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Notes and Comments

Elliot D. Samuelson, Editor Emeritus

Temporary Maintenance Statute Domestic Relations Law §236 B(5): Did It Achieve Predictability and Consistency and Do What Was Expected of It? …And Will It Lead to the Passage of a Formula Approach Law to Compute Permanent Maintenance?

A proposed bill for a formula approach *to permanent* maintenance, which contained many of the provisions already existing for *temporary* support was not passed into law in the last session of the legislature.[1] Whether a new bill, if later passed, will ameliorate some of the shortcomings of the temporary measure remains to be seen. To address these issues, some of the case law that has been handed down during the past three years after the existing temporary support statute was signed into law will be fruitful. However, because there is a paucity of appellate cases that have analyzed Domestic Relations Law §236 B(5-a) thorough review of those relevant becomes necessary.

Essentially there were but eight meaningful decisions handed down since the statute's inception in 2010,

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Elliot D. Samuelson: Over 37 Years of Dedication to the *Family Law Review*

By Lee Rosenberg
Editor-in-Chief

Some nine years ago, I was privileged to have been asked by Elliot Samuelson to become his Editorial Assistant at the *Family Law Review.* Now, I have been offered the opportunity and great honor to succeed him as Editor-in-Chief of this most important publication with Elliot being named Editor Emeritus.

Elliot Samuelson has been the Editor of the *Family Law Review* since its early incarnation as a newsletter and transitioned it to become a perennial cornerstone of the NYSBA Family Law Section. I can only hope that my stewardship of this publication lives up to the extraordinary standards set by Elliot.

His stalwart leadership remains at the forefront of scholarly insight and has spanned the passage of the Equitable Distribution Law, the Child Support Standards Act, the enactment of No Fault Divorce, the passage of the Marriage Equality Act, and five Chief Judges of the Court of Appeals. His academic and professional achievements have served us well as the *Family Law Review* became a beacon of well-crafted opinion and intellectual curiosity for important discourse on the issues in our field—a voice

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Inside

six by the Second Department and two by the First. (*See Khaira v. Khaira*,[2] *Woodford v. Woodford*,[3] *Goncalves v. Goncalves*,[4] *Davydova v. Sasonov*,[5] *Lennox v. Weberman*,[6] *Chusid v. Silvera*,[7] *Francis v. Francis*,[8] and *Vistocco v. Jardine*.[9]) They will be examined with a view of determining whether the statute has been applied uniformly, whether there is a correct way to deviate from applying the statute if the lower court believes that to do so would be unfair or unjust.

One of the first questions raised on appeal was whether DRL §236 B(5-a) permitted inclusion for the payment of the carrying charges of the marital residence, health costs, and other miscellaneous charges in addition to determining the presumptive award of temporary maintenance. *Khaira*, decided on February 7, 2012, the first appellate court to review the statute, made clear it did not, at least in the First Department.

Khaira also gave the court an opportunity to review the new statutory guidelines for temporary spousal awards for maintenance and the circumstance under which the court could deviate from the guideline amount. It also examined whether it was proper to make a presumptive award, and then, on top of that, direct payment as a separate sum for the expenses of the marital residence, and health insurance. In dealing with these issues, the First Department first observed that prior to the passage of this new statute, the courts had wide discretion to make temporary maintenance awards "in such amounts as justice requires" after factoring in the pre-separation standard of living, the reasonable needs of the party applying for support, and whether the person from whom support is requested has the financial ability to make the awarded payment. It then cited *Iannone v. Iannone*[10] where the court explained that the earlier law was to award maintenance simply "'to tide over' the more needy party, not to determine the correct ultimate distribution and to ensure that a needy spouse is provided with funds for his or her support and reasonable needs." The court then compared the purpose of DRL §236 B(5-a) to fix a "substantial presumptive entitlement" rather than awarding a "tide over" amount. It added that the new provision was adopted in order "to provide 'consistency and predictability' in calculating temporary spousal maintenance awards." It found, however, that the statute mandates that if the court should deviate from this formula, it would have to explain the reason for the deviation pursuant to the factors set forth in the statute.

Because in *Khaira* the motion court failed to offer any reason for deviation from the statutory formula when it added the payments for expenses of the marital residence and health insurance as a separate amount above the presumptive sum, its determination had to be reversed and the case remanded to the motion court for a new computation which must include a discussion of its reason for deviation pursuant to the mandates of DRL §236 B(5-a). In acknowledging that the initial sum may ultimately be correct, it made clear that such award must be "appropriately supported," in order to be in compliance with the mandates of the statute.

The next meaningful case to be decided, some nine months later on November 21, 2012, came from the Second Department in *Woodford*,[11] which followed the *Khaira* holding to some extent, and explained that "Indeed, it is 'reasonable and logical' to view the formulas set forth in Domestic Relations Law §236 (B)(5-a) 'as covering all the spouse's basic living expense, including housing costs,'" and remarked that the lower court may have been unaware that the statute was intended to cover *all* of the recipient's basic living expenses. Accordingly, it remanded the case to the Supreme Court to make a new determination which would include the expenses of the marital residence but not a direction to pay a fixed amount on top of the presumptive award, as the court below did in the order appealed from.

Thereafter, along came *Goncalves*,[12] in the Second Department, and cited both *Woodford* and *Khaira*, explaining that both the procedural and substantive requirements to fix the amount and duration of temporary support stems from DRL §236 B(5-a). It noted that unless the award exceeds the initial income cap of $500,000[13] the computation is simple, but if the court wishes to exceed this cap it must incur the additional steps of considering all 18 enumerated factors contained in the statute, as well as considering anything else it chooses provided it finds it to be "just and proper." As such, the lower court may consider any non-enumerated factors in order to support its decision to make a deviation to increase or decrease the statutory presumption. Once the calculation is made as indicated above, the court must then return to the statute to fix the duration of such support, which is based on the length of the marriage, and the two calculations establish the "presumptive award."

The other "wild card" that the statute employs to determine a deviation, held the *Goncalves*[14] court, is where the presumptive award is unjust or inappropriate. But to do so, a broad range of factors that are almost identical to whether or to the extent that a deviation may be changed must be considered and put into writing. Interestingly, the court noted that although the motion court went through the statutory requirements of considering the enumerated factors to deviate from the presumptive award, but did not do so sequentially (which the court suggested was the preferred way to do so), it nevertheless sustained the award and stated that the court's award of temporary maintenance was "appropriately supported and explained" citing both *Khaira* and *Woodford*. This ruling, of course, was another victory for substance over form…or was it form over substance?

Soon after *Goncalves*, on Sept 25, 2013, the Second Department decided *Davydova*[15] citing *Goncalves*, *Khaira*, and *Woodford*, and reiterating that if a deviation be made because the award would be unjust or inappropriate, the court must set forth in writing the factors it considered

and the reasons for adjusting the presumptive award. More importantly, it cautioned the lower courts to make a temporary award "based upon the needs of the payee or the standard of living of the parties prior to the commencement of the divorce action, whichever is greater," when insufficient evidence to determine gross income is present. Accordingly, the case was remanded for a new determination made in accordance with the appellate court's suggestions and the statutory requirements.

About a week later, the Second Department decided *Chusid*[16] which once again cites *Woodford*, *Khaira*, and *Goncalves* with approval and reiterates that deviation may occur when the presumptive award is unjust or inappropriate *provided* it complies with the statute. Nonetheless, the Second Department reduced the award because it exceeded the wife's alleged monthly expenses set forth in her net worth statement. It did so because it felt that the presumptive award was "unjust or inappropriate" and "justice required" such change. The court concluded that "justice requires a reduction of the award," based upon the fact that the wife's acknowledged needs were $2,577.55 less per month than the presumptive award made by the lower court.

A First Department case, *Lennox v. Weberman*,[17] found that the lower court properly deviated from the presumptive amount, specifically listing all 19 of the enumerated factors, in granting an *upward deviation* to $38,000 per month from the $12,500 a month in guideline support, and found that $38,000 per month was not "unjust or inappropriate."

Other cases that the reader might like to review are *Francis*[18] and *Vistocco*,[19] which deal with other permutations of deviation.

What can be learned from the review of these cases is that despite the definitive formula contained in the statute, the court may deviate from its mandates, provided it articulates significant reasons to do so, or simply because the court may feel the award computed by the formula is unfair, and like the *Chusid* court, hangs it hat on "justice requires" such deviation. I leave you with the adage that a rose by any other name.…

Endnotes

1. Bill A9606/S7266 in the 2014 Legislative Session.
2. 93 A.D.3d 194 (1st Dep't 2012).
3. 100 A.D.3d 875 (2d Dep't 2013).
4. 105 A.D.3d 901 (2d Dep't 2013).
5. 109 A.D.3d 955 (2d Dep't 2013).
6. 109 A.D.3d 703 (1st Dep't 2013).
7. 110 A.D.3d 660 (2d Dep't 2013).
8. 111 A.D.3d 454 (2d Dep't 2013).
9. 116 A.D.3d 842 (2d Dep't 2014).
10. 31 A.D.3d 713, 714 (2d Dep't 2006).
11. See note 2.
12. See note 3.
13. Now amended to $543,000.
14. See note 4.
15. See note 5.
16. See note 6.
17. See note 7.
18. See note 8.
19. See note 9.

Elliot D. Samuelson is the senior partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP and is a past president of the American Academy of Matrimonial Lawyers, New York Chapter, and is included in "The Best Lawyers of America" and the "Bar Registry of Preeminent Lawyers in America." He has appeared on both national and regional television and radio programs, including Larry King Live. Mr. Samuelson can be reached at (516) 294-6666 or esamuelson@samuelsonhause.net.

Note

After over 37 years as Editor of the *Family Law Review,* and author of the "Notes and Comments" column, I have now been elevated for these efforts to the position of Editor Emeritus. I pass the baton of professional excellence to continue this editorial goal to Lee Rosenberg, who for the past nine years has aided me as assistant editor and has earned my respect as an outstanding attorney. Lee has been my friend and colleague for many years and I could not think of another lawyer who would be more capable for the job of Editor-in-Chief. I welcome the other new members of the editorial board, Glenn Koopersmith, and my daughter, Wendy Samuelson, who I am certain will do an outstanding job in assisting Lee.

I am not saying goodbye. I remain to give guidance and contribute to the *Review* when needed. The ultimate continued success of this publication will depend upon the courts that have frequently cited our articles in the past to continue to do so, as well as the continuance of the many authors to contribute their scholarly articles to make the *Family Law Review* one of the jewels of the New York State Bar Association's Section publications.

—Elliot D. Samuelson

Elliot D. Samuelson: Over 37 Years of Dedication

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to be listened to by the Bar and by the Bench, whether simply considering a point of interest or serving as citation in a brief or judicial decision.

Trial attorney, negotiator, appellate counsel, author, charter member and President of the New York Chapter of the American Academy of Matrimonial Lawyers, Founding Barrister of the New York Family Law American Inn of Court, gentleman, scholar, professional and friend—Elliot Samuelson remains all of these and more. He has inspired me and many others who seek excellence in the practice of matrimonial law.

I embark on this path as only the second editor of this esteemed publication, knowing that the example set by Elliot Samuelson is the north star and the benchmark. I owe him a debt of gratitude for all of his support over the years and pledge to continue the high standard expected of the *Family Law Review* as established by the Editor Emeritus. I thank Section Chair Alton Abramowitz and his predecessor, Pamela Sloan, for selecting me to continue the *Family Law Review*'s legacy into the future.

Equitable Distribution and Tax Credits: A Lifeline for New York's Lower Income Families Facing Divorce

By Hon. Richard A. Dollinger and Michael P. Maiorana

While low income families struggle through divorce, judges and attorneys may often overlook an important resource: the federal and state child-related tax credits. These valuable credits can provide cash assistance, on a sliding scale, up to more than $6,000 annually if family incomes are less than $20,000 and lesser amounts as incomes exceed $20,000 annually. While New York's Domestic Relations Law never refers to distribution of these credits, judges and practitioners should nonetheless follow Ohio's lead and make tax-based findings that the distribution of the credits serve the best interests of the children.

The Earned Income Tax Credit

The Earned Income Tax Credit ("EITC") is a "refundable" federal and state tax income tax credit, enacted to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income, to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices.[1] When the credit exceeds the amount of taxes owed, it results in a direct payment to the taxpayer in excess of the taxes paid. In essence, the taxpayers get an additional direct cash payment if they claim the credit.

The EITC is not the only available credit. The child tax credit can be up to $1,000 per child for lower income families and phases out as incomes grow. There are also tax benefits for head of household status, credits for dependent care, and exclusions from income for dependent care assistance that can assist low-income families enduring divorce.

Some simple rules dictate who qualifies for what.

First, the Internal Revenue Code—through the IRS Form 8332 or its equivalent—allows parents or, if necessary, the courts by its orders, to allocate the exemptions and child tax credit to the non-custodial parent.[2] New York courts have ordered distribution of the exemptions.[3] In contrast, the EITC and the remainder of the valuable credits and exclusions, according to the Code, remain with primary residential parent and cannot be allocated by separation agreements or courts.[4]

Second, to qualify for the EITC, the filer—the parent having residence with the child for more than half the year—needs "earned income" from employment. Maintenance, child support, food stamps or Social Security disability payments will not qualify as earned income for purposes of the EITC. The EITC is designed to encourage employment and, hence, only earned income qualifies the filer for the credit.

Third, the EITC works on a sliding scale: the higher the income, the less benefit from the credit. There is a floor—the filer must meet some minimum income requirements—and a ceiling—the benefit ceases when the income of the filer rises above $47,000.

Fourth, applying for the credit involves some logistical challenges, which may be especially difficult for modest-income families. Qualifying children, whose numbers impact the size of the benefit, must have social security numbers, a tool to prevent parents from claiming the same children on multiple returns. The filer must be a citizen or resident of the United States. The *sine qua non* of effective use of the EITC is that modest income families, either while enduring a divorce or thereafter, must file income tax returns. Often, in resolving matrimonial disputes among families with meager incomes, a parent may not file a return or may not be required by law to file (as head of household) if their income is less than $12,850. In either case, the failure to file may waste the federal and state EITC claims.

Fifth, New York has the most generous state earned income credit in the nation—30 percent of the federal credit—which can be added to the federal benefit.

Sixth, New York has one other rarity: a non-custodial parent tax credit for parents who have paid their annual child support under a support order and this credit—to a non-residential parent—can be more than $600 if the parent's income is less than $16,420.[5]

How valuable is the EITC—state and federal? The answer for low income families: extremely valuable.

Some Real-World Calculations

A modest-income family of four who divorce in a year in which they can file a joint return can qualify for federal EITC with an income up to $48,378. The maximum federal benefit for a family of four is $5,372 if the combined family income is less than $22,870. In this example, the state EITC could be as much as $1,500 more. A single filer with two children, after the divorce is final, can claim a credit with an income up to $43,038. If the income for the same filer is less than $17,530, the maximum federal benefit is $5,372 and the state EITC is then added to that amount.

In this circumstance, the filer can not only recoup every penny of paid tax but substantially in excess of that amount.

The Dependency Exemption Component

New York's courts recognize the benefits of allocating the dependency exemptions. A recalcitrant former spouse must sign a Form 8332 if the settlement agreement directs it.[6] Often, however, when allocating dependency exemptions among parents with substantially different incomes—e.g., where one spouse has been the breadwinner and makes $70,000 and the other has just re-entered the workforce and makes only $15,000—attorneys and judges tend to allocate the exemptions to the higher income parent because they pay taxes at a higher rate or, if the incomes are roughly comparable, then the parties split the exemptions.[7] This conventional wisdom may ignore the benefit of the EITC and other credits: in the above example, the lower income spouse, provided he or she qualifies and meets income requirements, could realize more than $5,000 in cash benefits from the state and federal EITC annually.

Because of the potential for a substantial financial reward in the allocation of the exemptions and the impact of the EITC, New York should consider following a path set by Ohio, which, by statute, requires a finding of a net tax savings to parents—and specifically requires an evaluation of the EITC—before exemptions are distributed.[8]

Even in the absence of a statutory change in New York, practitioners in modest income divorce cases should give exemptions and tax credits a more discerning examination. Simply put, $4,000-$6,000 in annual tax credits for a low-income family annually—$20,000-$40,000 over a decade for parents with young children—can make a sizable difference in the life of a family, easing the burdens of both payor and recipient, while benefiting the children. Even in default divorces among low-income families, the dependency exemptions and EITC tax benefits should be examined by the courts before the divorce is signed.

Practitioners face challenges to secure the tax benefits as well. First, the settlement agreement should require the parents to obtain social security numbers for their children—if not already secured—to facilitate obtaining the exemptions and credits. Second, the agreement should require both parents to file income tax returns annually, regardless of the amount of their income and whether they are required by law to file, so the value of the exemptions and credits can be realized. If a party fails to file, the exemptions and credits should be transferable to the parent who does file and can qualify.

Third, if the exemptions and federal child tax credit are allocated to the non-residential parent, the residential parent should sign the federal tax allocation document simultaneously with the separation agreement. The form, dated, containing the Social Security numbers of both parents and the children and attached to the tax return, can prospectively list the years in which the exemptions can be used by the non-residential parent.[9]

Fourth, even if the exemptions are allocated to the non-residential parent, the residential parent should still file for the EITC and other credits.

Fifth, the IRS will no longer accept a signed separation agreement allocating the exemptions and credits in lieu of the Form 8332.[10] While practitioners favor the language—"the spouse only gets the exemptions if they are current on their child support"—the IRS will no longer allow taxpayers to simply file agreements containing this language in lieu of Form 8332 because the agreement does not contain a definite description of the years for which the non-residential parent would qualify.[11] In addition, if the exemptions are transferred by decree after trial or a hearing, the IRS will not transfer the exemptions and any credits based on a court's determination: the Form 8332—or its nearly exact equivalent—from the residential parent is still required.[12]

Sixth, the prudent use of the exemptions and credits requires parents, after a divorce, to engage in annual tax planning, even though there may be a substantial likelihood that a parent may lose contact with his or her former spouse after the divorce is final. Incomes change and the value of the exemptions—and credits—can fluctuate, especially as parents re-enter the workforce or, conversely, are laid off. Ideally, an agreement would also require that the parents annually share the benefit of the accumulated credit, with parents dividing the extra cash to assist both the payor and the recipient.

Finally, practitioners and the courts should consider the tax consequences if a divorced spouse remarries as a parent filing jointly with a new spouse may lose the ample benefit of the exemptions, the EITC or other credits. An agreement should contain a provision that remarriage by either party should require some recalculation of the tax benefits to the parents and children.

An Opportunity to Secure More Tax-Based Benefits in New York

The federal EITC and other credits generated billions in benefits to low income families in 2012, yet millions have never filed tax returns to ask for it. New York, which has the highest state EITC available and a benefit for a non-custodial parent, should follow Ohio's lead, require judges to make tax-based findings before allocating these benefits and have practitioners find creative ways to secure them for eligible families.

Endnotes

1. *Sorenson v. Secretary*, 475 U.S. 851,851 (1986).
2. 26 U.S.C. §152(e).
3. *Dunham v. Dunham*, 214 A.D. 2d 961 (4th Dep't 1995).
4. 26 U.S.C. §32(c)(3)(A); *Kotjok v. Commissioner*, T.C. Summ. Op. 2012-68 (2012).
5. NY Tax Law §606(d-1).
6. *Derasmo v. Derasmo*, 190 A.D. 2d 655 (2d Dep't 1993).
7. *Welch v. Welch*, 233 A.D. 2d 921 (4th Dep't 1996).
8. R.C. § 31119.82 (2013); *King v. King*, 2013 Ohio App. LEXIS 3515 at p.3 (Ct. App. 4th A.D. 2013) (abuse of discretion to grant exemption to nonresidential parent without finding net tax savings to the parties); *Brandon v. Brandon*, 2009 Ohio App. LEXIS 724 (Ct. App. 8th A.D. 2009) (case remanded because the trial court neglected to address the eligibility of either party for the EITC). Ohio judges consequently scrutinize the tax consequences of the exemptions and credits more rigorously than often occurs in New York, where the exemptions can be reflexively allocated without a serious examination of the tax consequences and the benefits to the children.
9. *Chamberlain v. Commissioner*, T.C. Memo 2007-178 (Tax Ct. 2007) (if exemptions released for multiple years, the Form 8332 must be attached to any future years when exemptions or credits are claimed).
10. 26 CFR §1.152(e)(1) & (5); 26 CFR §1.152-4(1)(ii), as amended by T.D. 9408, 2008 CB 323, 327 cited in *Armstrong v. Commissioner*, 139 T.C. 468, 472 (Tax Ct. 2012).
11. *Thomas v. Commissioner*, T.C. Memo 2010-11 (Tax Ct 2010).
12. *Browning v. Commissioner*, T.C. Summary LEXIS 114 (Tax Ct. 2012)(state court orders are not a valid substitute for Form 8332 because they lack a parent's signature); *Israel v. Commissioner*, T.C. Memo 2012-185 (Tax Ct. 2012) (husband submitted divorce decree granting him exemptions but IRS denied exemptions because he failed to produce Form 8332 signed by his former wife, despite litigation in two states to get the document).

Hon. Richard A. Dollinger is an acting Supreme Court Justice working in the matrimonial part in Rochester. Michael P. Maiorana is a senior at St. John Fisher College in the pre-law program. The authors thank Sherry S. Kraus, Esq. and Scott D. Shimick, Esq. for their assistance.

International Prenuptial Agreements: Necessary but Dangerous

By Jeremy D. Morley

Lawyers representing international clients who plan to marry and who want the protection of a prenuptial agreement should always consider the international ramifications of any proposed agreement. While conventional domestic prenuptial agreements raise grave malpractice concerns for family lawyers, the concerns become a hazardous minefield when the issues are multi-jurisdictional.

In many ways the world is rapidly shrinking and globalizing. "The World is Flat" is not only the catchy title of a bestselling book, but it also highlights the fact that international borders matter far less to most aspects of life than was the case a couple of decades ago. In sharp contrast, however, divorce laws remain local and parochial. Not only do divorce requirements and procedures vary from country to country, but so do the substantive laws concerning the division of assets and spousal and child support. Moreover, the laws about prenuptial agreements and marriage contracts vary considerably around the world and—just as important—the attitudes of courts to such contracts diverge considerably, significantly, and in many different ways from country to country. Outside of the European Union there is generally no international law that governs the application of local law to international personal relationships.

Certainly it would be foolish to assume that a "prenup" that is currently valid in the place of the marriage or the place of current residency will be equally valid in other places which might have divorce jurisdiction in the future.

International People

International issues concerning prenuptial agreements are obviously of critical importance for people of different countries of origin or for people from a country other than the place where they currently reside. But there are far more clients who may require international support concerning prenuptial agreement matters. Many clients have significant contacts with numerous countries or believe that they may in the future. Take the example of an international symphony conductor who may have ongoing appointments with many orchestras and festivals around the world, teaching positions with universities and conservatories in other parts of the world, and personal connections and assets in yet more parts of the world. What if his fiancée is an international business consultant? Or an international movie star? In such circumstances, where does the lawyer start? And where does the process end?

We recently represented an American business executive living in country A in Europe who was planning to marry a woman in the same city who was from country B. We knew that residency in country A created red flags as to the future enforceability of the proposed prenuptial agreement there. We elicited the fact that the parties might temporarily relocate to States C, D or E in the United States or to countries F or G in Europe. We further ascertained that they could potentially move to any of a host of countries in the future but that countries H, I and J were more likely than the others. Accordingly, we drafted a prenuptial agreement and certain other documents in close collaboration with attorneys in jurisdictions A, B, C, D, E, F, G, H, I and J.

While such precautions are time-consuming and expensive, it would often be "penny wise and pound foolish" (as the old British saying goes) to skimp on the prenup and leave it all to courts to resolve if and when things go wrong.

The need for extreme care and self-preservation in such circumstances hardly needs emphasizing.

Potential Jurisdictions

Lawyers representing international clients are now more frequently recognizing that a prenuptial agreement must often be drafted with a view to its potential enforceability in an array of potential jurisdictions. These might include any of the following:

- The state of current residence of the husband.
- The state of current residence of the wife.
- The state of domicile of either of them.
- The state of the nationality of each of them.
- The states to which they might relocate together in the future.
- The states to which just one of them might relocate.

Selection of the Governing Law

A critical element of any international prenuptial agreement is the choice of the jurisdiction under whose law the agreement will be drafted. Obviously lawyers should not be wedded to their own jurisdiction as the "home" of the agreement. It must also be recognized that silence as to the choice of law is in many respects equivalent to the express selection of that jurisdiction.

The decision as to the best choice of law provision cannot be made without being adequately informed as to the applicable laws and practices of the various competing jurisdictions and as to the potential effect of the foreign law in any of the potential jurisdictions. The decision should also be made upon the advice of counsel who has substantial experience in such matters, who is independent in thinking, and who has consulted or will consult with appropriate local counsel in other relevant jurisdictions. It is likewise important to be aware that choice of law clauses may or may not be valid in other jurisdictions.

A choice of law clause should usually be drafted broadly. In one case a court in Oregon applied the law chosen by the prenuptial agreement—California law—only as to the construction of the agreement, but did not apply California property law because the choice of law clause was limited to construction issues.[1] Choice of law clauses should provide for the application of both substantive and procedural law of the foreign jurisdiction to be effective.

Basic Principles

The following are some basic principles that the author has developed from handling many such agreements throughout the world over a number of years:

1. This is a very highly specialized area. There is much more risk for the family law practitioner who agrees to handle an international agreement than is the case with a conventional prenuptial agreement. These matters are tricky and they require great care. Do not handle international prenuptial agreements unless you have experience or are collaborating with an international family lawyer who handles international prenuptial agreements regularly.

2. Ensure that only one lawyer is in charge of the entire process, is the chief coordinator among the various lawyers in different jurisdictions that work on the prenuptial project, and is the primary (or sometimes the sole) liaison with the client. If one lawyer is not clearly in charge there may well be great confusion, lawyers will be tempted to jostle for a larger role than might be appropriate, the client will receive conflicting advice and important issues might never be addressed.

3. Do not take on the process of drafting an international prenuptial agreement unless you are prepared to work with foreign counsel, to understand foreign law, to become familiar with different legal concepts that may apply to your client's circumstances and to work in an environment in which there are no clear-cut rules or procedures in which you may often feel compelled to consult your malpractice policy.

4. Make it clear to the client that you are admitted to practice only in Jurisdiction A (or perhaps A and B); that while you may have a little familiarity with Jurisdiction C, you are not admitted to practice there; that anything that you might say about the law of that jurisdiction is strictly subject to the client's confirmation with local counsel; that you have no familiarity with the laws of Jurisdictions D, E, and F; and that you will endeavor to find out what you can about the laws in those jurisdictions, but you will need to rely on local counsel and that it is local counsel's advice upon whom the client will ultimately be relying. Back this up with a letter to the client and notes to your file.

5. Obtain clear authority from the client to engage the services of local family lawyers in other jurisdictions for the purposes of advising as to the laws and procedures of their own jurisdictions.

6. Be clear on client confidentiality when you hire a foreign lawyer. The rules vary considerably.

7. Obtain funding to cover all of the anticipated legal charges. It is critical to know that you may be responsible for the legal fees of lawyers you ask for help in foreign jurisdictions. See the International Bar Association's International Code of Ethics, Rule 19, which provides, in part, that, "Lawyers who engage a foreign colleague to advise on a case or to cooperate in handling it, are responsible for the payment of the latter's charges except express agreement to the contrary." Find out what fees each lawyer charges and how the lawyer expects to be paid. In some countries, fees are fixed by local law. You should establish a workable billing schedule. Foreign lawyers may not be accustomed to including a description of work performed in connection with billing. Some foreign attorneys may expect to be paid in advance. Others may demand payment periodically and refuse to continue until they are paid. Request an estimate of the total hours and costs of doing the work. Be clear who will be involved in the work and the fees charged by each participant.

8. When reviewing foreign law, be careful to understand the terms that the foreign local lawyers use. For example, foreign terms might be translated into English as "marital property," "custody," "ownership" and "commingled" but the terms might well have completely or even subtly different meanings in the foreign jurisdiction, which could seriously impact the way that a contract is interpreted. Become familiar not only with the law as it is written in the foreign jurisdiction, but the law as it is actually applied and as it might apply to your particular client if the prenuptial agreement were brought before the courts in that juris-

diction. In this regard, it is critical to determine how much discretion is afforded to a judge in the foreign jurisdiction to rewrite specific provisions or to take any action other than strictly applying the law concerning prenuptial agreements.

9. Check out the conflict of laws issues. Be alert to the fact that a contract executed in one jurisdiction might in any particular jurisdiction be governed by another jurisdiction's law. You may even need to consider renvoi rules (perhaps for the first time since cramming in law school for a Conflicts exam) insofar as another court that applies its own law to a prenuptial agreement might include its laws on the conflict of laws, which might require the court to apply the laws of another jurisdiction.

10. Inform the client that you do not know where the client and his or her spouse might reside in the future, where their children, if any, might be located and where either or both of them may in the future have assets or do business. All of these factors may have an enormously significant bearing on the enforceability of their prenuptial agreement.

11. Some jurisdictions still do not enforce prenuptial agreements. Other jurisdictions have rules that make it easy for a court to invalidate a prenuptial agreement. In some such situations, it is also good practice to consider whether the parties should sign so-called "mirror agreements" that contain essentially the same terms as the primary agreement but are executed in accordance with the local law and are to come into effect only if the primary agreement is not recognized by a local court. It is sometimes good practice to have the parties execute a simple regime selection document at the time of their marriage in a civil law country such as France or Italy while at the same time having a far more complete agreement entered into in a common law jurisdiction such as New York or California that cross-references the civil law selection. If there is to be more than one agreement, it is important to decide how to prioritize between them and to avoid unnecessary confusion by having multiple agreements that cover the same topic.

12. It may well be prudent to insist that there be compliance with both the procedural and substantive requirements of the toughest potential jurisdiction, or even that each and every hurdle to overcome for enforceability in any of a list of jurisdictions should be fully complied with. This may mean that counsel should ensure compliance with all of the execution requirements of every potential jurisdiction.

13. One must be alert to the fact that the way that the courts of a particular country apply foreign law may vary considerably. Thus, in a totally different context, the author worked on a custody case in Japan in which a Japanese court ruled that the provisions of California law requiring that both parents be permitted to be substantially involved in the lives of their children meant that a (good) foreign father could visit his child once a month for a few hours under supervision!

14. One must also be alert to varying rules in other jurisdictions as to validity of execution; requirements for independent representation; disclosure of assets; fairness; and unconscionability. One example is that of disclosure. It may suffice in one jurisdiction to attach an appendix that lists a party's assets and liabilities in summary form. However, in California it is the practice for the attorneys for each party to deliver a "disclosure packet" to the other party containing the last three years' personal tax returns as well as a schedule of assets and liabilities and, if the party owns a business, to also deliver three years of business tax returns and a profit and loss statement.

15. Make it clear to the client that you are not an oracle and that you cannot predict the future. Therefore, you do not know what the law will be in any particular jurisdiction, even including your own, in the future and how it might be applied by the courts in any such jurisdiction. Consequently, you are unable to guarantee that the prenuptial agreement will be enforceable at the time in the future when a court in your own jurisdiction or in a foreign jurisdiction might look at it.

Conclusion

International prenuptial agreements are traps for the unwary or unknowing. They are extremely important to clients but must be handled with great care by family law counsel.

Endnote

1. *In re Marriage of Proctor*, 203 Or. App. 499, 125 P.3d 801 (2005), opinion adhered to as modified on reconsideration, 204 Or. App. 250, 129 P.3d 186 (2006).

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Preventing the Transnational Abduction of Children by Parents in the Civil Context: Risk Factors and Available Preventive Measures Under New York Law

By Philip C. Segal and Cindy A. Singh

When a parent flees the United States with a child, the results can be devastating—and a parent's worst nightmare. But, the transnational abduction of children by parents is a sad reality that occurs all too often in New York and throughout the United States. The U.S. Department of State reports that, in 2013 alone, over 1,000 children were abducted from the United States by family members.[1]

New York courts, however, can make significant headway in putting a halt to this dangerous trend by determining when transnational abduction is likely and by implementing appropriate safeguards. Based on the Uniform Child Abduction Prevention Act ("UCAPA") and corresponding New York decisional law, this article (1) identifies circumstances that indicate a risk of abduction,[2] and (2) details court-ordered measures that can be considered to prevent the abduction of children. The information provided below may be most useful in addressing international child abduction; however, it also applies to interstate child abduction, even though the latter potentially can be remedied through the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"), which has been enacted in every state, if the abductor's location is known.[3]

The UCAPA[4] is a uniform act drafted by the Uniform Law Commission and submitted for enactment by jurisdictions within the United States in 2006. The UCAPA sets forth principles and remedies that are generally recognized as within the authority of state courts having jurisdiction over cases involving child custody, guardianship, access, and relocation.

As of May 2014, the UCAPA has been adopted in some form by 13 states and the District of Columbia and was under consideration in two other states.[5] The UCAPA has not been enacted in New York.[6]

The UCAPA provides courts with guidance on identifying families at risk for abduction of children and sets forth measures intended to prevent the abduction of children. Importantly, the UCAPA is not designed to provide new remedies for child abduction; rather it systematically codifies remedies already used in state courts nationwide, including New York, to enforce child custody orders and to protect against violations of those orders though abduction.

Circumstances Indicating a Risk of Child Abduction[7]

In determining whether there is a credible risk of abduction of a child in a particular action or proceeding, the court should consider any evidence that:

- A parent has previously abducted or attempted to abduct the child;
- A parent has threatened to abduct the child;
- A parent has recently engaged in activities that may indicate a planned abduction, including:
  a. abandoning employment;
  b. selling a primary residence;
  c. terminating a residential lease;
  d. closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities;
  e. applying for a passport or visa or obtaining travel documents for a parent, a family member, or the child; or
  f. seeking to obtain the child's birth certificate or school or medical records;
- A parent has engaged in domestic violence, stalking, or child abuse or neglect;
- A parent has refused to comply with a court order concerning custody or access;
- A parent lacks strong familial, financial, emotional, or cultural ties to the state or the United States;
- A parent has strong familial, financial, emotional, or cultural ties to another state or country;
- A parent intends to take the child to:

a. A country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention")[8] and does not provide for the extradition of an abducting parent or for the return of an abducted child;

b. A country that is a party to the Hague Convention, but:

   i. The Hague Convention is not in force between the United States and that country;

   ii. The country is noncompliant with the Hague Convention, according to the most recent compliance report issued by the U.S. Department of State;[9]

   iii. The country lacks legal mechanisms for immediately and effectively enforcing a return order under the Hague Convention;

c. A country where the child's physical or emotional health would be placed at risk because of human rights violations committed against children;

d. A country that has laws or practices that would:

   i. enable a parent to prevent the other parent from contacting the child in that country;

   ii. restrict the parent in the United States from freely traveling to, or exiting from, that country, based on factors including: gender, nationality, marital status, or religion;

   iii. restrict the child's ability legally to leave that country;

e. A country that is identified by the U.S. Department of State as a sponsor of terrorism;[10]

f. A country in which the United States does not have an official diplomatic presence;[11]

g. A country engaged in active military action or war, including a civil war, to which the child may be exposed;

- A parent is subject to a change in immigration or citizenship status that would adversely affect his or her ability to legally remain in, or return to, the United States;
- A parent has had an application for United States citizenship denied;
- A parent has forged, or presented misleading or false evidence on, government forms or supporting documents to obtain or attempt to obtain a passport, a visa, travel document, Social Security card, driver's license, or other government-issued identification card or has made a misrepresentation to the United States government;
- A parent has used multiple names in an attempt to mislead or defraud;
- A parent has engaged in any other conduct the court considers relevant to the risk of abduction.

Court-Ordered Prevention Measures Based on a Finding of a "Credible Risk of Abduction"[12]

When a court determines that one or more of the above indicators is present, it should consider whether there is a credible risk of abduction. If the court determines that there is such a risk, the following are appropriate measures it can take to prevent such an undesirable outcome:

- Direct supervised or restricted visitation;[13]
- Prohibit removal of the child from New York, the United States, or other geographic area, absent express court authorization or other parent's written consent;[14]
- Issue arrest warrant(s) to take physical custody of the child and/or parent and/or to prevent the child's removal from the state;[15]
- Direct surrender of the child's and/or parent's United States and/or foreign passport as a condition of unsupervised visitation;[16]
- Direct registration of the child with the U.S. Department of State Children's Passport Issuance Alert Program as a condition of unsupervised visitation; [17]
- Prohibit the parent from applying for a new or replacement passport on the child's behalf as a condition of unsupervised visitation;[18]
- If travel to a foreign country is permitted, require the traveling parent to provide in advance:
  a. the child's travel itinerary; [19]
  b. the address(es) and telephone number(s) at which the child can be reached;[20] and
  c. copies of all travel documents;[21]
- If travel to a foreign country is permitted, require the traveling parent to register the New York custody order in the foreign country and to provide proof of such registration;[22]

- If travel to a foreign country is permitted, require the traveling parent to obtain an order from the relevant foreign country containing terms identical to the New York custody order;[23]
- Direct the traveling parent to post a bond or to provide other security in an amount sufficient to serve as a financial deterrent to abduction and to pay the reasonable expenses of the child's recovery, including counsel fees, investigative services, travel, and related expenses.[24]

Conclusion

Child abduction is a critical problem that tears families apart and undermines the authority of the court to determine issues of custody, access, and relocation. Post-abduction remedies, such as domestic orders directing that the abducting parent return with the child to the United States, are effectively unenforceable. Greater awareness by the bench and bar concerning abduction risk factors and the implementation of measures that can prevent abduction from the outset can only help to stem this troubling reality and to protect children from such an arbitrary and uncertain fate.

Endnotes

1. U.S. Dept. of State, http://travel.state.gov/content/childabduction/english/legal/compliance/statistics.html (last visited May 20, 2014). (This number is undoubtedly low given that it does not include abductions that are not officially reported.)
2. "'Abduction' is defined to mean 'wrongful removal' or 'wrongful retention'...which together include violation of custody or visitation rights given or recognized under [local] law." Patricia M. Hoff, "*UU" UCAPA: Understanding and Using UCAPA to Prevent Child Abduction*, 41 Fam. L.Q. 1, *5 (2007) (citing UCAPA §§ 2(1), 2(10); 2(11)).
3. *See* Domestic Relations Law § 77-b(1) ("A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the determination has not been modified in accordance with this article…").
4. *Available at* http://www.uniformlaws.org/Act.aspx?title'Child%20Abduction%20Prevention (last visited May 19, 2014).
5. *Id*.
6. *Id*.
7. Based on UCAPA § 7.
8. The Hague Convention is the civil remedy available to parents seeking the return of their child from other treaty partner countries. Treaty partners to the Hague Convention have agreed that a child who was habitually resident in one Hague Convention country and then removed to, or retained in, another Hague Convention country in violation of the left-behind parent's custodial rights shall be returned. Once the child has been returned, any custody dispute can then be resolved in the courts of that country. The Hague Convention does not address who should have custody of the child. Instead, it addresses where the custody case should be heard. U.S. Dept. of State, http://travel.state.gov/content/childabduction/english/from/hague-app.html (last visited May 21, 2014); *see generally, Chafin v. Chafin*, 133 S.Ct. 1017 (2013).
9. *See* U.S. Dept. of State, http://travel.state.gov/content/dam/childabduction/complianceReports/2014.pdf (last visited May 19, 2014).
10. *See* U.S. Dept. of State, http://www.state.gov/j/ct/list/c14151.htm (last visited May 19, 2014).
11. *See* U.S. Dept. of State, http://www.usembassy.gov (last visited May 19, 2014).
12. Based on UCAPA § 8, specific New York decisional law, and the trial court's broad equitable authority to fashion remedies necessary to protect the welfare and best interests children. *See generally, e.g., Dickerson v. Thompson*, 88 A.D.3d 121, 123 (3d Dept. 2011) ("The power of equity is as broad as equity and justice require. Indeed, the essence of equity jurisdiction has been the power to mold each decree to the necessities of the particular case.") (citations, internal brackets and quotation marks omitted)).
13. *Lane v. Lane*, 68 A.D.3d 995, 996 (2d Dept. 2009) ("Family Court properly determined that it was in the son's best interests to have only supervised contact with his mother. The mother's past conduct of absconding with the son, coupled with her evasive testimony and disruptive behavior at the fact-finding hearing, provided an ample basis for the Family Court's determination to deny her unsupervised visitation with him.") (citations omitted); *Ahmad v. Naviwala*, 306 A.D.2d 588 (2d Dept. 2003) (awarding mother sole custody of children's passports and restricting father's visitation with children to the United States).
14. *White v. White*, 71 A.D.3d 473, 475 (1st Dept. 2010) ("[T]o allay plaintiff's fears that defendant might again take the child abroad, the court [properly] directed that neither party could remove the child from this country without the express written consent of the other parent or an order of the court."); *Welsh v. Lewis*, 292 A.D.2d 536, 537 (2d Dept. 2002). ("[T]he orders appealed from should be modified to prohibit the mother from removing the children from the United States without the father's consent").
15. Domestic Relations Law § 77-j ("Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is at imminent risk of…removal from this state."); Family Court Act § 671(a)(3) ("The court may issue a warrant, directing that the respondent [in a custody proceeding] be arrested[] [and] brought before the court, when…it appears that…the respondent is likely to leave the jurisdiction.").
16. *Moody v. Sorokina*, 40 A.D.3d 14, 19-20 (4th Dept. 2007) ("[N]or did the court exceed its authority in requiring defendant to surrender her Ukranian passport during her periods of visitation with the parties' child.") (citations omitted)); *Ahmad v. Naviwala*, 306 A.D.2d 588, 591-92 (2d Dept. 2003) (awarding sole custody of children and possession of their passports to mother); *Anonymous v. Anonymous*, 120 A.D.2d 983, 984 (4th Dept. 1986) ("[T]he court should have directed defendant to surrender his Algerian passport during visitation periods. In light of defendant's prior threats to take the child to Algeria and defendant's ability to remove the child on defendant's passport, a temporary surrender of the passport was reasonably necessary to prevent removal of the child.") (citation omitted); *Kresnicka v. Kresnicka*, 42 A.D.2d 607, 607 (2d Dept. 1973) ("[D]efendant shall leave his passport with the plaintiff as security, upon taking the child; and the plaintiff shall return the passport to the defendant when the child is returned.").
17. UCAPA § 8(c)(4)(A). The Children's Passport Issuance Alert Program provides notification to parents of passport applications made on behalf of their minor children and denial of passport issuance, if appropriate court orders are filed with the program. *See* U.S. Dept. of State, http://travel.state.gov/content/childabduction/english/preventing/passport-issuance-alert-program.html (last visited May 19, 2014).
18. 22 C.F.R. § 51.28(a)(3)(ii)(E) (authorizing state courts to designate specifically which parent may obtain passport on child's behalf); *see generally Anthony McK. v. Dawn M.*, 33 Misc. 3d 1235(A)

(Fam. Ct. 2009) (rejecting claim that mother is a flight risk and authorizing mother to obtain passport for parties' child).

19. *Puran v. Murry*, 37 A.D.3d 472, 472 (2d Dept. 2007) ("Family Court providently exercised its discretion in permitting the father to take the child to their home country of Guyana during the child's summer vacations, provided the father give [sic] 60 days' notice and itinerary information to the mother."); *see also, Samuel A. v. Aidarina S.*, 99 A.D.3d 420, 421 (1st Dept. 2012) ("Family Court properly suspended petitioner's visitation until he reveals to the mother where he takes the children during visitation.").

20. *See id.*; *M.R. v. A.D.*, 32 Misc. 2d 512, 536-37 (Sup. Ct. 2011) ("When either parent spends time outside of New York City with [the child], he and she shall provide the other parent with [the child's] travel itinerary,…address where [child] will stay, and a telephone number where [the child] can be reached.").

21. *DER v. SLR*, 20 Misc. 3d 1123(A), 2008 WL 2854518 (Sup Ct. 2008) ("During periods of vacation each party shall know the location and telephone number to enable access to the child. The child's passport shall be maintained by the father. If the mother seeks to leave the country with the child she shall do so only with written permission of the father (said permission shall not be unreasonably withheld) or court order. The father shall be informed and receive copies of all plane tickets purchased on behalf of the child.").

22. UCAPA §§ 8(c)(3), (5). The ability to register U.S. court orders in foreign countries is dependent on foreign law and/or agreement to the same by local authorities. General information concerning available "civil remedies" with respect to child abduction in particular countries may be obtained from the U.S. Department of State, Bureau of Consular Affairs. *See* U.S. Dept. of State, http://travel.state.gov/abduction/country/country_3781.html (last visited May 19, 2014).

23. UCAPA § 8(c)(6).

24. *Berlin v. Berlin*, 21 N.Y.2d 371, 377 (1967) (directing trial court to consider imposing bond requirement as a condition of out-of-state visitation by father to ensure compliance with New York visitation order); *accord*, *e.g.*, *Charpié v. Charpié*, 300 A.D.2d 143, 143 (1st Dept. 2002) (affirming order directing father to post $100,000 in escrow as a condition for allowing him to take the parties' children on vacation to Switzerland); *Goldring v. Goldring*, 73 A.D.2d 955, 957 (2d Dept. 1980) ("As to the question of posting a bond, the record shows that plaintiff desires to leave the country with her children.… Removal of the bond requirement would enable the wife to take the children out of the country and sever all contacts with their father. The provision of the divorce decree requiring the wife to post a bond must therefore be reinstated.").

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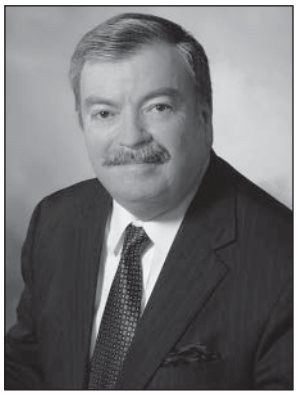
Guard and Reserve Pensions on the Day of Divorce: Part Two

By Mark E. Sullivan



In the first part of this article, we learned of the dilemma facing Sam Green, the soon-to-be-ex of Janet Green, a Navy Reservist. Visiting his lawyer, Sam was expressing his frustration and confusion in the attempts he had made to find out about what her benefits would be, what she would receive in retired pay, how much was his share, and what he'd receive if she died before him. The first part explained what is required for a Reserve Component (RC) or "non-regular" retirement, that is, one involving the National Guard or Reserves. It covered how retirement points are acquired, what a "points statement" looks like, and how one's retired pay will be calculated.

RC Pensions and Divorce

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, provides the rules for military retired pay and its division upon divorce. It applies to RC and regular retirements.[1]

There are two key considerations in dividing RC retirement rights. First, since RC SMs (servicemembers) usually do not begin to get paid until age 60 (regardless of when they stop drilling and apply for transfer to retired status), this deferral of payment must be taken into account in the negotiations and in any present value calculations. There will almost always be a "gap" between applying for retirement and "pay status" for the military member.

Second, the "marital fraction" should usually be computed twice—once using *marital years of service* over total years of service, and then again using *marital retirement points* over total retirement points—to determine which computation will best benefit the client. When dealing with RC retirements, be sure to get a copy of the SM's most recent statement from the Retirement Points Accounting System (RPAS), also known as the "points statement." This will show how many total points have been acquired and how many were earned during the marriage.

Computations—An Example

An example will help illustrate what a difference this might make. Major Bill Smith has four years of active duty and 16 years of service in the Army Reserve. He married when he left active duty.

To calculate the marital fraction using points, we start by counting the points he acquired during active duty by multiplying 4 times 365 to get 1460 points. Then we count his Reserve points. During his time as a Reservist, assume that he acquired 73 points a year—15 each year for membership, 44 points for 11 months of weekend drill, and 14 points for two weeks of annual training. This totals 1168 points for 16 years. Thus his total points at 20 years are 2628 (1460 plus 1168), of which 1168 (*or about 44%*) are marital. This should mean that *44% of his retired pay* is marital, assuming retirement and date of separation both occur at year 20.

Now let's use *years* in calculating the marital fraction. He was married for 16 years out of the 20 years of creditable service. Note the result: if we *use years* in applying the marital fraction to his retirement pay, then the marital share of his pension is 16 divided by 20. This means that it is *80% marital*.

What a difference! Recognition of these two ways of calculating the marital benefit, and the difference when Major Smith's pension is calculated, is essential to competent representation in the Guard/Reserve pension case.

The issue is complicated by the interplay between federal and state law. How to divide a pension, in general, is the province of state cases and statutes. Some states recognize the use of points for pension division, while others will only allow a "time rule" for the marital fraction.[2] Nothing in USFSPA says how to divide a Guard/Reserve pension or how to calculate the marital fraction, whether Guard/Reserve or active-duty. It is completely silent on this.

The retired pay center, which is usually Defense Finance and Accounting Center (DFAS), will not honor a formula clause in an RC pension division order which contains a marital fraction *using months or years* and the RC member is still drilling.[3] There are two reasons for this.

First, in practical terms, one cannot speak of RC service in terms of months or years. The Defense Department doesn't keep track of RC service in terms of time, since RC points are the method of computing retired pay at DFAS.

In addition, the regulation which DFAS uses requires that a formula clause containing a marital fraction must be written in terms of retirement points, not years or months:

> For members qualifying for a reserve (i.e., non-regular service) retirement, retiring from Reserve duty, the numerator expressed in terms of Reserve retirement points earned during the marriage must be provided in the court order. If the numerator is not provided in the court order, then either the court will have to clarify the award or the parties will have to agree on the numerator and provide it to the designated agent in a notarized statement signed by both parties.[4]

What can the family law practitioner do if the time calculation is more favorable to the client? There is no alternative formula clause which is acceptable to DFAS when the RC member is still drilling. If, however, the member has stopped drilling and applied for retirement status, or is already in pay status, then one can use any of the four available pension share clauses which DFAS will accept: set dollar amount, percentage, formula clause (using years or points) and hypothetical clause.[5]

Thus a probable approach to pension division in the above case, assuming the RC member is not still drilling, is to use a percentage clause, not a formula clause. This is also the case when state law "fixes" the spousal interest at the date of divorce or separation, as is the case in Florida, Texas, Tennessee, Kentucky and Oklahoma. It is a simple matter to convert the marital formula into a percentage since all of the terms—spouse's share (usually 50%), numerator and denominator of the marital fraction, and benefit to be divided—are known. A court order containing a percentage or a hypothetical award will be honored by DFAS if it leaves nothing out (other than data available to DFAS).

DFAS will also accept a set dollar amount that is specified in a military pension division order. However, the amount will not be adjusted annually for COLAs (cost of living allowance) for the non-military partner.[6] Such an award might state: "Sam Green will receive $400 a month from Janet Green's Naval Reserve retired pay."

PRACTICE TIP

These days, with the high number of Guard/Reserve mobilizations, it is increasingly possible for an RC member of the Reserve Components (RC) to accumulate enough years to consider "hanging on" for active-duty retirement after completion of 20 years of creditable service. What happens if Janet Green has eight creditable years of RC service, four initial years of active duty, and now four years of mobilized active-duty service in support of Operation Brass Key in the Duchy of Grand Fenwick? Involved in a pending divorce, what should Sam Green do when he is confronted with the almost equal possibility of her retirement from the "active side" or the "Reserve side," in terms of an order for present pension division?

In addition to the court's reserving jurisdiction until a final decision is made, the court could enter an order which provided for *one* of the two retirements, with the parties' property settlement agreement containing the following clauses:

> During 153 months of the parties' marriage, **the defendant-wife has served both on active duty and as a member of the United States Naval Reserve. She either will become eligible to apply for Reserve retired status after serving 20 qualifying years of Reserve service in 2018, with Reserve military retirement payable at about age 60, or will become eligible for active duty retirement after 20 creditable years of active duty service. The parties recognize the plaintiff's rights to a percentage of whichever of these two retirements that the defendant ultimately receives.**
>
> **Due to the complexity of the military retirement system and in the interest of affording plaintiff an equitable share, a formula should be used in order to divide the pension. This will cover the contingencies of defendant's continued Reserve service or a return to active duty, as well as her continued advancement in grade and time in service. Any retirement paid to plaintiff under either retirement plan is referred to as "Military Retired Pay." In either of these situations, the SBP (Survivor Benefit Plan) premium for former-spouse coverage for plaintiff will be deducted from total retired pay to arrive at Military Retired Pay.**
>
> **The parties will cooperate in the drafting and entry in the District Court for Coriander County, East Virginia, of an order dividing defendant's Military Retired Pay, so that plaintiff shall receive a portion of either monthly benefit payment according to the formula set forth below. The order shall be drafted as an order dividing active duty retired pay, but shall specifically state that the parties reserve the right to enter a "clarifying order" in the event that defendant-wife retires as a Reservist. In this latter event, the parties will cooperate in the drafting and entry of a clarifying order, and the parties will equally divide the cost of drafting the clarifying order.**
>
> **If defendant-wife retires from active duty, the plaintiff's share of the monthly**

pension benefit will be governed by the *time rule* and will be computed according to the following formula: 50% of the monthly benefit multiplied by a fraction, the numerator of which shall be the number of months the parties were married (153) up to the separation, and the denominator of which shall be the number of creditable months served by the defendant-wife earning the Military Retired Pay.

If defendant retires as a Reservist, the order dividing Military Retired Pay will be entered as soon as reasonably practicable after defendant's application for Reserve retirement. The plaintiff's share of the monthly pension benefit will be governed by the acquisition of Reserve retirement points and will be computed according to the following formula: 50% of the monthly benefit multiplied by a fraction, the numerator of which will be the number of Reserve retirement points acquired during the marriage up to the separation, which is 2,345 points, and the denominator of which will be the total number of Reserve retirement points at the date of defendant's Reserve retirement orders.

Where to Send the Court Order

The Military Pension Division Order (MPDO) is sent to the appropriate "designated agent" for payments. See DoDFMR (Department of Defense Finance Management Regulation),[7] Vol. 7B, ch. 29, § 290403 for the names and addresses of the designated agents for each branch of service. Note that the order is not called a Qualified Domestic Relations Order (QDRO) because military retirement is a statutory governmental program, not a "qualified plan" divided by a QDRO.

Which Military Retirement Plan?

Military personnel get a monthly Leave and Earnings Statement (LES). The Active Duty LES contains blocks reading "RETPLAN" and "DIEMS," while the Reserve and Guard LES may lack these blocks. The "RETPLAN" block tells which retirement plan the member will retire under: Final Basic Pay, High-3, or REDUX. That plan is in turn determined by the Date of Initial Entry into Military Service (DIEMS). As explained in Part One of this article, DIEMS before September 1, 1980 means Final Basic Pay. DIEMS between 1980 and 1988 means High-3. Finally, DIEMS after 1988 means CSB/REDUX. DIEMS is determined by the first date of military service. It is unaffected by a break in service and so can differ from Pay Entry Base Date, or PEBD.[8]

Other Requirements for Direct Pay of the Pension Share

The MPDO can only be used for direct payments if, pursuant to 10 U.S.C. 1408(c)(4), there is court jurisdiction because the SM—

- is domiciled in the state in which the suit for the divorce or property division occurs; or
- resides in the state in which the lawsuit occurs (other than because of military assignment); or
- consents to the jurisdiction of the court in which the lawsuit occurs.[9]

If the order states that jurisdiction is based on one of the above grounds, it must also state the basis for the finding (i.e., member's residence, member's domicile or member's consent).[10]

Virtually every former spouse wants to receive monthly payments from the retired pay center, not from the military retiree. Pension garnishments (as property division, as opposed to alimony or child support) require that the parties have been married for at least ten years while the military member performed at least ten years of creditable service; this is known as "the 10/10 Rule."[11]

Note that the "ten-year rule" is not a *jurisdictional requirement* for dividing military pensions. There is no limitation on the number of years of marriage overlapping military service as a requirement for military pension division, although this is a widely held misconception in the civilian bar. A military pension may be divided by court order whether the spouse has 30 years of marriage to the SM or 30 days of marriage. Rather, this time requirement is a prerequisite to *enforcement through DFAS*. The payment mechanism of a garnishment of the member's retired pay is not available unless this test is met.[12]

Note that some states don't use the term "garnishment" for support payments. But that is the terminology used in 42 U.S.C. § 659 and 5 C.F.R. Part 581, and that term should be employed when dealing with any federal pension, whether military or civilian.

When there are ten years of combined Guard/Reserve and active service, DFAS will aggregate them to allow the ten-year rule to be met.[13] It should be noted that being in the Guard or Reserves for 10 years is not necessarily the same thing as "having ten good years" which are creditable toward retirement. A "good year" is one in which the Guard/Reserve SM has accumulated at least 50 points. A year with fewer points means that the year is not creditable toward retirement (a minimum of *20 good years*) although the points in that year still count in calculating retired pay.

The order must also provide for payment from military retired pay in an acceptable clause.[14] The court order must be authenticated or certified within the 90 days

immediately before its service on DFAS, and it must state the eligibility of the spouse or former spouse under the "10/10 rule" stated above. The right information must be in the order (e.g., names, addresses, jurisdictional facts), and the amount for the former spouse must be within the maximum limits (i.e., 50% of disposable retired pay) for most orders). The SM remains liable for any amount still owing. In cases where there is an application for the direct payment of court-ordered division of military retired pay and a garnishment issued pursuant to 42 U.S.C. § 659 (child or spousal support), DFAS is authorized to deduct higher maximum amounts.[15] The parties have taxes deducted from their respective shares before the checks are sent.

The Hypothetical Clause

There are, in general, four acceptable methods of dividing military retired pay. The set dollar amount, percentage and formula clause have been covered above. The fourth is a hypothetical clause, which is an award based on a pay grade or term of years of service that is different from what exists when the SM actually retires. This is usually used when the parties' interests are fixed as of some specific valuation date. For example, if the parties divorced while the wife was a Navy chief petty officer with 18 years of creditable military service, the hypothetical clause might state:

> **Husband is granted ___% of what a chief petty officer (E-7) would earn if she were to retire with 18 years of military service with a retired pay base of $_____.**

A hypothetical clause in a military pension division order for a still-serving RC member might be worded as follows:

> **Husband is awarded _____% of the disposable military retired pay that wife would have received had she become eligible to receive military retired pay with a retired pay base of $_____ and with _____ Reserve retirement points on (date).**

If the wording isn't right, DFAS will return it for entry of a "clarifying order" by the court. Since there is no pre-signing review of draft MPDOs available at DFAS, counsel must get it right the first time. The "Attorney Instructions" and the sample military retired pay division order explain how to word the clauses.[16]

The Servicemembers Civil Relief Act

There must be a statement in the pension division order that "the member's rights under the Servicemember Civil Relief Act (50 U.S.C. App. 501 et seq.) were observed."[17] The Servicemembers Civil Relief Act (SCRA) offers protection for military members who are on active duty at the time of the property division or divorce; it does not apply to retirees, but it would be a better practice to include such wording in all military pension division orders.

What protections for Janet Green are involved? A checklist for SCRA protections would include at least the following:

SCRA Checklist for Servicemember Pension Division Protections

___ 1. If the SM, Janet Green, has not entered an appearance in the divorce case, or the pension or property division lawsuit, a stay (continuance) must be granted for at least 90 days if—

- ___ a. the judge determines that there may be a defense to the action, and such defense cannot be presented in the SM's absence, or
- ___ b. with the exercise of due diligence, counsel has been unable to contact the SM (or otherwise determine if a meritorious defense exists). 50 U.S.C. App. § 521(d).

___ 2. If Janet has actual notice of the lawsuit, a similar mandatory 90 day stay (minimum) of proceedings applies if she requests it properly. 50 U.S.C. App. § 522.

___ 3. She may ask for an additional stay at the time of the original request or later. 50 U.S.C. App. § 522 (d)(2). If the judge will not grant an additional stay, then counsel must be appointed to represent her in the action. 50 U.S.C. App. § 522(d)(2).

___ 4. The stay request does not constitute an appearance for jurisdictional purposes in the lawsuit, and it does not constitute a waiver of any substantive or procedural defense (including a defense as to lack of personal jurisdiction). 50 U.S.C. App. § 522(c)

___ 5. If Janet has been served but has not entered an appearance by filing an answer or otherwise, her husband may not obtain a default judgment (meaning an adverse ruling) under 50 U.S.C. App. § 521 unless the court first determines whether she is in military service. This means that Sam Green must file an affidavit stating "whether or not the defendant is in military service and showing necessary facts in support of the affidavit." 50 U.S.C. App. § 521(c).

___ 6. If Sam Green states in the affidavit that Janet is a member of the armed forces, no default may be taken until the court has appointed

an attorney for Janet in the pension division case.

___ 7. If the appointed attorney cannot locate Janet, actions by the attorney may not waive any defense she has or otherwise bind her in the pension action. 50 U.S.C. App. § 521(b)(2).

___ 8. If a default decree is entered against Janet during active duty or within 60 days thereafter and she has not received notice of the proceeding, she may move to reopen it so long as—

___ a. She does so while on active duty or within 90 days thereafter. 50 U.S.C. App. § 521(g); and

___ b. She can prove that, at the time the judgment was rendered, she was prejudiced in her ability to defend herself due to military service; and

___ c. She has a meritorious or legal defense to the initial claim.

If, at a minimum, these rights have been honored, then the court order for pension division could truthfully state that Janet Green's rights under the SCRA had been observed. Such a statement would read:

> **The court has complied with the rights of the defendant, Janet Green, under the Servicemember Civil Relief Act (50 U.S.C. App. 501 et seq.).**

Other Terms for Consideration

A well-written MPDO will protect Sam by stating terms for indemnification if Janet later is determined to be disabled. Disability payments received after retirement can reduce the amount which Sam Green should be receiving. An indemnification clause might read:

> **If Janet Green does anything that reduces the amount or share of retired pay to which Sam Green is entitled, such as the receipt of disability pay, then she will promptly make direct payments to Sam Green to indemnify him and hold him harmless from any reduction, costs or damages which he may incur.**

Starting the Process

The spouse or former spouse usually starts the process of division of the military pension by notifying DFAS by facsimile or electronic submission, by mail, or by personal service; service is effective when a complete application is received by DFAS. The notification form is DD Form 2293 ("Request for Former Spouse Payments From Retired Pay").[18]

Payments are made once a month, starting no earlier than 90 days after service of the decree on DFAS or the start of retired pay, whichever is later. The payments end no later than the death of the member or spouse, whichever occurs first.[19] Payments are prospective only; no arrears are allowed. USFSPA does not provide for garnishment of payments missed prior to the approval of the application by DFAS.

Survivor Benefit Plan

In regard to Sam Green's questions about the death of Janet before him, the answers about continued payments lie in the Survivor Benefit Plan (SBP), which is a joint and survivor annuity available to active-duty and RC retirees to ensure the continuation of payments after the SM/retiree dies. The surviving spouse or ex-spouse, when this is chosen, receives 55% of the selected base amount for the rest of his life, so long as he does not remarry before age 55. This should always be considered in a settlement or trial judgment when one represents the former spouse.[20]

When Janet got her "20-year letter," also known as the NOE (Notice of Eligibility), she also received a form for making a decision as to SBP. Shown on DD Form 2656-5 were these options:

- Option A—defer the decision until "pay status," which is usually age 60.
- Option B—elect coverage, but defer the payments until the SM would have attained pay status, usually at age 60.
- Option C—immediate coverage, which means that the survivor receives payments starting when the SM dies.

Any choice except Option C requires the consent of one's spouse. If the executed form is not returned within 90 days of receipt by the SM, he or she is defaulted into Option C.

To review the form, it will be necessary to have Janet produce a copy in discovery. If that doesn't work, then Sam must obtain a court order or a subpoena signed by a judge, for a copy of Janet's DD Form 2656-5. The subpoena or order is sent to the address under Instructions if Janet is not yet in pay status; it is sent to DFAS in Indianapolis if she is receiving retired pay. It usually takes a month or two to obtain delivery.

There is one hitch in coverage for Sam, however. He will lose his "spouse coverage" upon divorce. If he decides to request SBP coverage, he needs to obtain a court order requiring Janet to elect "former spouse" coverage for him. His submission of such an order, along with the divorce decree and his "deemed election" (on DD Form 2656-10) within one year of the order, ensures that he will be covered. If Janet submits an election for his coverage, it must be done within one year of the divorce decree.

Endnotes

1. *See* Captain Karen A. MacIntyre, "Division of U.S. Army Reserve and National Guard Pay upon Divorce," 102 MIL. L. REV. 23 (1983).
2. For cases holding that classification of the marital part of a Reserve Component (Guard/ Reserve) pension may be based on "marital points" divided by "total points," *see Faulkner v. Goldfuss*, 46 P.3d 993 (Alaska 2002), *Hasselback v. Hasselback*, 2007 Ohio 762, 2007 Ohio App. Lexis 644 (2007), *Woodson v. Saldana*, 165 Md. App. 480, 885 A.2d 907 (2005), *Bloomer v. Bloomer*, 927 S.W.2d 118 (Tex. App. 1996), *In re Beckman*, 800 P.2d 1376 (Colo. Ct. App. 1990) and *In re Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979). Some states, on the other hand, require calculation of the marital fraction based on time, not "points" or some other factor. *See, e.g.*, N.C. Gen. Stat. § 50-20.1(d), which states, "The award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment." In Virginia, where the division of a pension is according to years instead of points, the Court of Appeals upheld a time-rule division as within the trial court's discretion. *Jordan v. Jordan*, 2004 Va. App. LEXIS 285 (June 22, 2004).
3. The pay center, or "designated agent," for most USFSPA pension division orders is DFAS, since it handles orders for the Army, Navy, Air Force and Marine Corps; thus that abbreviation is used throughout this article. In fact, the Coast Guard, PHS, and NOAA pay centers are separate entities. See DoDFMR (Department of Defense Finance Management Regulation), Vol. 7B, ch. 29, § 290403 for names and addresses of the designated agents for each branch of service.
4. DoDFMR, Vol. 7B, ch. 29, § 290607.B. Acceptable formula award language is contained in the "Military Retired Pay Division Order" at Appendix A in the chapter.
5. *See* DoDFMR, Vol. 7B, ch. 29, § 290608 for the specific DFAS rules regarding permissible and required terms in the "hypothetical retired pay award."
6. DoDFMR, Vol. 7B, ch. 29, § 290601.C and 290902.
7. The DoDFMR can be found at http://comptroller.defense.gov/fmr.
8. Service Academy (e.g., West Point) time as a Cadet or Midshipman, while not creditable for retirement or pay, impacts DIEMS. The date the member swore into the Academy as a Cadet or Midshipman fixes DIEMS even if the member didn't graduate from the Academy. Service Academy dropouts who later re-enter military service should ensure their Academy discharge is recorded in their military record and that their Academy service is reflected in their Retirement Point Accounting System (RPAS) statements. The non-serving spouse of such a servicemember with a break in service around 1980 or 1988 will want to ensure that Academy service qualifying for the earlier retirement plan is entered into the RPAS.
9. DoDFMR, Vol. 7B, ch. 29, § 290604.A. *See also* 10 U.S.C. § 1408(c)(4).
10. DoDFMR, Vol. 7B, ch. 29, § 290605.
11. DoDFMR, Vol. 7B, ch. 29, § 290604.B. *See also* 10 U.S.C. § 1408(d)(2).
12. *See, e.g.*, *Carranza v. Carranza*, 765 S.W. 2d 32 (Ky. App. 1989).
13. E-mail, Phoenix attorney Michael McCarthy, to the author, subject: 10/10 issues for your book/question re: requirements for member to delete SBP (September 2, 2004) (on file with the author).
14. 10 U.S.C. § 1408(a)(2)(C).
15. DoDFMR, Vol. 7B, ch. 29, § 290901.
16. The Attorney Instructions may be found at www.dfas.mil > Garnishment Information > Former Spouses' Protection Act > Attorney Guidance. Also at the "Former Spouses' Protection Act" tab are notes on "Legal Overview," how to apply for payments from DFAS, the "maximum amount" rules, receipt of payments (including taxes and direct deposit information), and Frequently Asked Questions.
17. DoDFMR, Vol. 7B, ch. 29, § 290602.B; *see also* 10 U.S.C. § 1408(b)(1)(D).
18. This can be found by typing "DD Form 2293" at Google, Yahoo or any other search engine.
19. DoDFMR, Vol. 7B, ch. 29, § 291102.A.
20. A full explanation of how this works is found at the www.nclamp.gov > Silent Partner > Military Pension Division: The Spouse's Strategy.

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Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions That Permit Same-Sex Marriage

June marks the one-year anniversary of the landmark Supreme Court decision of *Windsor v. United States*, 133 S. Ct. 2675 (2013), which struck down the core of the federal Defense of Marriage Act (DOMA) and 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. It also marks the ten-year anniversary of the first state to permit same-sex marriage, Massachusetts. Since then, we have a total of 19 states that permit same-sex marriage. While the United States still remains divided, with some states respecting same-sex marriages and others discriminating against these couples, the landscape in the campaign to win marriage equality has changed immeasurably. However, some same-sex married couples live in states that don't respect their marriage, while the federal government does, which creates grave legal uncertainty and chaos for these families.

There is a snowball gaining speed down the mountain for the Supreme Court to take up another same-sex marriage case to rule that same-sex marriage should be federally permissible. In June, 2014, the United States Conference of Mayors reaffirmed its support of the freedom to marry for same-sex couples and found that "there continues to be an untenable patchwork imposing great legal uncertainty and hardship on committed same-sex couples in the 31 states that deny their freedom to marry and refuse to respect their lawful marriages, even as the federal government rightly treats these couples as married for federal programs and purposes" and urged the federal courts, including the U.S. Supreme Court, to "speedily bring national resolution by ruling in favor of the freedom to marry nationwide." The conference noted that as of June 17, 2014, every one of the 15 federal district court judges who has ruled in a same-sex marriage case has found that state marriage discrimination violates the U.S. Constitution.

Since my last column, two more states have permitted same-sex marriage, including Oregon (May 19, 2014) and Pennsylvania (May 20, 2014), where a federal judge in each state struck down the ban on same-sex marriage.

Seventeen additional states (19 total) recognize same-sex marriage: Hawaii, Illinois, New Mexico, 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 §§ 210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

The following countries permit same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, and Uruguay, and Mexico City, Mexico.

Recent Legislation

Surprisingly, there has been no recent legislative changes affecting matrimonial and family law since my last column. As a reminder, 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.

Cases of Interest

Custody and Visitation

Addiction treatment or counseling cannot be a condition precedent to visitation

Matter of Welch v. Taylor, 115 A.D.3d 754 (2d Dept. 2014)

The Family Court awarded the mother sole custody of the parties' child and conditioned the father's visitation upon his enrollment in a medical facility where random drug-testing is required and his compliance with maintaining a certain medical prescription, directed him to provide a copy of his prescription to the mother, and allowed the mother to suspend his visitation if he failed to supply proof of his prescription. The appellate court modified, holding that "a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation." *Id.* at 756 (quoting *Matter of Smith v. Dawn F.B.*, 88 A.D.3d 729, 730 (2d Dept. 2011). The court noted that directing the father to enroll

in a random drug-testing program does not improperly make the ordered treatment a prerequisite to his access to the child. In addition, it is the court's responsibility, not the parent's, to supervise and enforce this therapeutic component of its visitation order.

Child's behavioral problems in school warranted a modification of an existing custody order

***Matter of Mack v. Kass*, 115 A.D.3d 748 (2d Dept. 2014)**

The parties agreed to joint legal custody with residential custody to the mother. Two years later, the father petitioned for modification of the custody order because the mother was not adequately dealing with the child's behavioral problems in school, the child was being suspended from school often, and the mother was permitting the child to be absent from school. The lower court granted the petition and awarded the father sole legal and residential custody of the child, which was affirmed on appeal based on the extensive testimony offered at the hearing, which included testimony from the parties, the child's paternal grandmother, the forensic evaluator, a child protective specialist from the Administration for Children's Services, and school personnel.

Joint legal custody awarded

***Johanys M. v. Eddy A.*, 115 A.D.3d 460 (1st Dept. 2014)**

The appellate court reversed the lower court's award of sole custody of the child to the mother and granted the parties joint custody, with the mother having primary physical custody. The court held that it is in the child's best interest for the parties to have joint legal custody because the parties had a similar ability to financially provide for the child, the child spent an equal amount of time with each party, both parties had an emotional bond with the child, and the parties' relationship was not acrimonious or distrustful. Noting that the lower court had based its decision on the fact that the mother no longer worked outside the home, and thus, was better available to look after the child, the appellate court explained that the father "should not be deprived of a decision-making role in the child's life because he is unable to care for the child full-time." *Id.* at 461. Although sharing physical custody was not possible, because the parties resided in different boroughs and the child was starting school, there was no evidence to suggest that the father should be denied the right to participate in decisions concerning the child.

Father equitably estopped from denying paternity

***Matter of Shawn H. v. Kimberly F.*, 115 A.D.3d 744 (2d Dept. 2014)**

The court below properly equitably estopped the father from challenging an order of filiation where the child was 15, the father paid child support, sporadically exercised his visitation rights, attended some school functions and parent-teacher conferences, had telephone contact with the child, and visited her on some of her birthdays. The child considered the man to be her father, justifiably relied on the man's representations, and would be harmed if she learned otherwise.

Initial custody determination/relocation

***Quistorf v. Levesque*, 117 A.D.3d 1456 (4th Dept. 2014)**

The court properly denied the father's petition seeking sole legal and residential custody of the parties' children on the basis that the mother relocated with the children to Maine without the father's permission. Since this is an initial custody determination, the *Tropea* factors do not apply, and instead, relocation is just one of many factors to consider regarding the children's best interests. The mother was awarded sole custody since she was the children's primary caretaker since birth. Although acknowledging that the children's relocation would negatively impact the children's relationship with the father, the court stated that "relocation is not a proper basis upon which to award primary physical custody to [the father]…inasmuch as the children will need to travel between the parties' two residences regardless of which parent is awarded primary physical [residency]." *Id.* at 1457.

Relocation granted

***Caruso v. Cruz*, 114 A.D.3d 769 (2d Dept. 2014)**

The parents of 9-year-old twins entered into a stipulation of settlement, which provided the parties with joint legal custody, the mother with physical custody, the father with liberal visitation, and that neither party would relocate beyond 100 miles without the other's written consent.

After the mother was unable to negotiate a reasonable renewal of her lease at her current residence, she sought to obtain a new residence in New Rochelle, 57 miles from the father. The father brought an application to change sole custody to him because the relocation would disrupt his visitation. The lower court granted the father's motion. The appellate division reversed, reasoning that the relocation would not deprive the father of meaningful access to the children, particularly where the mother is directed to drive half the distance for the father to have visitation twice per mid-week and alternate weekends. The court below improperly gave undue weight to particular instances of conflict between the parties and the mother's failure to consult with the father before determining to move with the children. Also, the court below failed to give sufficient weight to the fact that the mother had been the primary care-giver of the children for their entire lives, and had almost single-handedly addressed their medical and educational needs. In addition, if the father

had custody, the children would be separated from their younger brother from the mother's second marriage.

It is not clear from reading this case what facts support that the move will serve the children's best interests or that the move was necessary, other than losing a lease.

Relocation denied

***Yaddow v. Bianco*, 115 A.D.3d 1338 (4th Dept. 2014)**

The court below properly denied the father's petition to relocate with the parties' eight-year-old son from central New York to Maryland to live with his new wife. The father failed to offer any proof that he received a teaching job offer in Maryland or that he had made any effort to secure a teaching position in the surrounding New York counties. The court found that the relationship between the child and the mother, who lives in New York, would be negatively impacted by such a relocation.

Award of custody to non-parent

***Campbell v. January*, 114 A.D.3d 1176 (4th Dept. 2014), *rearg. dismissed*, 117 A.D.3d 1507 (4th Dept. 2014), *appeal denied*, 23 NY3d 902 (2014)**

Affirming the decision of the lower court, the Fourth Department declined to grant the father custody of his child where the petitioner, a non-parent, had established that extraordinary circumstances existed to warrant an award of custody of the child to the petitioner. Noting that the child was placed with the petitioner just days after his birth, the father disputed that he was the father of the child even after receiving the results of a DNA test confirming that he was, the father neglected to seek custody of the child until the child was almost one year old, the father only visited with the child seven times, and the father demonstrated no interest in learning about the child's significant medical conditions and special needs, the court determined that the father had relinquished his right to custody due to "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." *Id.* at 1176-77.

Child Support

Child deemed emancipated where he lived with non-custodial parent during college

***Lacy v. Lacy*, 114 A.D.3d 500 (1st Dept. 2014)**

The parties' settlement agreement defined emancipation as a permanent residence away from the residence of the mother. When the parties' son was in college, he resided with the father, and also lived with him during at least one summer vacation, received mail at his father's residence, obtained a New York City driver's license listing his father's address, and only made sporadic visits to the mother's home in Connecticut during portions of his college vacations. Therefore, the child was deemed emancipated under the terms of the parties' agreement. The court pointed out that the child living with the father during college was not the same as a child living in a college dorm.

Equitable Distribution

Credit card debt

***Diaz v. Gonzalez*, 115 A.D.3d 904 (2d Dept. 2014)**

The court below improperly refused to admit evidence offered by the wife of alleged marital debt on the ground that the credit card statements related to credit cards in her sole name, despite her testimony that the credit card accounts were opened during the marriage to pay the parties' expenses. The appellate court remanded the case for a new trial on the issue of equitable distribution of the marital debt.

Payments made by one spouse during the pendency of the action to reduce marital debt credited to both parties equally

***Turco v. Turco*, 117 A.D.3d 719 (2d Dept. 2014)**

In modifying the trial court's decision to award the husband a credit against the sale proceeds of three marital properties for 100% of the amount he paid to reduce the mortgage principals during the pendency of the action, the Second Department relied on the long-standing rule that marital debt is to be shared equally between the parties. The court, noting that "generally, it is the responsibility of both parties to maintain the marital residence during the pendency of a matrimonial action," held that the husband was only entitled to a 50% credit for the reduction in mortgage principal during the pendency of the action. *Id.* at 722. Additionally, the court clarified that following the date of the judgment of divorce until the sale of the marital residence, during which time the wife will have exclusive occupancy of the residence, the wife will be required to pay all of the carrying charges on the marital residence. However, unlike payments made during the pendency of the action, the wife will be entitled to a 100% credit against the proceeds of the sale of the marital residence for her reduction in mortgage principal following the date of judgment.

Enforcement

Willful violation of divorce judgment where party elected retirement option in contradiction of divorce judgment

***O'Connor v. O'Connor*, 116 A.D.3d 1155 (3d Dept. 2014)**

The parties' divorce agreement provided that each party's teacher pension shall be divided according to the *Majauskas* formula with an election of survivorship benefits.

After the divorce, the husband filed a DRO regarding the wife's pension, but the wife failed to file a DRO on the husband's pension. When the husband retired, he

selected "an alternative option per DRO" as a retirement option, but was immediately notified by the plan administrator via telephone and follow-up letter that this option was not available to him due to the wife's failure to file a DRO. The follow-up letter encouraged the husband to notify the wife of the issue and consult with his attorney before finalizing his option. The husband, however, without speaking to the wife or his attorney, proceeded to select the maximum retirement option, which would not provide for the wife's survivorship benefits. Upon the wife's retirement four years later, she learned of what the husband had done and moved by order to show cause for, *inter alia*, contempt.

Agreeing with the lower court, the appellate court held that the husband willfully violated the judgment of divorce by immediately selecting the maximum retirement option when he was notified of the issue three months prior and failed to consult with the wife or his attorney before making his final selection. Therefore, the wife was awarded a credit for the past due payments, pre-judgment interest, and counsel fees.

Order directing a liquidation of property to pay arrears

***Theophilova v. Dentchev*, 117 A.D.3d 531 (1st Dept. 2014)**

The husband was directed to pay $653,000 of his enhanced earnings over the course of 5 years, with $130,600 due within 30 days of the divorce judgment, and $22,616 in child support arrears. The wife moved for a money judgment pursuant to DRL § 244 for his failure to pay same. The court directed the husband to liquidate securities in his separate account sufficient to pay the arrears, but directed the wife to pay the capital gains tax on the amount the husband was directed to liquidate in order to pay the arrears. The First Department reversed, holding that the wife should not be responsible for the capital gains tax.

Exclusive Occupancy

Exclusive occupancy granted

***McCoy v. McCoy*, 117 A.D.3d 806 (2d Dept. 2014)**

The court below erred by directing the custodial parent of the parties' children to either buyout the husband's interest in the marital residence or sell the home and equally divide the proceeds. The appellate court held that the wife was entitled to exclusive occupancy of the marital home until the parties' youngest child reaches age 18, in light of the educational needs of the parties' two children and the financial circumstances of the parties. (The decision does not report the ages of the children.) However, the custodial parent is responsible for paying the carrying charges for the home, including the first mortgage payments, property taxes, utilities, and upkeep costs. In determining whether the custodial parent should be granted exclusive occupancy of the marital home, the trial court should consider, *inter alia*, "the needs of the children, whether the non-custodial parent is in need of the proceeds from the sale of that home, whether comparable housing is available to the custodial parent in the same area at a lower cost, and whether the parties are financially capable of maintaining the residence." *Id.* at 807.

Maintenance

An overall chock-full-of-facts case regarding maintenance and equitable distribution

***Alexander v. Alexander*, 116 A.D.3d 472 (1st Dept. 2014)**

The wife was properly awarded $7,500 per month in maintenance for 12 years in light of the wife's age of 56, her lack of work history, her inability to support herself after being a homemaker throughout the parties' almost 25 -year marriage, raising two now emancipated children, and the wife's equitable distribution award of the marital home valued at $2,000,000 and $750,000 in liquid assets. The court also credited the expert testimony that the husband could work for another 12 years, until age 67, with an earning capacity of $275,000 to $320,000 per year.

The court held that the wife was properly awarded a 35% interest in the husband's corporate stock shares and credited the neutral appraiser's valuation based on the formula in the shareholders' agreement. The court rejected the wife's expert's valuation, which was significantly higher and did not consider the stock transfer restrictions contained in the shareholders' agreement. The neutral appraiser's report, on the other hand, was based on the price in the shareholders' agreement, which was the only evidence in the record of the actual value of the shares.

The court declined to award the wife counsel fees in addition to the $135,000 interim counsel fees she had already received.

Kudos to the appellate division for reciting the pertinent facts of the case, so that this case may be used as legal precedent.

Counsel Fees

The sequel to the "skin in the game" case

***Sykes v. Sykes*, 43 Misc.3d 1220(A) (Sup. Ct. N.Y. County 2014)**

In my Spring 2014 column, I reported on *Sykes v. Sykes*, 973 NYS2d 908 (Sup. Ct. N.Y. County 2013), a mid-trial motion, where the court relieved the wealthy hedge fund husband of his obligation to pay further interim counsel fees after he had already paid the non-monied spouse's counsel fees of $750,000. The court ordered each party to proceed with "skin in the game" and be responsible for their own interim litigation costs by directing each party to receive a $1,000,000 advance from equitable

distribution to pay for their respective counsel fees, subject to reallocation, if any, at trial.

After trial, in considering the reallocation of the $1,000,000 in counsel fees advanced to each party, and despite the wife's receipt of $11,500,000 in equitable distribution, the court concluded that the husband should be responsible for an additional $400,000 of the wife's unnecessary litigation fees that resulted from the husband's litigious behavior with regard to property that he aggressively argued was his separate property throughout trial, but conceded was marital property in his post-trial brief, and a motion which the husband withdrew only after the wife was required to submit voluminous papers in opposition. This left the wife responsible for only $600,000 of the $1,000,000 in advanced fees, and the husband with a total payment of $1,150,000 for the wife's counsel fees.

Along with the extensive discussion of counsel fees, this after-trial decision also dealt with issues of equitable distribution, maintenance, and child support. With regard to equitable distribution, the parties agreed upon the values of most of their assets and to equally distribute these assets, but disagreed on the percentage of the husband's business that the wife was entitled to receive. Although stipulating that the business was worth $8,000,000 as of the date of commencement, the wife asserted that she was entitled to 50% of the business and the husband asserted that the wife was only entitled to 5%. The court awarded the wife 30%, acknowledging the significance of the indirect contributions of the wife, which included emotionally supporting the husband in his change from one financial firm to another prior to opening his own business, and handling the domestic duties of the household, whether through her own doing or the assistance of hired household staff.

Regarding maintenance, the court considered the length of the marriage (14 years), and determined that, post-marriage, the wife will no longer need to spend money on household help to fulfill her role of tending to the home nor will her travel expenses be comparable to the travel expenditures made by the couple during the marriage. Noting that the husband would be responsible for 100% of the child support add-ons and that the wife would be receiving an after-tax income stream of $378,810 per year from her $11,500,000 equitable distribution award, the court ruled that the wife's marital standard of living could be maintained on an additional $415,474 in annual pre-tax maintenance ($228,095 after-tax), totaling $606,905 per year, for a period of eight years.

In computing the husband's child support responsibility for the parties' twelve-year-old son, the court, acknowledging that the husband agreed to pay 100% of the child's add-on expenses, which constitutes the child's most significant expenses, capped the husband's $10,000,000 income at $600,000 and calculated his annual child support obligation to be $102,000 per year.

Award of interim counsel fees was warranted where husband concealed his actual income

***Bykov v. Gevargiz*, 42 Misc.3d 1212(A) (Sup. Ct. Kings County 2014)**

Although the husband's tax returns reflected an annual income of only $30,000, extensive discovery and multiple day depositions revealed that $60,000,000 in credits passed through the husband's business accounts in the five years immediately preceding the husband's commencement of this divorce action. Due to the hundreds of thousands of dollars in unrecorded income from the husband's business and the tactics he used to delay the proceedings by concealing his income, which caused the wife to incur unnecessary counsel fees, the court granted the wife's motion for $40,000 in interim counsel fees.

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