 414 (2d Dept 2006); *see also Gretz v. Gretz*, 109 A.D.3d 788 (2d Dept 2013) (denied request to exceed the SUNY cap set forth in a stipulated settlement).
5. *Holliday v. Holliday*, 35 A.D.3d 468 (2d Dept 2006).
6. *Tishman v. Bogatin*, *id.* at endnote 1.
7. *See R.E. v. S.E.*, 27 Misc. 3d 1216(A) (Sup. Ct. NY County 2010) (no SUNY cap considered when child already enrolled at an Ivy League institution).
8. *Kurtz v. Johnson*, 54 A.D.3d 904 (2d Dept 2008); *see also A.C. v. J.O.*, 40 Misc. 3d 1226 (A) (Sup. Ct. Kings County 2013) (court-ordered funds from children's 529 Savings Accounts were not credited against the parental contribution).
9. *Matter of Rashidi v. Rashidi*, 102 A.D.3d 972 (2nd Dept 2013) (even though the judgment of divorce applied a SUNY cap and despite any language regarding the allocation of the student loans, the court held that the parents were liable to repay any loans incurred by the son). *See also Bungart v. Bungart*, 107 A.D.3d 751 (2nd Dept 2013) (in the absence of a clear and unambiguous provision expressly authorizing the deduction of the children's student loans from the college expenses toward which the parties agreed to pay, a court should not take into account any college loans for which the student is responsible).
10. *A.C. v. J.O.*, 40 Misc. 3d 1226 (A) (Sup. Ct. Kings County 2013) (even in the absence of an agreement, the parents were required to pay their proportionate share of college application fees, fees for the SAT and other pre-college standardized tests, and preparation costs for those tests).
11. *S.B. v. J.R.*, 2013 N.Y. Slip Op 5470 (Sup. Ct. Monroe County 2013).
12. *Rohrs v. Rohrs*, 297 A.D.2d 317 (2d Dept 2002) (error not to reduce basic child support obligation by amount contributed to pay for room and board expenses while the child is away at college); *Levy v. Levy*, 52 A.D.3d 717 (2d Dept 2008).
13. *Juhasz v. Juhasz*, 92 A.D.3d 1209 (4th Dept 2012) (no credit if funds are paid from a grandparent trust fund).
14. *Matter of Dorcean v. Longueria*, 44 A.D.3d 770 (2nd Dept 2007).
15. *Patete v. Rodriquez*, 109 A.D.3d 595 (2d Dept 2013).
16. *Martinovich v. Bloch*, 40 Misc. 3d 1215(a) (Sup. Ct. Queens County 2013).
17. *L.L. v. R.L.*, 36 Misc. 3d 777 (Sup. Ct. Monroe County 2012).
18. *R.E. v. S.E.*, 27 Misc. 3d 1216(A) (Sup. Ct. NY County 2010).
19. *Hearon v. Hearon*, 1997 Conn. Super. LEXIS 1743 (Super. Ct. Conn. 1997) (authorizing semester abroad costs to be included under an obligation to pay as "financially able").
20. *Settle v. McCoy*, 108 A.D.3d 810 (3d Dept 2013).
21. *Hejna v. Reilly*, 88 A.D.3d 1119 (3d Dept 2011).
22. *Benno v. Benno*, 33 A.D.3d 1143 (3d Dept 2006).
23. *Shapiro v. Shapiro*, 91 A.D.3d 1094 (3d Dept 2012).
24. *Murray v. Murray*, 101 A.D.3d 1320 (3d Dept 2012).
25. *Allyn v. Allyn*, 163 A.D.2d 665 (3d Dept 1990).
26. *In re Briley*, 2013 Bankr. LEXIS 2491 (Bk. Ct. S.D. Ind. 2013); *see also Schramm v. Schramm*, 2008 Conn. Super. LEXIS 569, p.5 (Sup. Ct. Conn. 2008) (the value of the tax credits and deductions can certainly be factored into any formula used for the allocation of expenses between them).

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Observing Change: The Indian Child Welfare Act and State Courts

By Kathryn E. Fort

Perhaps more than any other area of law, family law cases are stories. To start a discussion with a family law practitioner is to start with "Did you hear about the family where…?" While all law is narrative, family law fits so well into storytelling because we all know unhappy families, unhappy family members, children of all ages. We have children the age of the children in the case, we have sisters who were in abusive relationships, we lived through a divorce, our niece had her son removed. Family law cases become quickly personal, and the faces of the people in the cases become the faces of the people we know.

While that happens, however, the cases also become routine, and the stories seem to be the same story over and over. The cases become frighteningly familiar. Parents cannot take care of their children. There are substance abuse problems. Mental health problems. Over and over, the court system is faced with the same story. When this happens, the repetitive, numbing nature of the task can overtake the individual human story of each case. Lawyers, judges, guardians ad litem, and social workers see each other repeatedly in the course of a day, a week, a month. The repetitive nature means the only parties who are new to the courtroom are the parents. Everyone else present knows what is going to happen, how the procedure works, who the people are in the courtroom. The people who are the subject of the proceeding are the only ones who have no idea how to interpret what is happening around them.

For American Indian families, this process is necessarily entwined with the history of abusive state and federal family law policies specifically directed at American Indian families.[1] Those policies, all with the endgame of removing children from American Indian families whenever possible, means removal stories permeate all American Indian communities. They are one of the defining tribal narratives. The government's removal, mistreatment, and abuse of children—and the historical and present trauma caused by that—is ever present. The policies, and the stories that come from them, led to Congress passing the Indian Child Welfare Act ("ICWA") in 1978.[2] In so many ways, ICWA is the codification of those stories.

ICWA is an attempt to counter the generations of federal and state policies designed to remove Indian children from their parents.[3] The law puts up deliberate roadblocks designated to ensure that state courts provide due process for the parents, the tribes, and the children. Those roadblocks include the testimony of a qualified expert witness prior to placement in foster care or termination of parental rights. They include the required notification of a tribe when one of its children is the subject of a state proceeding. They include specific placement preferences for children in foster care and for adoptions. They include active, not just reasonable, efforts to avoid the breakup of the American Indian family.[4]

Congress designed these provisions to slow down and stop the process of removing Indian children from their homes. However, since ICWA passed, the movement of the federal and state requirements has been to speed up the process of removal and termination of parental rights to all children in the foster care system.[5] State law timelines and court rules often do not give judges enough time for the extra work ICWA cases require. This conflict creates one of the many reasons state court actors have a difficult time with ICWA enforcement. The extra work leads to the perception of ICWA as a burden, rather than the gold standard to which all child welfare cases ought to be held.[6]

In many state systems, practitioners are simply unable to treat the cases as individual cases. Most large counties rarely have enough funding or staff for true individualized treatment of cases. Practitioners make assumptions about the parents based on previous cases, or assumptions about what is best for the children based on their own beliefs. ICWA was designed to force the system to treat Indian family law cases differently, individually.[7] However, the nature of the law puts it at odds with the current systemic courtroom routines. This causes resentment about the law, and in turn the families who receive its protections.

While ICWA is one of the foundational laws of federal Indian law, it usually arises in the broader public consciousness when there is a voluntary adoption subject to the law. Recently, the law was subject to Supreme Court review in *Adoptive Couple v. Baby Girl*.[8] Though a heart-wrenching case, ICWA is far more regularly applied in abuse and neglect cases. Any involuntary removal of an American Indian child, as defined by the Act, requires the application of ICWA.[9] While cases of voluntary adoptions designed to thwart the requirements of ICWA require constant vigilance from states and tribes, the law provides broader protections for those families in the state child welfare system.

This article posits one way to both collect data about abuse and neglect compliance within the framework of ICWA, and increase that compliance through collaborative change to the systems. "QUICWA," a project by the Minneapolis American Indian Center, consists of a group

of interested stakeholders who have created a checklist to measure what happens in each individual hearing where the court must apply ICWA.[10] While other groups, such as the National Council of Juvenile and Family Court Judges, use a different checklist format, the goals of the projects are similar—to find ways to increase compliance with ICWA. Funded in collaboration with Casey Family Programs, law schools and social work programs in key states have started observing ICWA hearings using the QUICWA checklist. In Michigan, for example, the Michigan State University College of Law has observed ICWA hearings in three counties, using law students as observers. Though family law is driven by narrative, collecting data is vital to identify patterns surrounding fairness and due process in the individual stories.

This project assumes the abuse and neglect cases are heard in an open courtroom. While this is true of both Michigan and Minnesota, it is not the case in every state. There are a number of good reasons to advocate for an open system, however. These cases are no less important than criminal cases. They are sometimes even called quasi-criminal cases, because indigent parents are appointed counsel. In ICWA cases, the standard of proof for termination of parental rights is no less than beyond a reasonable doubt, a standard otherwise reserved for criminal guilt.[11] The potential stigma onlookers might attach to the parents is outweighed by two factors. First, outsiders are rarely in the courtroom on any given day. Very few members of the public have a reason to attend a court hearing not their own. Second, identifying serious due process issues, as illustrated by Amy Bach, in her book, *Ordinary Injustice*.[12] While Bach focused on criminal cases, the lessons from her work apply to abuse and neglect cases.

Bach details what happens in criminal courtrooms in "small" cases, such as misdemeanors and some felonies.[13] All of the people in the courtroom knew what was happening. Everyone, that is, except the defendant. As the cases moved quickly through the system, the defendant often did not know what she was pleading to, and though she was represented, the attorney did not always explain the details of the proceedings.[14] One of Bach's proposed solutions? Have people monitor criminal hearings, to watch the operations of the court systems and point out where the systems are failing the people with the most to lose.[15] Not the judges, or the lawyers, or the social workers, but the accused. The lessons from Bach's book are easily applied to abuse and neglect cases. In Michigan, preliminary, or emergency, hearings for a child's removal are required within 24 hours. Like the hearings Bach observed, in emergency removal hearings, the court-appointed attorneys and guardians ad litem usually have not had time to meet the family. The hearings are usually held in front of referees, not judges, even though the removal of the children from the family easily can be as terrifying as a criminal conviction.

ICWA is a best practices statute, and all children in the system would be better off if the standards of ICWA applied to them. While ICWA exists due to the specific history of American Indian families and the non-Indian governmental structures that can, and did, destroy those families, monitoring and discussing cases with the court helps improve the handling of all abuse and neglect cases. Having outsiders in the courtroom can be disturbing and sometimes uncomfortable to the regular practitioners. But if both the practitioners and observers are willing to work in good faith, their perspectives can bring needed sunlight and change to difficult cases.

The goals of an observation project are multifaceted. Most of the stakeholders are particularly interested in collecting some form of data on ICWA compliance in state court. This data is useful for the state, the tribes, and Casey Family Programs to develop trainings and address areas of concern, such as conflicting court rules or difficulty complying with notice requirements. Perhaps more importantly, however, having an outside observer present provides a counter-weight to the familiarity of the state court actors. The observer notices issues that are otherwise overlooked as routine. The observer notices when the case goes off the record, what happens on the record versus off the record, or when a courtroom does not have enough chairs for all of the interested parties. An observer has the unique ability to understand the difficulty of when a party, usually the parent, doesn't know or understand who all the participants are in the room. While the observers eventually learn the system, their initial confusion provides a small window into what the non-practitioners feel when entering the courtroom.

Gaining court cooperation for an observation project can be either fairly easy or incredibly difficult. Without the court's cooperation, however, there is no way to share the data to help with quality improvement. Even then, how to share that data usefully also raises a number of questions. For perhaps obvious reasons, most judges and referees usually feel the need to defend their decisions rather than take the data at face value. Anything less than one hundred percent compliance creates a certain level of defensiveness. Emphasizing that no one is perfect all of the time, or that the goal is improved change over time, helps in the delivery of data. Indeed, information from the data that seems the most benign can cause the most amount of consternation from the courts. On the other hand, some state actors prefer the observers' presence, understanding the information they gather is inherently valuable.

Setting up an observation program does not take a lot of money, but it does take time and capacity. The program at Michigan State pays observers well, because they see the most difficult cases, and hear the most difficult facts. But even at $14 per hour, four to five students can observe most of the ICWA cases in two counties for less than $2,000 per month, depending on the caseload. In Michi-

gan, the hearings are public, but in a large urban county, the docket for child welfare can be massive. Determining which cases may end up being an ICWA case requires the cooperation of the court administrator, DHS, or the prosecutor's office.

While the focus of the court involved with the project is usually the actual data, the very act of setting up an observation process leads to positive change. For example, how does a court system know if there is a potential ICWA case? In order to get that information, referees or judges have to make the inquiry into the child's potential tribal citizenship a uniform part of every hearing. Once that inquiry becomes a standard part of the procedure, hearings that involve Indian children are often continued so DHS can notify the tribe. Then a court system might be able to modify the tracking system to get a better understanding of what cases are being continued for ICWA notice procedures and which are not. That kind of systemic tracking can lead to improvements in the accuracy of how many ICWA cases are moving through any given court system.

The capacity aspect of an observation project includes a director who has connections with tribal attorneys, state courts, and the State Court Administrative Office. The Michigan State project dovetails with the existing work of the Indigenous Law and Policy Center. Adding the QUICWA program increased work hours for staff, but gave students paying jobs with the added opportunity of exposure to the local court systems and key players. The information discovered through the observation has helped inform other projects involving American Indian child welfare and the state court system with which the Center was already involved.[16]

These additional ICWA compliance-related projects in Michigan would not have been possible without the cooperation of the State Court Administrative Office ("SCAO").[17] There is a dedicated SCAO staff person who works on issues of tribal-state court relations. In addition, SCAO created the Tribal Court Relations subcommittee of the Statewide Task Force. Both actions demonstrate a commitment of the state's Supreme Court and administrative body to tribal court relations in general and to ICWA compliance specifically. SCAO uses Court Improvement Program ("CIP") money to fund various ICWA-related initiatives. This funding comes from the federal grant program, established in 1993 as part of the Omnibus Budget Reconciliation Act.[18] The money is to be used to "conduct assessments of [state] foster care and adoption laws and judicial processes and to develop and implement a plan for system improvement"; to implement "improvements the highest courts deem necessary to provide for the safety, well-being, and permanence of children in foster care"; and to "implement a corrective action plan as necessary."[19] This pot of money, which every state receives, should be used to insuring ICWA compliance. The provisions of ICWA apply only in state court, and it is the state courts' administrative body's responsibility to ensure training and education for ICWA compliance. SCAO has provided Michigan State University's observation program with the contacts and meetings necessary to get into courtrooms. Without that assistance, the observation program would not be able to do the work it does.

While SCAO does not have binding authority over the specific operations of each county's court system, its participation is vital in an observation program. There is a difficult balance between the county-by-county differences of each court, which are surprisingly large, and statewide or federal requirements. Working with the statewide supervisory body of the court system makes it much easier to implement changes that can encourage court compliance. In addition, through SCAO and the CIP program, the observation program was able to make contacts with the representatives from the Department of Human Services, who also need to see the data and understand the role of the observation program.

Once the program is set up, training and scheduling students to go to court takes a fair amount of administrative work. Assigning one experienced student extra hours to supervise the other students, track the court hearings schedule, collect the hours from the students, and collect and scan the checklist, gives that student extra supervisory experience. Student observers must be notified of the hearings, they must be able to work out when they are available, how long a hearing may last, how to get to court, and how to work with the court clerks and administrators. These factors change by county, so depending on how many student observers there are and the number of counties monitored, training is an ongoing process. The observers, future lawyers, gain experience from watching the proceedings, from working with court clerks and court personnel, and learn how abuse and neglect cases work through the system. Student observers have had to figure out how to answer questions from referees such as, "How am I doing?" or "Is this how you would like me to do this?" or "Did I do that part right?" They learn how the courts work. They see what it means to become familiar with pain, and then what happens when someone becomes numb to it. If they plan on practicing in the area, they have made invaluable contacts, and are well ahead of their colleagues when they graduate. They are no longer scared of the courts. Rather, they are ready to change them.

The QUICWA observation process will not, on its own, force compliance with ICWA. It is, however, a valuable tool to add to education, training, and additional data-driven projects. More than thirty years after its passage, ICWA continues to confound state courts. The law is not difficult, but compliance with the law requires state systems to see American Indian families individually, and to dedicate the time and resources to them. Our systems must do better by way of our children. Perhaps in collect-

ing data about the children we can see through the stories and find a way to change the way court systems operate for the betterment of the families in front of them.

Endnotes

1. Barbara Ann Atwood, Children, Tribes, and States Adoption and Custody Conflicts over American Indian Children, 155-60 (2010).
2. 25 U.S.C. §§ 1901, et seq. (2000).
3. Matthew L.M. Fletcher, *The Indian Child Welfare Act: Implications for American Indian and Alaska Native Children, Families, and Communities, in* American Indian and Alaska Native Children and Mental Health 269, 270 (Michelle C. Sarche et al. eds. 2011).
4. 25 U.S.C. § 1912 (e), (f), (a), § 1915.
5. Adoption and Safe Families Act of 1997, Pub. L. 105-89 (codified as amended in scattered sections of Titles IV-B and IV-E of the Social Security Act).
6. Brief for Casey Family Programs et al. as Amici Curiae Supporting Respondent at 30, Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013) (No. 12-399).
7. 25 U.S.C. § 1912 (d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family" (emphasis added)).
8. 133 S.Ct. 2552 (2013).
9. 25 U.S.C. § 1903 (1).
10. The term "QUICWA" is used both for a case monitoring system for tribes and the observation project described here. Both are housed at the Minneapolis American Indian Center.
11. *Id.* at 1912 (f).
12. Amy Bach, Ordinary Injustice: How America Holds Court (2009).
13. *Id.* at 19-26.
14. *Id.* at 12-76.
15. *Id.* at 262.
16. *See* Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 Tulsa Law Review 529, 535-40 (2012).
17. *Id.*
18. Pub. L. 103-66; U.S. Dep't of Health and Human Services, *Court Improvement Program* (April 21, 2010), www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/ct_imprv.htm.
19. *Id.*

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Determining "Custody" of Beloved Companion Pets in Matrimonial Actions

By Sherri Donovan

Trisha Murray and Shannon Travis had a short marriage—marrying in 2012, filing for divorce in 2013. They had no children, few assets and their sole dispute was over who would keep Joey, their miniature dachshund. In *Travis v. Murray*,[1] Justice Matthew Cooper issued a 19-page decision which ordered the parties to appear for a one-day hearing to determine which party would win possession of the dog. The judge would apply a "best for all concerned" standard following the hearing, thus departing from strict property analysis traditionally used for possessory disputes over animals, yet falling short of engaging in a full-fledged child custody analysis.

In 2011, a year before their marriage, Ms. Travis purchased Joey at a pet store and brought him home to the couple's shared apartment. When Ms. Murray moved out in 2013 while Ms. Travis was away on a business trip, she took with her a few pieces of furniture, some personal possessions and Joey. When Ms. Travis asked for Joey's return, Ms. Murray claimed she had lost him in Central Park.

One month later, Ms. Travis proceeded to file for divorce. Two months later, she brought a motion seeking an account of Joey's whereabouts and an order directing that he be returned to her "care and custody" and that she be granted "sole residential custody of her dog." Ms. Murray revealed that Joey was not in fact lost, but rather living with her mother in Maine.

In her papers, Ms. Travis argued that Joey was her property because she had purchased him with her own funds prior to the marriage. Further, she stated that she was the party who had provided primary financial support for Joey. Ms. Murray replied that Joey was her property, as Ms. Travis had purchased him as a gift for her as consolation after she had given away her cat at Ms. Travis's insistence. Ms. Murray also stated that she, too, had contributed financially to Joey's care.

While Ms. Travis asserted that she was the party who had cared for Joey on a primary basis, Ms. Murray countered that Joey slept on her side of the bed and that she was the one who "attended to all of Joey's emotional, practical and logistical needs." Ms. Murray concluded that it was in Joey's "best interests" to be with her mother in Maine, where she could visit him regularly and where he is "healthy, safe and happy," adding that Ms. Travis traveled often for work.

In his November 29, 2013 decision, Justice Cooper noted that both parties invoked two distinct approaches in determining which one should be awarded Joey: traditional property analysis, *i.e.*, ownership stemming from purchase or gift, and child custody analysis, whereby core custody concepts such as primary caretaking and best interests were called into play.

The judge engaged in a thorough analysis, referencing cultural articles in *New York* magazine and the *New York Times* that discuss the "humanification" of our pets and the important role that dogs play in our emotional lives[2] and citing research detailing the ever increasing amount of time, money and attention that household pets receive in the United States.[3]

Following a review of New York case law, Judge Cooper noted that while the *New York* magazine and *New York Times* articles prove that New Yorkers consider their pets as far more than mere property, prevailing New York law continues to treat a dog as just that—specifically, as "chattel."[4]

In most non-matrimonial actions regarding ownership and possession of dogs, unless a dog is a pure-bred show dog, the most an owner can expect to recover for negligent care of or failure to return a dog is the animal's fair market value. The aggrieved owner would pursue an action for "replevin," where the standard is defined as superior possessory right in the chattel, thus based solely upon the property rights of the litigants, rather than their respective abilities to care for the pet or emotional ties.[5] Cooper notes only one New York case where temporary possession of a dog was granted to a wife in a matrimonial action, which decision was based solely upon the fact that the dog was an interspousal gift to her.[6]

Yet a few New York cases showed that courts were willing to acknowledge the importance of pets beyond that of ordinary, inanimate property. In *Corso v. Crawford Dog and Cat Hospital, Inc.*,[7] the plaintiff recovered damages beyond the market value of the dog whose remains were wrongly disposed of by a veterinarian, holding that "a pet is not just a thing but occupies a special place somewhere in between a person and a personal piece of property." In *Feger v. Warwick Animal Shelter*,[8] the court observed that "companion animals are treated differently from other forms of property. Recognizing companion animals as a special category of property is consistent with the laws of the State."

Justice Cooper then engaged in a nationwide survey of the analyses utilized in pet-related disputes, finding that while there were a small number of cases that actually used the term "custody" when making an award of a dog to a spouse,[9] the majority of cases from other jurisdictions have declined to extend full-fledged child custody precepts to pet-related disputes, such as the "best interests" standard.[10]

Finally, Justice Cooper turned to the most relevant New York case, *Raymond v. Lachmann*,[11] to inform his deci-

sion, a case involving a dispute over the ownership and possession of an elderly cat named Lovey. The First Department wrote:

> Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.

From here Justice Cooper finds the standard he would apply to the *Travis v. Murray* matter: "best for all concerned." He notes that the concept of a household pet being treated as mere property is outmoded and that the court in *Raymond* offered a perspective for determining possession of a pet that differs radically from traditional property analysis. Yet, while the factors in the decision included concern for the animal's well-being and the relationship that existed between the cat and the person with whom he lived, the court stopped short of applying a traditional "best interests" child custody standard. The judge states that it is impossible to truly determine what is in a dog's best interests and that the subjective factors that are key to a best interests analysis—particularly those concerning a child's feelings or perceptions—are unascertainable when the subject is an animal.

Judicial resources are also cited as a major concern in limiting the scope of the standard applied in pet-related disputes. A court needs a tremendous amount of information in child custody disputes, often necessitating the appointment of an attorney for the child and a forensic psychologist, collateral interviews, testimony, and possibly *in camera* proceedings with the children themselves. Justice Cooper notes that our court system is already overwhelmed with child custody cases and to allow full-blown "dog custody" cases in which the same "best interests" analysis is applied would further burden the courts to the detriment of children.

Cooper also recognizes the reality that significant judicial resources are already devoted to matters such as who gets a luxury car or second home, and therefore room should rightly be made in order to give real consideration to a case involving a treasured pet.

Accordingly, Justice Cooper granted the parties a full one-day hearing, where he would apply a "best for all concerned" standard. Each side would have the opportunity to prove why she would benefit from having the dog and why the dog would have a better chance of living, prospering, loving and being loved in her care. The judge advised the parties to address questions such as: Who bore the major responsibility for meeting Joey's needs (feeding, walking, grooming, trips to the veterinarian)? Who spent more time with Joey on a regular basis? Why did Ms. Travis leave Joey with Ms. Murray at the time of separation? Why did Ms. Murray send Joey to live in Maine with her mother rather than have him stay with her or Ms. Travis in New York?

The judge made it clear that the hearing would result in only one party retaining sole possession of the dog and that he would not entertain any kind of joint custody or visitation arrangements, which would result in both parties remaining involved in the dog's life, thus inviting post-judgment litigation. Again, Justice Cooper voiced his concern that judicial resources in cases of pet disputes be limited, stating that "while children are important enough to merit endless litigation, as unfortunate as that may be, dogs, as wonderful as they are, simply do not rise to that level of importance."

Shortly after receiving the decision, Ms. Travis and Ms. Murray settled privately with the aid of their attorneys. Rhonda Panken, Esq. represented Ms. Travis and I represented Ms. Murray. While the hearing was ultimately unnecessary, Justice Cooper has indeed crafted a thoughtful and thorough analysis that should help both courts and practitioners deal more successfully with disputes over beloved pets in the wake of a divorce.

Endnotes

1. 42 Misc 3d 447 (Sup Ct NY Co 2013).
2. John Homans, *The Rise of Dog Identity Politics*, New York, Feb. 1, 2010; Gregory Berns, *Dogs Are People, Too*, New York Times, Oct. 6, 2013; Alexandra Zissu, *After the Breakup, Here Comes the Joint-Custody Pet*, New York Times, Aug. 22, 1999.
3. Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. Am. Acad. Matrim. Law 1 (2006); Derek Thompson, TheAtlantic.com, *These 4 Charts Explain Exactly How Americans Spend $52 Billion on Our Pets in a Year*, http://www.theatlantic.com/business/archive/2013/02/these-4-charts-explain-exactly-how-americans-spend-52-billion-on-our-pets-in-a-year/273446/ (Feb. 23, 2013).
4. *See Mullaly v. People*, 86 NY 365 [1881]; *Schrage v. Hatzlacha Cab Corp.*, 13 AD3d 150 (1st Dept 2004); *Rowan v. Sussdorff*, 147 App Div 673 (2d Dept 1911); *ATM One, LLC v. Albano*, 2001 NY Slip Op 50103[U] [Nassau Dist Ct 2001].
5. *See, e.g., Jason v. Parks*, 224 AD2d 494 (2d Dept 1996); *Mercurio v. Weber*, 2003 NY Slip Op 51036[U] (Nassau Dis Ct 2003); *Merriam v. Johnson*, 116 App Div 336 (1st Dept 1906); *LeConte v. Lee*, 35 Misc 3d 286 (Civ Ct, NY County 2011); *Webb v. Papaspiridakos*, 23 Misc 3d 1136[A], 2009 NY Slip Op 51152[U] (Sup Ct, Queens County 2009); *Saunders v. Reeger*, 50 Misc 2d 850 (Suffolk Dist Ct 1966).
6. *C.R.S. v. T.K.S.*, 192 Misc 2d 547 (Sup Ct, NY County 2002).
7. 97 Misc 2d 530 (Civ Ct, Queens County 1979).
8. 59 AD3d 68 (2d Dept 2008).
9. *See e.g., Juelfs v. Gough*, 41 P3d 593 (Alaska 2002) (granting "sole custody" of a dog to ex-husband); *Van Arsdale v. Van Arsdale*, 2013 WL 1365358, *4 (2013), 2013 Conn Super LEXIS 574 (granting "joint legal custody" of dogs, with "principal place of residence" to plaintiff); *Placey v. Placey*, 51 So3d 374 (Ala Ct Civ App 2010) (awarding dog to one party, expressly referring to the "best interests" of the dog).
10. *See e.g., Desanctis v. Pritchard*, 803 A2d 230, 232 (Pa Super Ct 2002) (declining to award "shared custody" of a dog because he is "personal property," such as a table or lamp); *Clark v. McGinnis*, 298 P3d 1137 (Kan Ct App 2013) (declining to award custody of a dog, holding that the "argument that child custody laws should be applied to dogs is a flawed argument").
11. 264 AD2d 340 (1st Dept 1999).

Guard and Reserve Pensions on the Day of Divorce: Unraveling the Riddles

By Mark E. Sullivan

Introduction—An Office Visit

"I need some help—I'm lost in the woods," exclaimed Sam Green when he sat down in his lawyer's office. "My soon-to-be-ex just told me she's putting in for retirement next year from the East Virginia Army National Guard. I don't know what the benefits are, when they arrive, what's my share—anything! Whenever I try to look it up on the internet, I get completely confused."

"Slow down, Sam," replied Amanda Allen, his divorce lawyer. "What is it you want to find out?"

"Well, for starters, I want to find out how much Janet is going to get for the Guard pension," answered Sam. "She's been drilling for over 24 years, and 20 years of that was during our marriage. Shouldn't I be entitled to some share of that pension benefit?"

"Yes," answered Amanda. "Since she has 24 years of service, my calculations show that the court should grant you half of 20/24 of the pension."

"But when will I begin to get payments? How much will I receive? If Janet dies first, will I get anything? How can we find out this information?"

"Not to worry," responded Amanda. "All Guardsmen begin drawing retired pay at age 60, so that's when you'll start to receive your share. As for her death, there's no way of telling whether she signed up for the Survivor Benefit Plan or not; if she did, she could have elected an option which cut you out entirely. To get the amount that she'll be receiving—and all the other information, for that matter—we'll have to serve a subpoena on the Army to require the release of that to us."

"Wow—you really know your stuff, Amanda! I feel better already," exclaimed Sam.

Riddles and Reality

Unfortunately, Sam didn't get the right advice. Virtually nothing which Amanda told him was correct. While he asked the right questions, the answers from Amanda were bogus. The purpose of this article is to set out the correct answers to the main concerns of the spouse of an RC member. "RC" stands for *Reserve Component*, meaning Reserves and National Guard. These issues, as expressed by the client, are usually the following:

- When do the payments begin?
- How much will I receive?
- What if my former spouse dies before me—will I be cut out of payments entirely?
- Does my ex pay me, or can the government send me a check?
- What options did my former spouse have for Survivor Benefit Plan Coverage, and how can we find out what choice she made?
- Are the future payments a flat amount? Do they go up with inflation? Can they ever go down?

The answers will be found in this two-part article.

RC Retired Pay—the Nuts and Bolts

Members of the Reserve Component (RC) have a defined benefit retirement system.[1] An RC member must meet all of the following minimum requirements to be eligible for what's known as "non-regular" retired pay:

- be at least 60 years of age;[2]
- have performed at least 20 years of qualifying service computed under Section 10 U.S.C. §12732;
- have performed the last six years (formerly eight years) of qualifying service while a member of the Active Reserve;
- not be entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve;
- must apply for retired pay by submitting an application to the Guard or Reserve.

When an RC member is under 60 and has applied for retired pay and stopped drilling, he or she is waiting for pension payments to begin. Avoid using the verb "retire" when referring to RC personnel, since it can have two meanings. One meaning is when Janet Green begins to receive retired pay. This is "pay status" for her and, as explained herein, it's usually (but not always) at age 60. Another meaning is the point in time when Janet stops drilling and applies for retirement. These RC personnel are sometimes known as "gray-area retirees," since the color of the ID card for them used to be gray. With two different meanings of retirement, there can only be problems when using "retire" in a pension division document.[3]

Retirement Points

When determining the retired pay of RC members, it is important to know how many points are involved and when the servicemember (SM) entered military service. The amount of retired pay depends on the number of

points acquired during the minimum 20 years of service and also on one of two formulas.

RC members are awarded retirement points for weekend drills and various forms of active duty training. In general, an RC member may currently obtain up to 90 inactive duty points for each year of reserve service, plus an unlimited number of active-duty points. A weekend drill counts as four points (two mornings, two afternoons), while a two-week period of annual training counts as 14 points (Reserves) or 15 points (Guard) since the RC member is *serving on active duty*. RC SMs also receive points for online courses, serving at military funerals, and other special duties.

Twenty years of creditable service must be acquired for retirement application from the Guard or Reserves. To obtain a "good year" for retirement purposes—one that qualifies toward the minimum of 20 necessary—an RC SM must acquire 50 points in that year. The points acquired in each year, regardless of whether it is a "good year," count toward calculation of retired pay.

It's a different story when a mobilization occurs. If an RC member is "called up" or mobilized for a 12-month tour of duty, either individually or as part of a unit, the retirement points accounting statement, or RPAS, would show 365 points at the end of a full twelve months of duty—one point per day. No more than 365 points per year (366 for leap years) may be acquired.

When working one of these cases, counsel needs to obtain a current RPAS (or "points statement") in order to determine how many points have been acquired, both during the marriage and since the start of military service. The Guard and Reserves issue RC members an RPAS once a year, usually within two or three months after the RYE (Retirement Year End date) of the member.[4] Don't let the attorney for the member try to claim that there is no points statement, it cannot be located, or "it must have floated away in the big flood in Smallville last year." One is available to each Reserve Component SM online. All she or he has to do is log in to the RC website involved, insert his or her log-in name and enter his or her password. Here is an example of what an Air Force Reserve points statement might look like for Sergeant John T. Doe:

ANG/USAFR POINT CREDIT SUMMARY for Sgt DOE, JOHN T., 123-45-6789

Service History

From Date	Through Date	AD	IDT	ECI	IDS	MBR	RETIRE	SATSVC yr mo dy
1985 Jul 23	1985 Oct 07	Delayed Enlistment Program						
1985 Oct 08	1986 Oct 07	365	0	0	0	0	365	01 00 00
1986 Oct 08	1987 Oct 07	365	0	0	0	0	365	01 00 00
1987 Oct 08	1988 Oct 07	366	0	0	0	0	366	01 00 00
1988 Oct 08	1989 Oct 07	315	00	0	0	0	315	00 10 11
1989 Aug 19	1990 Aug 18	15	44	29	0	15	75	01 00 00
1990 Aug 19	1991 Aug 18	57	48	24	0	15	117	01 00 00
1991 Aug 19	1992 Aug 18	13	48	0	0	15	73	01 00 00
1992 Aug 19	1993 Aug 18	68	40	0	0	15	123	01 00 00
1993 Aug 19	1994 Aug 18	365	0	0	0	15	365	01 00 00
1994 Aug 19	1995 Aug 18	365	0	0	0	15	365	01 00 00
1995 Aug 19	1996 Aug 18	365	0	0	0	15	365	01 00 00
1996 Aug 19	1997 Aug 18	365	0	0	0	15	365	01 00 00
1997 Aug 19	1998 Aug 18	365	0	0	0	15	365	01 00 00
1998 Aug 19	1999 Aug 18	365	0	0	0	15	365	01 00 00
1999 Aug 19	2000 Aug 18	365	0	0	0	15	365	01 00 00
2000 Aug 19	2001 Aug 18	365	0	43	0	15	365	01 00 00
Points Summary		4486	180	96	0	180	4721	15 10 11

Calculating Retired Pay

RC points earned are computed based on an equivalent year of service with a standard of 360 days in a year. Thus, for instance, if an RC SM receives 3600 points, this equates to 10 years of equivalent service. From this example we can determine the RC SM's percentage share of retired pay. If a 20-year active-duty SM receives at retirement 50% of his or her base pay, then a 10-year RC SM would receive retired pay equal to 25% of base pay. The formula is:

Points ÷ 360 X 2.5% X final base pay according to rank and years of service at pay status.

At present there are two different computations for RC SMs. For those whose Date of Initial Entry into Military Service (DIEMS) is before September 8, 1980, years of creditable service are multiplied by 2.5% up. The resulting percentage is applied to the base pay in effect for the RC SM on the date retired pay starts to determine monthly retired pay. In the above example, the 25% figure would be multiplied by the base pay of the RC SM at the time of receipt of retired pay. If the active duty pay of a SM at retirement were $4,000 a month, then in this example he or she would begin receiving 25% of that, or $1,000 a month. This retirement plan is known as the Final Basic Pay plan.[5]

Those RC SMs whose DIEMS is on or after September 8, 1980, but before 1988, have the same retired pay multiplier, namely, 2.5% per year times years of creditable service. The difference lies in how the actual retired pay is calculated. The retirement percentage is applied to the average of the highest 36 months of basic pay of the SM, effective at age 60, to determine monthly retired pay. Thus, this retirement plan is known as "High-3." For one who transfers to the Retired Reserve, this is usually the rates of pay to which the RC member would have been entitled if serving on active duty immediately before the date when retired pay is to begin.[6] Members who request a discharge from the Retired Reserve before 60, however, can only use the basic pay for the 36 months prior to their discharge.

The Guard and Reserve are required to notify RC members when they have completed sufficient years for retired pay purposes. A letter with the subject "Notification of Eligibility for Retired Pay at Age 60," commonly referred to as the "20-year letter," accomplishes this.[7] The RC SM should receive this letter within one year of completing 20 qualifying years of service for retired pay purposes.[8] The member is required to acknowledge receipt and to decline or accept the Survivor Benefit Plan (SBP). If the member is married or divorced from a spouse with an interest in military retired pay, the member cannot lawfully decline SBP without the written and notarized consent of the other party. Since the acknowledgement can take place before any notary public, it is not unheard of for a spouse or former spouse to find out that an impersonator has executed a waiver of SBP.

Janet's RC pension begins about one month after her 60th birthday. The payments to Sam, if all his papers are in order according to Defense Finance and Accounting Services (DFAS), will begin about two months later, or about 60-90 days after Janet turns 60. The pension payments will include an annual cost-of-living adjustment, or COLA, whenever that occurs. The only exception is when Sam's pension award is phrased as a "set dollar amount," as will be explained in Part 2 of this article.

At the beginning of this article, Sam Green asked about what the retired pay of Janet Green would be. Estimating this is difficult, but not impossible. Since she is still drilling, there is no way of telling how many points she will have accumulated at retirement, and those points determine what she will be paid. There is, however, a retired pay calculator at the Army's Human Resources Command website, and it works equally well for all Reserve Component (RC) branches of service. Go to www.hrc.army.mil and type "how to estimate your retired pay" into the SEARCH window. You'll find that there is chart which asks for *Year Born*, *Grade at Retirement*, *Total Years of Service at Retirement*, and *Total Points at Retirement*. Once these are filled in, the form will generate a retired pay estimate.

Part Two of this article will cover pension division, indemnification, disability, the Survivor Benefit Plan, the marital fraction (points vs. months of service) and the drafting of a dual-option clause to cover Sam if his wife goes on to earn an active-duty retirement.

Endnotes

1. The DoD Financial Management Regulation (referred to herein as DoDFMR), DoD 7000.14-R, Volume 7B, "Military Pay Policies and Procedures—Retired Pay" contains full details about retired pay for the Army, Navy, Air Force and Marine Corps. You can access it at http://comptroller.defense.gov/fmr. For a summary of military retirement, go to Chapter 1 of Volume 7B, "Initial Entitlements-Retirements," and review Section 0101, "Military Retirement Overview." This can be found at http://comptroller.defense.gov/fmr/07b/07b_01.pdf.
2. The FY 2009 National Defense Authorization Act made it possible for certain RC members to start receipt of retired pay as early as age 50, depending on additional time spent on active duty after January 28, 2008. 10 U.S.C. §12731(F). Generally speaking RC members can drop three months from their mandatory retirement age of 60, at which they begin to draw retired pay, for each period of 90 days served on active duty in any fiscal year. Qualifying time does not include weekend drill time or annual training. The reduced age for pay doesn't change the age-60 requirement for medical benefits. For the rest of this article, references to retired pay will state that it starts at age 60, even though there are exceptions for those members who have served on active duty as above since 2008.
3. Assume, for example, that a pension division order involves an Army Reservist who has stopped drilling at age 40 with 20 years of creditable Army Reserve service, 16 of which were during the marriage. He has applied for transfer to the Retired Reserve, and the order states that the ex-spouse will receive 50% of the final retired pay of the member times a fraction, the numerator of which is 16 and the denominator of which is the number of years of service at retirement. The ex-spouse's interpretation of "retirement" would be "20 years," and thus the marital fraction would be 16/20. The Reservist, however, might take the position

that "retirement" means when he begins to draw retired pay, and at age 60 his years of service would be 40, since he transferred to the Retired Reserve (thus permitting the military to recall him in the future) instead of requesting a discharge. The difference for the ex-spouse is that she might receive half of 40% of the pension (under the Reservist's analysis) instead of half of 80%. The faulty wording could lead to an expensive battle in court or negotiations, and might result in her loss of half of the expected pension share benefit.

4. The document for the Army Reserve is AHRC Form 249-2E, DARC Form 249 or AGUZ Form 115. For National Guard points, see NGB Forms 22 and 23. The Air Force Reserve document is AF Form 526, and the Navy Reserve document is NAVPERS Form 1070-161. For the Coast Guard Reserve, obtain CG HQ Form 4973.

5. On some Leave and Earnings Statements (LESs), there are "RETPLAN" and "DIEMS" blocks, while on others these blocks don't appear. If the blocks appear on the LES, it is up to the member and member's servicing personnel office to ensure that the blocks are complete and the information is accurate. Since Active Guard / Reserve (AGR) personnel get Active Duty pay and benefits but are members of their RC paid using the RC pay system, there can be discrepancies.

6. DODFMR, Vol. 7B, ch. 1, § 010102.

7. This is also referred to as the NOE, or Notice of Eligibility.

8. A wealth of information about RC retirement, applicable to all RC branches of service, is found at the following Army Reserve web page: https: / / www.hrc.army.mil / site / reserve / soldierservices / retirement / index.htm.

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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., Spring 2014) 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.

In the Matter of Jared J.P., a Person Alleged to Be a Juvenile Delinquent, Family Court, Dutchess County (Joan S. Posner, J., December 17, 2013)

On February 19, 2013, the Presentment Agency (agency) filed a petition against the respondent (DOB: 6/7/1997), pursuant to Article 3 of the Family Court Act alleging that he committed acts which, if committed by an adult, would constitute the crimes of attempted assault in the third degree, in violation of penal law §110/120.00(1), a B misdemeanor and menacing in the third degree, in violation of penal law §120.15, also a B misdemeanor. The petition alleges that on October 22, 2012 the respondent attempted to cause physical injury to his mother and other members of his family and menaced them. The agency seeks an adjudication that he is a juvenile delinquent.

At the initial appearance on February 28, 2103, the Court (Sammarco, J.[1]) appointed a guardian ad litem, based upon the representation by respondent's attorney that respondent was diagnosed with autism and did not understand what was occurring. Respondent was released under the supervision of the Probation Department (RUS). The Court also issued a limited temporary order of protection on behalf of Rebecca P. (his mother), Judith M. (his grandmother), Alexis P., Brianna P. and Jillian P. (his siblings).

In June 2013, respondent's local school district referred him for an intake interview with the S. School, a residential therapeutic educational institution located in Rockland County. He was accepted and placed there by the school district and has had periodic home visits with his mother, grandmother and siblings since that time.

On August 23, 2013, the agency filed a motion pursuant to Family Court Act §322.1(1) for an order directing that respondent be examined by two psychiatrists as defined in CPL §710.30 to determine whether he is an incapacitated person (motion #1). The application is based upon his medical and educational records; his diagnosis of autism and with "various other problems related to his brain"; and the fact that at his attorney's request, a guardian ad litem had been appointed for him.

The guardian ad litem opposes the agency's motion and filed a motion to dismiss the proceeding in furtherance of justice (FCA §315.2). In support of dismissal, she asserts that the agency did not commence this juvenile delinquency proceeding until February 19, 2013, almost four months after the alleged incident; since February 2013 respondent has been receiving necessary services and is doing well at the S. School. She also argues that there is no need for further Court intervention. The respondent's mother has clearly indicated on the record that she does not wish to pursue the juvenile delinquency proceeding and that to do so would be detrimental to him and other family members.

The guardian ad litem argues that the information presented to the Court indicates that various professionals have, over many years, recommended that respondent be placed in a residential therapeutic school setting. However, until recently the school district instead had respondent in a BOCES day program. He is now currently in an appropriate therapeutic residential school, where he is thriving. She argues that a consideration of the factors under Family Court Act §315.2 supports dismissal of the proceeding in the interest of justice.

The agency opposes the motion to dismiss on the grounds that the allegations are serious and asserts that the police responded to nine domestic calls at respondent's home between December 19, 2009 and January 28, 2013.[2] The agency alleges that respondent has significant mental health needs and requires specialized educational services and mental health treatment. As a result, the agency asserts that if the juvenile delinquency matter proceeded to final disposition the Court would have to find that respondent requires supervision, treatment or confinement.

The agency concedes that the complainants are unwilling to cooperate with the prosecution of the juvenile delinquency proceeding but argues that regardless they need to be protected. The agency argues that if respondent is discharged from his current educational facility he may reside with the family at some point in the future and could act out aggressively.

The respondent's attorney did not submit any papers with respect to either motion but repeatedly stated on the record that he support dismissal of the proceeding in furtherance of justice and that its continuation would serve no useful purpose and result in an injustice.

Pursuant to FCA §315.2, a court may dismiss a juvenile delinquency petition in the interest of justice at any time if it finds that "even though there may be no basis for

dismissal as a matter of law, such dismissal is required as a matter of judicial discretion by the existence of some compelling further consideration or circumstances clearly demonstrating that a finding of delinquency or continued proceedings would constitute or result in injustice."

In making such a determination the court must consider the following factors: (a) the seriousness and circumstances of the crime; (b) the extent of harm caused by the crime; (c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition; (d) the history, character and condition of the respondent; (e) the needs and best interest of the respondent; (f) the need for protection of the community; and (g) any other relevant fact indicating that a finding would serve no useful purpose (FCA § 315.2[1]). At least one of the factors must be readily identifiable and sufficiently compelling to support the dismissal (*People v. Rickert*, 58 NY2d 122, 128 [1983]; *In the Matter of Chris H.*, 197 AD2d 689 [2d Dept 1993]).

The Court takes judicial notice of its own records and file in this matter (*see Matter of Khatibi v. Weill*, 8 AD3d 485 [2d Dept 2004]). The medical records and correspondence from respondent's treating physicians from 2006 reflect that he was diagnosed with Pervasive Developmental Disorder (PDD) / Autism, ADHD, OCD and static encepalopathy. He was placed on medication to help ameliorate his behavioral symptoms but changes in his school placement caused a deterioration in respondent's performance on such medications. As early as 2006, respondent's pediatrician and neurologist recommended that he be placed in an academic setting with smaller classes and summer classes which would allow for a twelve-month-per-year treatment period. In his April 14, 2006 correspondence, Dr. Z., respondent's pediatrician, states that "continued management in a larger class setting will cause prolonged and worsening regressive behavior." In a letter dated February 13, 2007, the respondent's neurologist indicated that he was diagnosed with Asperger's with a rage disorder and that "he is somewhat holding it together on medication at school but by the time he goes home the medication is not working well enough and he becomes extremely violent." At that time the neurologist recommended that respondent be placed in a residential program where these issues could be addressed. Despite the parents' repeated efforts to achieve this placement, he was not placed in a residential therapeutic educational facility until the summer of 2013 when he was placed in S. School. This Court has received periodic probation reports since his placement there, which have been entered into evidence on consent. The August 2013 report (Court Exhibit #2) indicates that he is doing well at S. School. Respondent's mother also reports that he is doing well and the most recent probation report dated November 15, 2013 (Court Exhibit #3) indicates that he is doing "wonderfully" at the S. School. It further states that the school sees no signs of aggression; he follows the program well and there have been no behavioral issues there. Further, he was home for an overnight visit and he exhibited no aggressive behavior.

Throughout the proceedings respondent's mother has repeatedly stated that she does not wish to pursue the juvenile delinquency proceeding as her son is finally receiving appropriate schooling and therapeutic services, is doing well and he has not been aggressive on visits. The plan is for him to remain at the S. School until he reaches the age of 21. There have been no reported incidents during the respondent's visits home since he started at the S. School.

The Court also notes that in July 2013, during the pendency of these proceedings, the family's home burned down, all their possessions were lost, as well as their pet. This has caused significant stress for the respondent and his family. During the Court appearance on August 6, 2013, respondent's mother expressed that the grandmother, who would be a witness at a trial, is 73 years old, suffers from dementia, has difficulty walking, and has been distraught at the loss of her home and all her possessions. The respondent's siblings were similarly affected, having lost all of their belongings and their pet in the fire. The mother has stated that in light of the trauma the family members have suffered, having them appear as witnesses and be subjected to questioning by the assistant county attorney would undoubtedly cause respondent's grandmother and siblings additional anguish.

The probation reports reflect that, while the respondent believed that the mother caused the fire and was upset with her, he chose not to visit with his family for a while when they were residing in a motel. The visits have gone well since they resumed in October 2013. The Court finds this to be a very compelling indication of the respondent's progress since the alleged incident on October 22, 2012 and an indication of his ability to now control his anger and address his feelings.

Having considered each of the factors set forth in Family Court Act § 315.2, the Court finds that dismissal is warranted as a matter of judicial discretion as the circumstances clearly demonstrate that a finding of juvenile delinquency would serve no useful purpose and would result in an injustice.

The Court is cognizant that this remedy should be exercised sparingly and only when compelling factors demonstrate that prosecution would be an injustice. The Court is not discounting the allegations in the petition but notes that respondent has been charged with B misdemeanors and no lasting harm or injuries requiring medical attention has been alleged (*cf. In the Matter of Kwane M.*, 121 AD2d 635 [2d Dept 1986]).

The respondent is 16 years old and has been struggling with mental health issues since age seven. His mother has been struggling to secure the right services for him. Through no fault of his own, it appears that he was not previously receiving the appropriate educational and psychological services necessary for him to be able to manage his mental illness.

The respondent was released under supervision in February 2013 and there have been no incidents since that time (*cf. In the Matter of Carlief V.*, 121 AD2d 640 [2d Dept 1986]; *In the Matter of Kwane M, supra*). The respondent's needs are being met at the S. School and the plan is for him to remain there until he reaches the age of 21. His best interests warrant his continued placement there, which is the intention of both the local school district and his family. There is no need for further Court intervention and an order of supervision is not required for respondent to continue in his current school.

The goal in a juvenile delinquency proceeding is rehabilitation and the protection of the community (see FCA § 301.1; *Matter of Quinton A.*, 49 NY2d 328, 334-335 [1980]; *Matter of Tristan C.*, 156 Misc2d 1007 [Fam Court, Kings County 1993]). "The overriding intent of the juvenile delinquency article is to empower Family Court to intervene and positively impact the lives of troubled young people while protecting the public." (*In the Matter of Robert J.*, 2 NY3d 339, 346 [2004]). Here, everything is in place to achieve that goal towards which significant progress has already been made.

While the Court is not basing its decision on the wishes of the respondent's mother, it does recognize that continuing these proceedings in contravention of the alleged victims' expressed wishes would serve no useful purpose. To the contrary, in light of the fragile condition of the respondent's grandmother and the family's catastrophic loss of their home, belongings and pet in a fire, subjecting the alleged victims to the stress of a trial, against their will, causing them more trauma, would be an injustice (*Matter of P. C.*, 10 Misc3d 1073[A], 2005 Slip Op 52232[U][Fam Ct, Nassau County 2005]). In addition, the respondent is getting the very help his family sought for so long and objectively responding extremely well to that help. It would not be in the best interests of the child to continue this proceeding.

Further, there is no need to continue this proceeding for the protection of the community. There are no allegations that the respondent engaged in criminal conduct outside of his home environment. Since matriculating at S. School all reports about his behavior has been positive. Notably, even in their papers the agency's only argument is the respondent's family constitutes "the public" which may need to be protected against him in the future. The Court finds this argument unpersuasive in light of the position expressed by the respondent's mother throughout these proceedings and respondent's behavior since receiving residential treatment.

Based on the presence of these compelling factors, the Court, in the exercise of its judicial discretion, dismisses this juvenile delinquency proceedings in furtherance of justice.

Accordingly, it is hereby,

ORDERED that the motion to dismiss the juvenile delinquency proceedings in the interest of justice (motion #2) is granted. In light of the Court's decision, the agency's motion seeking a competency evaluation (motion #1) is denied as moot.

In determining this motion, the Court has read and considered the following: notice of motion (motion #1) (1p.), affirmation in support (6pp.), exhibits (A-C); affirmation in opposition (guardian ad litem) (4pp.); reply affirmation (4pp.); notice of motion to dismiss (motion #2) (1p.), affirmation in support (6pp.), exhibits (A-C); affirmation in opposition to motion to dismiss (8pp.), exhibits (A, B).

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

DATED: December 17, 2013

Hon. Joan S. Posner

Endnotes

1. All further proceedings were before the undersigned, the Family Court Judge assigned to the proceeding.
2. The petition filed by the agency on February 19, 2013 does not contain any allegations of incidents occurring prior to or after October 22, 2012. Accordingly, the Court will not consider any allegations beyond those contained in the petition. No new or amended petitions have been filed.

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy Samuelson

Same-Sex Marriage Update

Jurisdictions That Permit Same-Sex Marriage

Since my last column, three more states have been added to the roster of states that recognize same-sex marriage, including Hawaii (legislation approved on November 13, 2013), Illinois (legislation approved on November 20, 2013), and New Mexico (unanimous Supreme Court ruling on December 19, 2013).

The other states that recognize same-sex marriage are New Jersey, California, Rhode Island, Delaware, Minnesota, Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (DRL §§ 210a, 210b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

The U.S. Supreme Court in *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. Same-sex marriage litigation continues, with approximately 60 cases in 30 states. Federal appellate court cases include the states of Kentucky, Michigan, Nevada, Ohio, Oklahoma, Tennessee, Texas, Utah, and Virginia.

In Utah, a federal judge recently struck down the state's ban on same-sex marriage, declaring it unconstitutional and a violation of the equal protection clause and due process. The decision is currently stayed, pending a decision from the Court of Appeals.

On March 21, 2014, a federal judge ruled that Michigan's state law prohibiting same-sex marriage is unconstitutional, and did not grant a stay of the decision pending an appeal. More than 300 couples married prior to the Court of Appeals issuing a stay. The U.S. Department of Justice, on March 23, 2014, announced that the federal government will respect the marriages of the couples that have already taken place before the stay.

Since my last column, several countries have permitted same-sex marriage: Brazil, Uruguay, New Zealand, and the United Kingdom (England, Wales). Scotland will permit same-sex marriages effective October 2014. The other countries that permit same-sex marriage are the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, and Mexico City, Mexico.

Recent Legislation

Child Support and Maintenance Thresholds Increased

As of January 31, 2014, the combined parental income to be used for purposes of the CSSA changed from $136,000 to $141,000 in accordance with Social Services Law § 111i(2)(b), and 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 $543,000 rather than $524,000. The self-support reserve is now $15,512.

Domestic Relations Law §§ 240(3)(b) and 252(2), Family Court Act §§ 155, 168(3), 446, 551, 656, 759, 842, 846 and 1056, and Criminal Procedure Law §§ 140.10(4) and 5301.2 amended, November 20, 2013: Orders of Protection and Temporary Orders of Protection

The above-mentioned sections of the Domestic Relations Law, the Family Court Act, and the Criminal Procedure Law were amended to protect victims of domestic violence from invalidating orders of protection issued in their favor by communicating with the party against whom the order of protection is granted. The violation of an order of protection by victims of domestic violence does not subject the victim to prosecution for that violation. The amended sections require that this notice be included in orders of protection and temporary orders of protection.

Family Offenses and Orders of Protection

Family Court Act §§ 812, 821, 446, 551, 656, 842, and 1055, Domestic Relations Law §§ 240 and 252, and Criminal Procedure Law §§ 530.11 and 530.12 amended, effective December 18, 2013

Recognizing economic abuse as a form of domestic abuse, and a family offense, the purpose of this amendment is to protect victims of domestic abuse from the economic tactics used by abusers to control the victim's finances and prevent them from leaving the relationship. By giving family courts concurrent jurisdiction over these

crimes, it will make it possible for victims to address these crimes in family court and obtain relief in the form of orders of protection. In addition, the amendments permit courts to order the respondent of an order of protection to return to the protected party their respective documents and credit devices in order to prevent the perpetration of economic abuse.

The Release of Mental Hygiene Records: Mental Hygiene Law § 33.25(b) amended, effective October 21, 2013

The Mental Hygiene Law was amended to provide clarification regarding the further dissemination of records obtained by parents or guardians relating to allegations of abuse and mistreatment of a loved one residing at a mental health facility. Prior to the amendment, the section simply prohibited the dissemination of these "highly confidential" reports, which made it unclear whether these records could be shared with health care providers, or in the event that a crime has been committed, an attorney representing the family. The amended section now makes it clear that the recipient of such records may share these reports with a health care provider, a behavioral health care provider, law enforcement if the recipient believes that a crime has been committed, or the recipient's attorney. A cover letter including this information must accompany such records and reports when released to qualified family members.

Acknowledgments of Paternity by Minor Parents Family Court Act § 516-a and Public Health Law § 4135-b amended, effective January 19, 2014

An acknowledgment of paternity, executed by an individual under the age of eighteen (the signatory), may be vacated by that individual up to sixty days after reaching the age of eighteen by filing a petition with the court to vacate his previous acknowledgment of paternity. If granted, the result is not an automatic vacatur of the parent's child support obligation, but rather a court will order a DNA test to establish paternity and child support. The purpose of this amendment is to account for the "judgmental limitations of minor parents" and provide them with a method of relief.

E-Discovery and Preliminary Conferences

22 NYCRR § 202.12 amended, effective September 23, 2013

The section, as amended, provides a more comprehensive outline of the rules regarding electronic discovery. Along with requiring that counsel discuss any potential issues relating to electronic discovery prior to the preliminary conference, the amended section also sets forth a non-exhaustive list of considerations for determining whether a case is reasonably likely to include electronic discovery as well as a list of considerations for the court to use in establishing the method and scope of electronic discovery.

Supreme Court Round-up

Child's wrongful abduction does not require return where child is settled in his environment

Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014)

Pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (ICARA), the United States Supreme Court denied the petitioner-father's petition to return his child following respondent-mother's abduction of the child. The treaty, seeking to promote the best interests of the child and prevent against wrongful removal, sets forth that a court must order the return of a child upon receipt of a Petition for Return of Child filed within one year of the child's wrongful removal. If the petition is filed after the one-year period, then the court must order the return of the child, *unless* it is shown that the child has settled into his or her new environment.

In this case, the child, just over 3 years-old at the time of the abduction, was removed by the mother from her home in the United Kingdom and brought to New York to reside with the mother's sister. Unaware of his daughter's whereabouts, the father actively searched for the mother and his abducted child until discovering that the child was in the United States some 16 months later. Upon receiving the father's Petition for Return of Child after the one-year period, the United States District Court for the Southern District of New York determined that, although the child's habitual residence was the United Kingdom and the father had rightful custody of the child at the time of the abduction, the child's stability in New York merited the denial of the request for the child's return to the United Kingdom. The District Court further noted that, contrary to the father's argument, the one-year period set-forth in the treaty was not subject to equitable tolling. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court, and the United States Supreme Court granted *certiorari*.

Explaining that the doctrine of equitable tolling is an American principle applied to federal statutes of limitations, the Supreme Court declined to extend the application of this principle to an international treaty. Designed to protect defendants from endless exposure to liability, statutes of limitations do not contemplate the same purpose addressed by the expiration of the one-year period of the treaty, which is to consider the third-party child's interest in settlement. The court, looking to the text and context of the Hague Convention, determined that the drafters did not intend equitable tolling to apply to the one-year period. Despite the fact that the child was concealed from the father during the one-year period, the treaty specifically states that the one-year period begins on "the date of the wrongful removal or retention," and neglects to provide for any extension of this period. *Id.* at 1235.

Author's note: This appears to be an inequitable and alarming result, allowing child abducters free rein.

Other Cases of Interest

Child Support

Father's child support obligation terminated on the basis of constructive emancipation

***Jurgielewicz v. Johnston*, 114 A.D.3d 945 (2d Dept. 2014)**

The appellate division reversed the decision of the family court and granted the father's petition to terminate his child support obligation to his 18-year-old daughter on the basis of the child's constructive emancipation where she is of employable age. While the mother did not actively interfere in the relationship, the non-custodial father's regular calls to his daughter went unanswered and ignored, his repeated suggestions to attend counseling or have therapeutic visitation with the daughter were rejected, and gifts that he left for the daughter at the mother's home went unacknowledged.

The court noted that the deterioration of the relationship between the father and the daughter was through no fault of the father, which would have affected a finding of constructive emancipation.

Downward modification of child support granted

***Dimaio v. Dimaio*, 111 A.D.3d 933 (2d Dept. 2013)**

The parties' stipulation of settlement was incorporated but not merged into the parties' judgment of divorce, which was granted prior to the 2010 amendments to the Family Court Act § 451. After the divorce, the father lost his job as a manager and head waiter at a restaurant, and subsequently obtained a job at another restaurant as a manager. However, his salary decreased and he was unable to secure a position as both a manager and head waiter. Based on the father's lesser salary and his efforts to find new employment commensurate with his earning capacity, the appellate division found that the father satisfied his burden of proving a substantial change in circumstances, reversed the lower court's decision, and granted his petition for a downward modification of child support. The court failed to state the efforts the father made to secure new employment commensurate with his prior income or the actual change in his income.

A child's unanticipated receipt of benefits does not warrant a downward modification of a parent's child support obligation

***Matter of McDonald v. McDonald*, 112 A.D.3d 1105 (3d Dept. 2013)**

Pursuant to the parties' separation agreement, the legal father was required to pay $150/month in child support for the two children in excess of the amount required by the Child Support Standards Act due to his earning capacity. The legal father, claiming that he was now earning substantially less and that the son was receiving $859/month in Social Security survivor's benefits from his biological father, sought to reduce his child support obligation.

Although finding that the legal father had not demonstrated a substantial change in his earning ability, the lower court granted the petition on the basis of the son's receipt of monthly Social Security survivor's benefits. The appellate division reversed, holding that the son's receipt of those benefits did not affect the legal father's financial situation or result in any showing of need for modification. A child's assets are to be considered as a supplement to existing resources and not as a discharge of a parent's duty to support a child.

Custody

Modification of custody to split residential custody

***O'Connell v. O'Connell*, 105 A.D.3d 1367 (4th Dept. 2013)**

Petitioner-father brought an action to modify the parties' custody stipulation that was incorporated into the divorce judgment, which provided for joint custody of the parties' two daughters, ages 15 and 13, with the mother to have residential custody of the children and the father to have visitation. The Family Court determined that a change in circumstances had been shown, and that it was in the younger child's best interest to reside with the father, but the older daughter should continue living with the mother.

The appellate court affirmed, reasoning that based on the mother's testimony and demeanor at the hearing, the mother had become unable to adequately communicate with the youngest daughter and the relationship had become antagonistic. The court noted that this is one of those rare cases where a split residential custody arrangement is appropriate, particularly since the siblings attend the same school and will spend time with each other during the parental visitation throughout the week and every weekend.

Modification of custody where parental alienation is shown

***Parchinsky v. Parchinsky*, 114 A.D.3d 1040 (3d Dept. 2014)**

The Family Court properly granted a change in custody of the parties' two sons, ages 13 and 15, from the mother to the father where the mother limited the sons' communication with the father by listening in on their telephone conversations, refused to rearrange the visitation schedule when the children's activities interfered with the father's scheduled visitation, failed to immediately notify him when one of the sons was diagnosed with cancer, neglected to inform him that the son was undergoing surgical treatment for cancer until after the surgery was completed, and refused to authorize the father's communication with the son's doctors.

Although a change in custody required the sons to move to Brooklyn and change school districts, the appellate division took into consideration the sons' preferences to reside with the father and the father's openness to helping maintain the sons' relationships with the mother. Based on the mother's hostility towards the father and her inability to foster the relationship between the sons and the father, the appellate division found that it was in the children's best interest to change custody.

Relocation denied

Matter of Christy v. Christy, 113 A.D.3d 848 (2d Dept. 2014)

The Family Court properly denied the mother's petition to relocate to Arizona with the parties' children where she failed to prove that it would serve the best interests of the children. Although the mother was an unemployed teacher, and received a pending job offer in Arizona, she failed to provide information regarding her expected salary. The mother's second husband, who has a stable job in New York with an income of $60,000 to $80,000 per year, had not yet found any job prospects in Arizona. Moreover, the children did not want to move to Arizona, and most importantly, their visitation with the defendant-father would be significantly decreased as a result of relocation.

New York has exclusive jurisdiction over a custody agreement executed in the state even where the child has resided outside of the state for more than six months

Seminara v. Seminara, 111 A.D.3d 949 (2d Dept. 2013)

Pursuant to a separation agreement, the parties agreed that the mother would have primary physical custody of the child in Florida and the father would be entitled to a four-month visitation with the child in New York. After the mother failed to abide by the agreement, the father sought to modify custody by granting him sole legal and residential custody. However, on the basis that the child resided outside of the state of New York for more than six months, the court, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), dismissed the petition for lack of jurisdiction. Three months later, the father again petitioned for a change in custody, and the mother moved to dismiss for lack of jurisdiction. The Family Court denied the mother's motion.

The Family Court improperly granted the mother's oral application to dismiss the father's prior custody petition for lack of jurisdiction. The court failed, as required by Domestic Relations Law § 76Ba(1), to determine whether the child, or the child and a parent, had a significant connection to New York, or whether substantial evidence was available in this state, or to determine whether New York was an inconvenient forum based upon the factors set forth in Domestic Relations Law § 76Bf(2) .

The Family Court correctly determined that New York had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law § 76Ba where the initial child custody determination was rendered in New York, and there is a significant connection of the child with New York since the father had extensive parenting time with the child in New York, the child has relationships with a half-sibling and extended family in New York, and the father has furthered the child's education and attended to her medical care in New York.

NYS Department of Education's policy of deferring education decisions to parent who has primary physical custody despite joint custody arrangement is not deemed arbitrary and capricious

Jennings v. Walcott, 110 A.D.3d 538 (1st Dept. 2013)

The petitioner-father, who, pursuant to a judgment of divorce, had joint legal custody but not primary physical custody of the child, brought a CPLR article 78 proceeding against the NYS Department of Education for a judgment declaring that its policy of deferring education decisions to the parent who has primary physical custody, unless otherwise ordered by the court, is arbitrary and capricious. The order granting the petition was reversed and dismissed because the Department of Education rationally adopted its policy to avoid becoming entangled in custody disputes, especially where the parents could not agree upon the child's course of education. The court determined that the petition's remedy is to pursue a modification of the judgment of divorce to provide for joint decision making with respect to education.

Author's note: Doesn't joint custody mean joint decision making on educational issues? Will this case require all joint custody agreements to specifically state that educational decisions are to be made jointly by both parents?

Equitable Distribution

Award of husband's medical degree and license reduced from 50% to 30%

Kim v. Schiller, 112 A.D.3d 671 (2d Dept. 2013)

Although the wife did not make direct financial contributions to the husband's attainment of his medical degree and license, she made substantial indirect contributions. The wife worked full-time during the marriage, except during those periods when she was on maternity leave or collecting disability benefits due to her chronic lupus, was the primary caretaker of the parties' two children, contributed her earnings to the family, cooked the families' meals and participated in the housekeeping. However, because the husband made accommodations for the sake of the wife's career and her desire to remain near her family, and made financial contributions during his tenure at medical school, the court lowered the wife's entitlement from 50% to 30%.

Distribution of pension's death benefits and Enhanced Earnings Capacity

Lauzonis v. Lauzonis, 105 A.D.3d 1351 (4th Dept. 2013), *rearg. denied*, 107 A.D.3d 1647 (4th Dept. 2013)

The court below erred by distributing an investment account to the husband where title was held jointly by the parties during their marriage and the funds were derived from a refinance of their home just prior to the commencement of the action. The appellate court held that "an equal disposition of that property should be presumptively in order, with the burden on the party seeking a greater share to establish entitlement." *Id.* at 1352.

Additionally, the court below erred in failing to distribute the death benefit of the husband's teacher's retirement pension (although it properly equitably distributed the pension), and remitted the matter to the trial court to determine the value of the death benefit and the distribution of it.

The court below failed to award the wife a portion of the enhanced earnings of the husband's master's degree, which was earned partially during the marriage. The appellate court held that the wife made modest contributions to the husband's attainment of the degree, which requires some distribution to her, including that she worked during the marriage, performed household duties, helped the husband with his course work, took over the husband's responsibilities as a swim coach, put her own master's degree on hold, and took over various other responsibilities in order to assist the husband. The court's opinion did not include the length of the parties' marriage.

The court below did not err in imputing $20,000 of income to the wife to determine child support based upon her education, qualifications, employment history, past income, and demonstrated earning potential. The court failed to state the facts surrounding her work history and income.

Six-year statute of limitations governs enforcement of rollover of retirement funds

Boardman v. Kennedy, 105 A.D.3d 1375 (4th Dept. 2013)

The decedent's ex-wife commenced an action against the decedent's widow for the enforcement of a matrimonial stipulation, which was entered into on November 15, 1990 and incorporated into their judgment of divorce on March 1, 1991. The ex-wife claimed that she never received the one-half interest in the decedent's IRA that she was entitled to receive pursuant to the stipulation. In response, the defendant-widow moved for summary judgment dismissing plaintiff's complaint, and the lower court granted the motion.

The appellate division affirmed, reasoning that the ex-wife's enforcement of the matrimonial stipulation is time barred, as it is governed by the six-year statute of limitations pertaining to contractual obligations pursuant to CPLR §213(1) and (2), rather than the twenty-year statute of limitations for an action to enforce a money judgment contained in CPLR §211(b).

Author's note: The ex-wife was immediately entitled to a rollover after the granting of the judgment of divorce. It appears that she failed to do her due diligence in following up with the rollover, and therefore, this does not even appear to be an enforcement matter. I cannot tell you the number of times I have had consultations with potential clients that report that their former divorce attorney failed to follow up on the retirement account transfer, DRO or QDRO. The clients should be warned that they have a six year deadline, regardless of whether the attorney's retainer includes these services.

Ambiguity of life insurance provision construed against drafter

DeAngelis v. DeAngelis, 104 A.D.3d 901 (2d Dept. 2013)

The separation agreement between the decedent and his first wife, which was incorporated but not merged into the judgment of divorce, provided that the decedent would maintain a $300,000 life insurance policy for the benefit of defendant-children, and that his subsequent failure to do so would entitle the children to a claim against the decedent's estate for that amount. Following the divorce and the emancipation of the defendant-children, the decedent remarried and named plaintiff-wife as the beneficiary of his life insurance policy. After the decedent's death, plaintiff-wife collected the proceeds from his life insurance policy and the defendant-children, who were no longer named as the beneficiaries of any life insurance policy, filed a claim for $300,000 against the decedent's estate. Thereafter, the plaintiff-wife filed this suit to bar the defendant-children's claim, and the lower court ruled in her favor.

On appeal, the appellate division reversed, relying on the doctrine of *contra proferentem*, which resolves contractual ambiguities against the drafter and in the light most favorable to the nondrafter. Although the separation agreement was ambiguous with regard to the decedent's obligation to maintain the life insurance policy beyond the emancipation of the defendant-children, the decedent's attorney drafted the separation agreement, so the ambiguity must be resolved in the defendant-children's favor. Therefore, the court ruled that the defendant-children do indeed have a claim against the decedent's estate for his failure to maintain the life insurance policy for their benefit.

Author's note: The practitioner should be mindful to state when the obligation to maintain life insurance is terminated. To me, the agreement does not appear to be ambiguous in this case because it did not have a cutoff date.

Wife entitled to 50% credit of marital funds used to pay husband's restitution of money judgment for arrears in support of former wife that accrued prior to second marriage

***Levenstein v. Levenstein*, 99 A.D.3d 971 (2d Dept. 2012)**

The husband was convicted in a Virginia federal court for failure to pay his child support obligations and was ordered to pay restitution in the amount of more than $132,000. After failing to pay the restitution amount and not fully divorced from his first wife, the defendant-husband proceeded to marry the plaintiff-wife. Over the course of their marriage, the restitution owed by the husband was paid.

After an annulment of her purported marriage to the husband on the ground of bigamy, the wife sought recoupment of 50% of the marital funds used to satisfy the husband's restitution. The lower court, relying on *MahoneyBuntzman v. Buntzman*, 12 N.Y.3d 415 (2009) (payments made to a former spouse for child support and/or maintenance cannot be recouped), denied the wife's request.

On appeal, the Second Department modified the judgment, holding that the wife was entitled to recoupment of 50% of the payments that were made during the marriage to satisfy the defendant-husband's criminal judgment. The appellate court distinguished this case from *MahoneyBuntzman*, since the maintenance payments made in that case had become due during the parties' marriage, whereas here, the wife sought a credit for amounts that were due before the marriage took place.

Ex-spouse cannot be disgorged of assets obtained from divorce due to the alleged fraud of the other spouse where the ex-spouse provided fair consideration for the assets

***Commodity Futures Trading Comm'n v. Walsh*, 2014 WL 847900 (S.D.N.Y. Feb. 28, 2014)**

The Commodity Futures Trading Commission ("CFTC") and the Securities Exchange Commission ("SEC") brought suit against the ex-wife of an alleged Ponzi-schemer to disgorge her of the funds she obtained via the terms of a separation agreement and divorce decree. The United States District Court for the Southern District of New York entered preliminary injunctions against the defendant-wife precluding her from transferring, disposing of, or encumbering any of her assets. The wife appealed and the Second Circuit Court of Appeals certified questions to the New York State Court of Appeals.

Tasked with deciding whether the proceeds of fraud can constitute marital property and whether forfeiting a claim to the proceeds of fraud constitutes fair consideration, the New York Court of Appeals held that

> [P]roceeds of fraud can constitute marital property, and that, monies obtained by fraud cannot be followed by the original owner into the hands of an innocent former spouse who now holds them (or assets derived from them) as a result of a divorce proceeding where that spouse in good faith and without knowledge of the fraud gave fair consideration for the transferred property. *Id.* at 1.

As a result, the Second Circuit vacated the preliminary injunctions and remanded the case to the District Court to determine whether the wife provided fair consideration and qualified as a *bona fide* purchaser for value based on the terms of the separation agreement. On remand, the wife moved for summary judgment dismissing the claims of the CFTC and the SEC.

The District Court, in deciding whether the wife was a bona fide purchaser for value, looked to the elements of fair consideration, including that the transferee conveyed property or discharged an antecedent debt in exchange, the exchange was for a fair equivalent, and the exchange was made in good faith. Since the wife conveyed to her ex-husband her interest in one of their homes, waived her right to any further equitable distribution, maintenance, or inheritance, and was unaware of the "tainted nature of the particular assets," the District Court found that the wife was indeed a bona fide purchaser for value. The District Court further noted that the state has a "strong public policy of ensuring finality in divorce proceedings" and that the alleged fraud on the part of the ex-husband was not revealed until three years after the settlement was finalized. *Id.* at 7. For these reasons, the District Court granted defendant-wife's motion for summary judgment dismissing the agencies' claims against her.

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

Judgment of Divorce and Grounds

Foreign divorce upheld where it was not challenged by the ex-spouse until more than two years later

***Siddiqui v. Siddiqui*, 107 A.D.3d 974 (2d Dept. 2013)**

The parties, married in Pakistan, moved to the United States, and thereafter, the husband commenced divorce proceedings in New York. According to the plaintiff-wife, while the divorce proceedings were pending in New York and unbeknownst to her, the defendant-husband obtained a divorce in Pakistan by performing "talaq." Talaq, a tradition under Pakistan's Muslim Family Ordinance, involves declaring or writing that the man is divorcing his wife three times, notifying a specific Pakistani governmental official of this pronouncement in writing, and providing the wife with a copy of the notice. Following the expiration of 90 days from the day that the notice

is delivered to the governmental official, the divorce is given effect and becomes official.

Thereafter, the husband withdrew the divorce pleadings in New York and remarried. Two years after the Pakistani divorce was official, the wife moved to have the divorce declared void and the husband's remarriage illegal on the ground of bigamy. The lower court denied the wife's motion, and the appellate division affirmed based on evidence that the wife was notified of the foreign divorce weeks prior to it taking effect in Pakistan. The appellate division noted that the wife did not object to the Pakistani divorce until more than two years had passed and the husband relied upon this divorce to remarry. In addition, the wife did not suffer any prejudice since all other issues such as child custody, maintenance, and child support were currently being addressed in Family Court.

Transmission of herpes more than 20 years ago not considered egregious fault

***Foti v. Foti*, 114 A.D.3d 1207 (4th Dept. 2014)**

The court below properly determined that the defendant's allegation that the plaintiff infected her with genital herpes more than 20 years prior to her motion was insufficient to warrant discovery of the plaintiff's confidential medical records, and was not considered egregious fault.

Counsel Fee Corner

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

***Guzzo v. Guzzo,* 110 A.D.3d 765 (2d Dept. 2013)**

The appellate court modified the lower court's award of only $35,000 of the requested $161,000 of legal fees and awarded the wife $100,000 based on the significant disparity in the parties' income (although no facts were provided) and the husband's egregious tactics that prolonged the litigation and caused the wife to incur additional legal fees.

"Skin in the game"

***Sykes v. Sykes*, 973 N.Y.S.2d 908 (Sup. Ct. N.Y. County 2013)**

The husband was a hedge fund manager with income in the millions and the wife was unemployed and receiving $75,000 per month in *pendente lite* child support and maintenance. During the 3 years of litigation, the husband had paid his own counsel fees and the wife's fees, totaling approximately $1 million. Before and during the first eight days of trial, the wife requested the husband to pay an additional $668,000 of legal fees. The wife had three attorneys regularly appear for her on the case at hourly rates of $900, $700, and $500. The parties are expected to divide $20 million in marital assets, and the wife is expected to receive $10 million.

The court held that the *pendente lite* counsel fees of both parties should be paid equally out of their $2 million in marital funds, subject to reallocation at trial, rather than continuing to be paid solely by the husband out of his separate property. Requiring the wife to contribute to her own counsel fees would ensure that she has "skin in the game," meaning that she would have an incentive to negotiate settlement terms in good faith. The inquiry into the parties' financial circumstances should not be restricted to their respective income alone, but should instead be based upon their respective assets and entitlement to equitable distribution.

***Chusid v. Silvera,* 110 A.D.3d 660 (2d Dept. 2013)**

An award of $100,000 interim counsel fee to the wife was reduced by the appellate court to $75,000. No explanation was given.

***Rivacoba v. Aceves*, 110 A.D.3d 495 (1st Dept. 2013)**

Award of more than $60,000 in interim counsel fees was affirmed. Although the wife received one bill within an 18-month period, she did not object to the billing statement and waived her right to receive a statement every 60 days. Under 22 NYCRR 1400.2, the court noted that it is the client's right, not the adversary spouse's right, to raise the objection that the bill was not provided every 60 days.

***Kessler v. Kessler*, 111 A.D.3d 894 (2d Dept. 2013)**

Award to the wife of $141,000 in counsel fees after the divorce, which was half the amount requested.

Wendy B. Samuelson is a partner of the boutique matrimonial law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature and lectured for the Continuing Legal Education programs of the New York State Bar Association, the Nassau County Bar Association, and various law and accounting firms. Ms. Samuelson was selected as one of the Ten Leaders in Matrimonial Law of Long Island, was featured as one of the top New York matrimonial attorneys in Super Lawyers, and has an AV rating from Martindale Hubbell.

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