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The Right to Be Heard on an Initial Custody Determination: The Court of Appeals Considers *S.L. v. J.R.*

By Lee Rosenberg

The Court of Appeals has heard arguments in *S.L. v. J.R.*[1] resulting from the Second Department's affirmance of an award of custody to the father of the parties' two children without a hearing.[2] The appellate decision, relying on the concept that no hearing is necessary where the court possesses "adequate relevant information" to enable it make an informed and provident *best interests* determination, appears to have considered only the affidavits of the parties, a forensic report, and the support of the children's attorney in this initial custody determination with no prior proceedings before it. The question, of course, is how on an *initial* determination can this concept be fairly measured without a hearing to determine what is "adequate" and what is "relevant"—the former relating to a level of proof and the latter relating to evidence, with both challengeable at hearing/trial.

Fundamental Rights

In *Troxel v. Granville*,[3] the United States Supreme Court discussed in detail "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." While *Troxel* involved a dispute between parents and a grandparent under a Washington State statute and not a custody fight between the two parents themselves, custody rights to one's children remain paramount and fundamental concepts in New York. The New York Court of Appeals in *Debra H. v. Janice R.*,[4] citing *Troxel*, reiterated, "Significantly, 'the interest of parents in the care, custody, and control of their children[ ] is perhaps the oldest of the fundamental liberty interests recognized by' the United States Supreme Court." Neither parent has a prima facie right to custody of the child.[5]

Custody is of such importance that a statutory right to counsel attaches.[6] Failure to advise a custody litigant of such right to counsel is reversible error.[7] Due to the fundamental rights and issues involved with custody, "as a general rule it is error to make an order respecting custody based on controverted allegations without the benefit of a full hearing."[8] As the Court of Appeals held in *Obey v. Degling*,[9]

> In a custody proceeding arising out of a dispute between divorced parents, the first and paramount concern of the court is and must be the welfare and the interests of the child (Domestic Relations Law, § 70; *Matter of Lincoln v. Lincoln*, 24 NY2d 270, 271-272; *Finlay v.*

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> *Finlay*, 240 NY 429, 433-434; see Family Ct Act, § 651, subd [b]). Generally, a determination of that issue should be made only after a full and plenary hearing and inquiry (*Bowman v. Bowman*, 19 AD2d 857; *People ex rel. Cachelin v. Cachelin*, 18 AD2d 1057; *Glasser v. Gluckstern*, 14 AD2d 525; *Matter of Uhlan v. Uhlan*, 283 App Div 1013; *Fernandez v. Fernandez*, 282 App Div 1043; 15 NY Jur, Domestic Relations [Rev], § 348, p 581; cf. *Matter of Jewish Child Care Assn. of N. Y. [Sanders]*, 5 NY2d 222, 228).

Notably, the cases cited by *Obey*, do not use the term "generally" in addressing the need for a hearing. In *Matter of Uhlan v. Uhlan*,[10] for example, the lower court was

> unanimously reversed, with costs and disbursements and the proceeding remitted to Special Term for a determination, after a hearing before the court, on all the issues raised by the petition and answer. The application, involving as it does the welfare of a child, should not have been decided upon the inadequate affidavits submitted herein and the mother's request for a hearing should have been granted. (*Fernandez v. Fernandez*, 282 App. Div. 1043.)

The appellate division in *Fernandez v. Fernandez*,[11] also reversing the motion court, held,

> The motion, involving as it does the welfare of a child, should not have been decided upon the meager, conclusory and inadequate affidavits submitted herein, and the mother's request for a hearing should have been granted. Order unanimously reversed and the matter remitted to Special Term, to take proof on notice, as to the fitness of the parties and on the other matters in issue and to make a determination consonant with the best interests of the child.

In *Bowman v. Bowman*,[12] the court held,

> The custodial provisions of the annulment decree were changed without any common-law proofs being taken. The custody of children should not be determined on the basis of recriminatory and controverted affidavits, but the court should make such a determination only after a full and plenary hearing and inquiry.

In *Glasser v. Gluckstern*,[13] after a modification on motion:

> While it may be that some changes are desirable and should be made, it is our view that such drastic action should not be taken by judicial fiat, but only after a full and comprehensive hearing is accorded the parties.

In *People ex rel. Cachelin v. Cachelin*,[14] in considering the mother's unfitness:

> The primary consideration on this application for habeas corpus is the welfare of the child of the parties. A very important factor in this consideration is the fitness of the mother to have custody of the child. Related considerations are the attention and care that either parent is willing to devote to the child, the opportunities for uninterrupted schooling, the religious education to be provided, and the like, the question being under provisions for custody are the most satisfactory conditions most likely to be had. Neither the papers before the court nor the purported informal hearing was in any degree sufficient for advised conclusions on the questions presented. A hearing is called for (*People ex rel. Norwood v. Coffey*, 12 A D 2d 579; *Glasser v. Gluskstern*, 14 A D 2d 525). In a proceeding of this character prior stipulations and determinations are limited to the situation then prevailing and the proof presented at that time and, hence, have no conclusive weight when conditions have changed or new facts are established. The issue of the child's welfare cannot be determined on the basis of the outcome of the prior maneuvers of the parents.

Totality of Circumstances

Clearly, at a hearing or trial, we have evidence and burdens of proof which are subject to the rigors of argument and cross-examination. Importantly, the court also has the opportunity to assess the character and credibility of the witnesses appearing before it, in its mandate to determine the best interests of the child under the totality of the circumstances.[15] That totality, on an initial determination, has been held to include: "(1) which alternative will best promote stability; (2) the available home environments; (3) the past performance of each parent; (4) each parent's relative fitness, including his or her ability to guide the child, provide for the child's overall well being, and foster the child's relationship with the noncustodial parent; and (5) the child's desires";[16] "the quality of the home environment and the parental guidance the cus-

todial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent."[17]

While the above noted factors are not all encompassing, the Court of Appeals has held that "*The weighing of these various factors requires an evaluation of the testimony, character and sincerity of all the parties involved in this type of dispute*. Generally, such an evaluation can best be made by the trial court which has direct access to the parties and can supplement that information with whatever professionally prepared reports are necessary."[18] (Emphasis added).

Claims and assertions on an *initial* determination are not subject to the condition precedent of modification proceedings in which changes of circumstance must first be demonstrated or at least alleged before the court is required to hear other arguments.[19] Failure to assert a prima facie claim of such change will be fatal to the right to get to a hearing.[20]

Adequate Relevant Information?

It appears that historically the vast bulk of cases, which now rely on the "adequate relevant information" theory as an exception to the "general rule," derive from cases involving pendente lite relief[21] and modification/enforcement[22] of previously existing custodial arrangements.[23] Similarly, while it has been held in *Webster v. Webster*[24] that "(a) hearing is not required to resolve a custody issue unless there are controverted specific allegations of fact, conflicting affidavits, extraordinary circumstances or allegations of unfitness," that matter also involved a *pendente lite determination*. In the initial custody determination in *Goldfarb v. Szabo*,[25] citing "adequate relevant information," the court still heard testimony and evidence from the parties and other witnesses, and observed the mother's in-court behavior, thus giving it a present and immediate view of the parties' then-current arguments and conditions,

> Here, although there was not a full hearing, contrary to the mother's contentions, considering the testimony elicited from, among others, the father, the mother, the maternal grandmother, a visitation supervisor, and the neutral forensic psychologist, as well as the reports received from various professionals and agencies, the Family Court possessed adequate relevant information to enable it, without additional testimony, to make an informed and provident determination as to the best interests of the subject child (see *Matter of Law v. Gray*, 116 A.D.3d at 700, 983 N.Y.S.2d 582; *Matter of Hom v. Zullo*, 6 A.D.3d 536, 536, 775 N.Y.S.2d 66). Moreover, the court properly determined that the best interests of the child would be served by awarding the father sole legal and physical custody in light of the mother's numerous unfounded allegations of sexual abuse against the father and her erratic and inappropriate behavior during the pendency of the proceeding.

In *S.L. v. J.R.*, however, we have the court, on an initial custody *motion*, relying *without hearing* upon:

(1) a forensic report;

(2) the support of the children's attorney;

(3) the affidavit of the mother.

The Second Department in affirming the motion court held,

> Significantly, the parties' affidavits and the report prepared by the court-appointed forensic evaluator demonstrate that the plaintiff admits the defendant's allegations regarding her emotionally destructive and sometimes violent behavior toward him and the parties' two children. Moreover, the forensic evaluator, who interviewed the parties and the subject children, concluded that the defendant was the more stable parent, and that the defendant was able to make sound parenting decisions for the children. Additionally, the attorney for the children supported the award of custody to the defendant.
>
> The plaintiff's remaining contentions are without merit.
>
> Thus, a sound and substantial basis in the record exists to support the Supreme Court's determination that it was in the best interests of the subject children to award the defendant sole legal and physical custody. (Citations omitted).

The Determinative Factors in *S.L. v. J.R.*

Given that the underlying decision was rendered on motion alone, the forensic report relied upon would not, without a hearing, properly be in evidence. It would also not be subject to the cross-examination of its author as provided at the very least by 22 NYCRR §202.16(g)(2).[26] Certainly, under these circumstances, the underlying raw data and notes would also not be available to confirm or challenge the basis of the report's findings.[27] Further, that report offers what *appears* to be akin to a "best interests

determination" that the father was the "more stable parent" who is "able to make sound parenting decisions for the children"—veering into the province solely held by the court as the trier of fact.[28] Going back to the inability to cross-examine, the court states that the forensic report references interviews with the parties and the children. The mother's attorney then had no ability to cross-examine the father nor did she have the ability to expand upon/explain any statements attributed to her in the report (or in her affidavit for that matter) "regarding her emotionally destructive and sometimes violent behavior toward (the father) and the parties' two children" to further determine if the forensics report is even accurate in its recitation of what occurred in its interviews, analysis, and methodology. Nor would the mother have the opportunity to tell the court if she had addressed or tried to mitigate some of her prior behavioral issues or to present expert or treating mental health witnesses to elaborate upon the causes and treatment of any of those causes or conditions. All of the foregoing falling squarely within the ambit of the "totality of the circumstances" which the court must consider.

The court also relied upon the "fact" that attorney for the children supported the award of custody to the father. Of course, the attorney for the child, unless contrary circumstances exist, is to advocate the child(ren's) position.[29] Even still, when looking at the totality of the circumstances, the child's desire is but one factor and is "non-determinative."[30] The decision in *S.L. v. J.R.* also makes no reference to the court actually meeting with the children *in camera*.[31]

The most objectively damaging aspect of *S.L. v. J.R.* to the mother is the appellate court's finding that "significantly the parties affidavits and the report prepared by the court appointed forensic evaluator demonstrate that the plaintiff *admits* the defendants allegations regarding her emotionally destructive and sometimes violent behavior towards him and the parties to children" (emphasis added).

We then have a "party admission" as to both "emotionally destructive" and "sometimes violent behavior" which was also towards the children. Again, however, *confirmation* of the behavior, to the extent such confirmation is in the forensic report, not in evidence, remains problematic for the reasons set forth above.

That aspect of the mother's admission by affidavit in sealing her fate *on motion* may also have flaws which are not necessarily explored properly without hearing. While not excusing any such behavior nor saying that she is the proper custodial parent, she apparently acknowledged same. Nevertheless, exigent and mitigating circumstances may still have existed. Her behavior may also have been subject to ongoing remediation, so that different circumstances "in their totality" may exist *at the time of trial* vis-a-vis *pendente lite—or when the motion was submitted*.

In looking at the cases cited in *S.L. v. J.R.*, in its reliance upon "adequate relevant information," *Matter of Hom v. Zullo*[32] is, again, a *modification* case where the court used "provident judgment of discretion since court was fully familiar with relevant background facts regarding parties and child from several past proceedings"; *Matter of Lazo v. Cherrez*[33] is a relocation case in which *more than 16 hearings* had already previously been held by the court; *Matter of Zaratzian v. Abadir*[34] is a *modification* case in which the court considered, "*inter alia*, the numerous court dates in this matter and the relationship between the parties"; and *Matter of Schyberg v. Peterson*,[35] another *modification* case, but where the appellate court *reversed the Family Court and directed a hearing:*

> Here, the Family Court did not possess adequate relevant information to enable it to make an informed and provident determination as to the children's best interest so as to render a hearing unnecessary. Indeed, the court was not involved when the parties agreed to the existing custody and parenting agreement, and only became involved in this proceeding after the prior Family Court Judge in this matter retired.

Interestingly, the *Schyberg* court also held,

> Furthermore, although the court had the recommendations of an expert before it, the recommendations of experts are but one factor to be considered (see *Matter of Nikolic v. Ingrassia*, 47 AD3d 819, 821 [2008]), and "are not determinative and do not usurp the judgment of the trial judge.

Protecting Due Process and Fundamental Rights

There are circumstances where the "adequate relevant information" standard may very well be appropriate. Barring, however, consent or a failure to oppose the ultimate relief in an initial custody application, or some objectively extraordinary circumstance—for example, an incarceration—a hearing should be held. Ascribing an "adequate relevant information" exception to a "general rule" on an initial custody determination does great injustice to a fundamental right. Even still, where a litigant is incarcerated, the rights of a parent to be heard still exist. Notably, in *Matter of Jackson v. Wylie-Turnstall*,[36] addressing visitation, the father was incarcerated and the trial court's initial hearing-less visitation determination (after the father consented to custody) was reversed. A hearing was then directed "to permit a comprehensive independent review the child's best interest." That is not to say that visitation does not differ from custody, but simply that the standard for determining the fundamental due process right to be heard also requires a "comprehensive independent review."

The standard used in *S.L. v. J.R.*, would appear to fall far short. While inappropriate claims for custody, whether in misguided "good faith" or frivolously as leverage against the other party, should not be rewarded; summarily foreclosing a hearing on an initial determination is unnecessarily draconian. That no testimony at all was allowed to be taken and not once piece of evidence properly introduced contravenes a parent's fundamental right to be heard. It is hoped that the Court of Appeals will now clarify this issue and preserve the fundamental right to be heard.

Endnotes

1. 26 N.Y.3d 910 (2015).
2. 126 A.D.3d 682 (2nd Dept 2015).
3. 120 S.Ct. 2054 (2000).
4. 14 N.Y.3d 576 (2010).
5. *Matter of Goldfarb v. Szabo,* 130 A.D.3d 728 (2nd Dept 2015) citing DRL §70.
6. FCA §262(a)(v); see *Collier v. Norman*, 69 A.D.3d 936 (2nd Dept 2010): "Family Court Act § 262(a)(v) confers the right to the assistance of counsel upon "the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody." Similarly, Family Court Act § 262(a)(ii) confers the right to the assistance of counsel upon parties in proceedings brought pursuant to Family Court Act article 8. The statute further provides that "[w]hen such person first appears in court, the judge shall advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same" (Family Ct. Act § 262[a]). The deprivation of a party's right to counsel guaranteed by this statute "requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Brown v. Wood*, 38 A.D.3d 769, 770, 834 N.Y.S.2d 196 (citations ommitted)."
7. *Howard v. Howard*, 85 AD3d 1587 (4th Dept 2011); *Ryan v. Alexander*, 133 A.D.3d 605 (2nd Dept 2015); *Collier v. Norman, id*.
8. *Lee v. Xu*, 131 AD3d 1013 (2nd Dept 2015).
9. 37 N.Y.2d 768 (1975).
10. 283 App Div 1013 (1st Dept 1954).
11. 282 App. Div. 1043 (1st Dept 1953).
12. 19 A.D.2d 857 (4th Dept 1963).
13. 14 A.D.2d 525 (1st Dept 1961).
14. 18 A.D.2d 1057 (1st Dept 1963).
15. *Matter of Moiseeva v. Sichkin,* 129 A.D.3d 974 (2nd Dept 2015); *Ryan v. Alexander, Id.; Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982); *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982).
16. *Matter of Rosado v. Rosado*, 2016 N.Y. Slip Op. 01189 (2nd Dept 2016).
17. *Matter of Tan v. Kuang*, 2016 NY Slip Op. 01195 (2nd Dept 2016).
18. *Eschbach* at note 15.
19. *Stachan v. Gilliam*, 129 A.D.3d 1679 (4th Dept 2015); *O'Connor v. Klotz*, 124 A.D.3d 666 (2nd Dept 2015).
20. *In re Antonio Dwayne G. v. Ericka Monte E.*, 2016 N.Y. Slip Op. 02161 (1st Dept 2016); *Menutti v. Berry,* 59 AD3d 625(2nd Dept 2009).
21. A hearing is not required on a pendente lite determination. *Assini v. Assini*, 11 A.D.3d 417 (1st Dept 2003), also citing "adequate relevant information on the application for temporary relief. A comparison may also be made to "non-dispositional" interim Family Court proceedings. See *Porter v. Burgey*, 266 A.D.2d 552 (2nd Dept 1999).
22. This is not to say that such proceedings do not usually require a hearing. See *Matter of Kadyorios v. Kirton*, 130 A.D.3d 732 (2nd Dept 2015); *Matter of Velez v. Alvarez*, 129 AD3d 1096 (2nd Dept 2015).
23. See *Hom v. Zullo*, 6 A.D.3d 536 (2nd Dept 2004); *Smith v. Molody-Smith*, 307 A.D.2d 364 (2nd Dept 2003; *Vangas v. Ladas*, 259 A.D.2d 755 (2nd Dept 1999); *Oliver S. v. Chemung County Dept of Social Services*, 162 A.D.2d 820 (3rd Dept 1993) citing *Nessia v. Nessia*, 121 Misc.2d 479 (Sup Ct Monroe County 1983):

    > It is clear that "[i]n a custody proceeding arising out of a dispute between divorced parents, the first and paramount concern of the court is and must be the welfare of and the interests of the child (citations omitted). Generally, a determination of that issue should be made only after a full and plenary hearing and inquiry (citations omitted)" (*Obey v. Degling*, 37 N.Y.2d 768, 769–70, 375 N.Y.S.2d 91, 337 N.E.2d 601). This rule as to a hearing is also usually applicable to requests for modification of custody (see *Matter of Black v. Black*, 84 A.D.2d 922, 447 N.Y.S.2d 54; People *ex rel. Yaklin v. Yaklin*, 19 A.D.2d 405, 243 N.Y.S.2d 775; see, also, *Daghir v. Daghir*, 56 N.Y.2d 938, 944–46, 453 N.Y.S.2d 609, 439 N.E.2d 324 [dissent]).

    However, commentators state that "a modification for a matrimonial decree with respect to custody without a hearing is not prejudicial where there are no complicated issues of fact presented, no request is made for a hearing, and both parties evidently are content to submit the application for determination by the court on the papers presented" (19A Carmody-Wait 2d, § 118:230 and 2 Foster-Freed, Law and the Family, § 29:38, both citing *Radeff v. Radeff*, 272 App.Div. 582, 74 N.Y.S.2d 749; see, also, *Kuleszo v. Kuleszo*, 59 A.D.2d 1059, 399 N.Y.S.2d 801, *lv. to app. den.* 43 N.Y.2d 647, 403 N.Y.S.2d 1025, 374 N.E.2d 398, wherein a party's conduct was found to constitute a waiver of an evidentiary hearing). *Nessia, id.*
24. 163 A.D.2d 178 (1st Dept 1990).
25. 130 A.D.3d 728 (2nd Dept 2015).
26. Whether or not the court should read the forensic report not in evidence is a subject for another day. See Tippins, *Forensic Custody Reports: Where's the Due Process?* NYLJ May 6, 2010.
27. See *J.F.D. v. J.D.*, 45 Misc 3d 1212(A) (Sup Ct, Nassau County 2014); *K.C. v. J.C.*, 50 Misc 3d 892 (Sup Ct, Westchester County 2016).
28. *Henrietta D. v. Jack K.*, 272 A.D.2d 995 (4th Dept 2000); *Linda R. v. Ari Z.*, 71 A.D.3d 465 (1st Dept 2010); *Matter of Schyberg v. Peterson,* 105 A.D.3d 857 (2nd Dept 2013).
29. 22 NYCRR §7.2.
30. *William-Torand v. Torand*, 73 AD3d 60056 (1st Dept 2010)
31. *William-Torand, id.*, citing *Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270 (1969) and *Koppenhoefer v. Koppenhoefer*, 159 A.D.2d 113 (2nd Dept 1990).
32. *Hom* at note 23.
33. 121 A.D.3d 1002 (2nd Dept 2014).
34. 105 A.D.3d 1054 (2nd Dept 2013).
35. *Schyberg* at note 28.
36. 2016 N.Y. Slip Op. 01848 (2nd Dept 2016).

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Exclusive Use and Domestic Violence: The Pendente Lite Dilemma for Matrimonial Trial Judges

By Hon. Richard A. Dollinger and Colleen Moonan

It is one of the most contentious decisions a matrimonial trial judge may need to make: when to remove a spouse from their house?

Even as I review the precedents and pen this article, I am still unsure.

The collision of emotionally-laden factors—the nature and extent of marital discord, the impact on children, the risk of escalating domestic violence, the financial consequences of dislocation, the temporary divestiture of a spouse from marital property—militates against any easy answers to the question. But, if New York is committed to a zero-tolerance policy on domestic violence it should be manifest in judicial decisions involving couples living under one roof while enduring a contentious divorce.

Legislative History and Judicial Frustration

The often cited statutory source for the authority to award temporary "exclusive and possession" provides little guidance on balancing these weighty competing and critically important variables for families. Domestic Relations Law Section 234 permits a court to make "such direction between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties." The statute's second sentence expressly permits a court to make these "directions…from time to time before or subsequent to final judgment."[1]

But a plea for legislative guidance on this complicated issue arose even before the enactment of DRL § 234. Section 1164-a of the now-defunct Civil Practice Act, enacted in 1953, applied only to separation actions and was designed to "prevent any injustice which might arise as a result of a spouse's continued rights as a tenant by the entirety notwithstanding a judicial decree of separation."[2] Section 1164-a was seldom cited in pendente lite matters before *Kahn v. Kahn*.[3] In 1960, a trial court judge who later ascended to the Court of Appeals, Bernard S. Meyer, analyzed Section 1164-a of the then, Civil Practice Act, seeking guidance on whether to exclude a husband who threw his glasses at his wife, chased her down their street in the middle of the night and later assaulted her. Borrowing from an American Law Reports annotation, Justice Meyer in *Mayeri v. Mayeri*[4] concluded that a party could be excluded from the marital domicile if there was "an immediate necessity to protect the safety of persons or property." He fortified that conclusion by citing *Smith v. Smith*,[5] a California case which, under a temporary injunction statute, held that a spouse could be excluded from a marital residence for discharging a weapon. Justice Meyer suggested that New York's temporary injunction statute gave trial judges the same power to exclude a belligerent spouse during the pendency of a divorce action.[6]

Within two years, the Legislature, perhaps reading of Justice Meyer's frustration with a lack of legislative guidance, enacted DRL § 234 in 1962. The new statute gave courts the discretion to "direct" a spouse's possession of their residence during a divorce, but no "direction" on how to do it or what factors to consider. The statutory history casts no more illumination on the legislative intent. Even after Section 234 was enacted, there was a conflict over the extent of judicial authority to exclude any tenant by the entirety from property during a matrimonial matter. In 1971, the Second Department adopted Justice Meyer's formulation from *Meyeri v. Meyeri*, holding that any party seeking such "direction" from a court needed to prove such possession was necessary "to protect the safety of persons and property."[7] By 1978, the Second Department held that sworn factual allegations of prior incidents of violence and abuse, combined with a protective order from the Family Court, justified an exclusive use order.[8]

After the enactment of the Equitable Distribution Law in 1980, the Second Department latched onto another standard, holding that if one spouse had an alternative residence, then the standard was somewhat less onerous to a litigant, only requiring proof of the "existence of an acrimonious relationship between the parties, and the potential turmoil which might result from the husband's return to the marital home."[9] Subsequent cases, enlarging the concept, described the precondition for "exclusive use" as "domestic strife."[10] But the requirement that the offending spouse has established "alternative residence," was a prerequisite to applying the lesser "the existence of an acrimonious relationship between the parties, and the potential turmoil which might result from the plaintiff's return to the marital home" standard, to justify exclusive use during the pendency.[11] The First Department approached the "exclusive use" test in a more generic fashion in *Delli Venneri v. Delli Venneri*,[12] wherein the court held domestic "strife" was a recognized standard for an award of temporary exclusive possession. But that case involved unique facts: the litigant refused to leave the residence, attested that if permitted to re-enter, he intended to occupy the marital bedroom, a circumstance which, the Court acknowledged, "all other considerations aside, is rife with the potential for strife and turmoil."[13] The decision in that case hinged, in part, on proof that the excluded party has access to an "alternative residence." The Court added that it "rejected any rule which would ignore other salient facts and limit the award of temporary exclusive possession to only those instances where, based

on past experience, there is a verifiable danger to the safety of one of the spouses." The First Department later accepted the two-prong test—available alternative residence and avoiding domestic strife in *Fleming v. Fleming*[14] (declining to grant exclusive possession because the offending parties actions were no more than "petty harassments") and in *Kenner v. Kenner*.[15] The Third Department in *Grogg v. Grogg* expanded the notion, concluding that "marital strife"—as exemplified by a litigant breaking into the house to recover personal items—and allegations of "serious marital discord" were sufficient to just exclusive possession pendente lite.[16]

The Trial Court View

The lower courts have generally required more evidence of "strife" than the "petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce."[17] In 2002's *Estis v. Estis*,[18] a wife and husband obtained mutual orders of protection, but still endured police visits and the children's treating therapist concluded the shared living arrangement was harmful to the children. Yet, the orders of protection had never been forced and the accused argued there was no evidence of any verbal attacks upon the spouse. The wife argued that the best interests of the children required the husband's removal under DRL § 234. The court noted:

> The statute does not delineate any factors that the Court must assess, analyze and weigh. The invocation of words such as "domestic strife" and an amorphous often times subjective standard such as "the best interest of child" as a predicate for such applications is a concept that may ultimately lead a Court into awarding exclusive occupancy in every litigated matter and will provide little guidance to counsel in advising clients. It could also be said that the parties are adversarial, uncivil and less than cordial to to each other in many cases that reach the point requiring Court intervention, regretfully often in the presence of their children.[19]

The court then ventured outside the record into a discussion of how divorce impacts children.

> It has been postulated that the whole trajectory of a child's life is altered by the divorce experience. (Wallerstein, Judith, The Unexpected Legacy of Divorce. Hyperion, 2000). The same author states that children who grow up in wretched families with parents that [avoid] divorce, who stay together "because of the children," grow to be the most unhappy adults of all. Other studies and our Courts have found that a child who loses contact with a parent due to divorce is much more at risk than a child whose both parents remain actively involved as a resource to the child, even throughout the divorce process, and that they fare as well as a child in an intact family.[20]

The court provided no source for the "other studies" and citations to "our courts" and their conclusions regarding the impact of divorce and accompanying domestic violence on children. The court held that the allegations did not exceed "petty harassments such as the hostility and contempt admittedly demonstrated herein that are routinely part and parcel of an action for divorce."[21]

Estis also reflects an outdated view of the use of mutual orders of protection, pendente lite. New York's Family Court Act, amended in 1997, reflects a legislative disposition *against* mutual orders of protection (even on consent) unless justified by separate pleading and a finding of facts.[22] The federal Violence Against Women Act ("VAWA") makes mutual orders of protection unenforceable in other states unless they meet that exacting standard.[23]

VAWA is designed to discourage judges from issuing mutual orders against domestic violence victims who have not committed acts of abuse, or who acted in self-defense, by making such orders unenforceable across state lines.[24] In addition, the notion that mutual orders will somehow quell incipient domestic violence has been roundly debunked as being based on misconceptions of domestic violence, sending the wrong message ("trivializing abuse"), and endangering and confusing to children as well as ultimately, to the police.[25] In short, the judicial impulse to "calm the roiling waters" by issuing mutual orders of protection as an alternative to granting exclusive use and possession, even if upon consent, may create more problems than it cures.

Whether *Estis* would be similarly decided in the second decade of this century and stand up in the face of new research on the extent and impact of domestic violations may be debatable, but it does reflect the judicial hesitancy to grant exclusive use pendente lite.

One court recently acknowledged that reluctance:

> The courts are generally reluctant to deprive one spouse of equal access to a marital residence prior to trial and recognize the unfairness that could result from forcibly evicting a spouse from his or her home on the basis of untested allegations in conflicting affidavits. The party seeking exclusive occupancy must present specific, detailed factual allegations as to incidents of violence or abuse, of police intervention or severe family strife (McKinneys DRL §234, Practice Commentaries, Alan

> D. Sheinkman, p.464 f.). The fact that violence or abusive conduct occurred does not, standing alone, mandate that the court grant a motion for temporary exclusive occupancy. The court must consider, among other things, the financial circumstances of the parties, whether one spouse or the other has available alternate residences, whether one spouse or the other has a particular need to reside in the marital residence for employment, business, geographic or other reasons, and whether there are children and, if so, what custody or visitation arrangements are required.[26]

In that case, the court noted there was a confrontation between the wife and her daughter ("reactive striking" as described by the Court), a no-violence order of protection, and there was a "disruptive and tense environment" that was "detrimental to the children," one child was suffering from "extreme depression" and was forced to live with her grandparents and yet the court did not grant exclusive use and possession. More recent cases reflect a further judicial reluctance to grant pendente lite exclusive use and possession.[27]

In fact, recent case law suggests that fewer spouses may be applying for exclusive use in divorce cases, which may be attributable, in part, to the use of orders of protection, often granted ex parte, pursuant to DRL §252 or under Article 8 of the Family Court Act. But, given all the pertinent variables in this complex calculation, what seems to be missing from judicial consideration of applications for "exclusive use and possession" is a detailed recognition of undisputed social science research that documents the extent of domestic violence and especially its impact on children living a besieged household.

Behavioral Research Studies

The recent research indicates that domestic violence comes in many packages and "petty harassments," when aggregated during the time a divorcing couple share a residence, can easily compound into what experts would clearly characterize as a form of violence. Experts define "domestic violence" to include name-calling and verbal "put downs," isolating a partner from family and friends, withholding money and preventing a partner from being alone with their children. The New York Office for Prevention of Domestic Violence describes "coercive control"—including intentional control tactics by a spouse—as a form of domestic violence. These behaviors include restricting daily activities, manipulating or destroying family relationships, stifling a party's independence, controlling access to information and services, extreme jealousy, excessive punishments for violations of rules, and other inter-personal conduct.[28]

These executive initiatives are grounded in decades-old but nonetheless almost incontrovertible social science research. The Centers for Disease Control and Prevention describes a child's exposure to intra-family violent and abusive behavior as a life-threatening crisis of nearly historic proportions:

> Recent research by Kaiser Permanente and the Centers for Disease Control and Prevention (CDC) strongly implicates childhood traumas, or "adverse childhood experiences" (ACEs), in the ten leading causes of death in the United States. ACEs include physical violence and neglect, sexual abuse, and emotional and psychological trauma. ACEs are associated with a staggering number of adult health risk behaviors, psychosocial and substance abuse problems, and diseases. History may well show that the discovery of the impact of ACEs on noninfectious causes of death was as powerful and revolutionary an insight as Louis Pasteur's once controversial theory that germs cause infectious disease.[29]

Other studies have found that aggression against either parent has unique effects for children's emotional security and aggression—verbal and physical—against both mothers and fathers was related to increased levels of emotional insecurity in children (i.e., higher negative emotional reactivity, behavioral dysregulation, negative cognitive representations of the family). In turn, higher levels of emotional insecurity were related to higher levels of internalizing problems, symptoms of PTSD, and externalizing problems.[30] Numerous studies conducted during the past three decades have shown that children with divorced parents have an elevated risk of a variety of problems, including conduct disorders, emotional disturbances, difficulties with social relationships and academic failure and exposure to chronic, unresolved conflict between parents increases the risk of comparable problems for children.[31]

Expanding Recognition of the Impact of Domestic Violence/Differing Standards of Proof

The New York Legislature has already embraced the expansive notion of domestic violence as it impacts children, albeit not in the text of DRL §234. In the Legislative findings accompanying the enactment of Section 252, the Legislature noted there are:

> …few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members. We also know that this violence results in tremendous costs to our social services, legal, medical and criminal

justice systems, as they are all confronted with its tragic aftermath.

Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.

The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly. Abuse of a parent is detrimental to children whether or not they are physically abused themselves. Children who witness domestic violence are more likely to experience delayed development, feelings of fear, depression and helplessness and are more likely to become batterers themselves.[32]

Domestic Relations Law §240(1)(a) requires a court to consider domestic violence in all matters related to the best interests of the children. The recent amendments to the temporary and permanent maintenance guidelines both suggest domestic violence should be a factor in evaluating support awards.[33] Domestic Relations Law § 240(1)(a) requires that for domestic violence to be considered by the court as a mandatory factor in its determination of custody, two elements must be met (1) the allegation must be contained in a sworn pleading; and (2) the allegations must be proven by a preponderance of the evidence.[34]

The broad statutory command to "consider" domestic violence in matrimonial matters contrasts with a more demanding standard of proof involving Family Court decisions regarding neglect. In the family courts, domestic violence in a child's presence can justify a finding of neglect but only if the child's mental or emotional health is impaired or placed in imminent danger.[35] By placing this qualifier on the finding of neglect, the Legislature, according to the Court of Appeals, recognized that the consequences of domestic violence relating to emotional or mental impairment to a child—unlike physical injury—may be murky, and that it is unjust to fault a parent too readily.[36] In the latter case, the Court of Appeals suggested—more than a decade ago—that mental or emotional impairment of a child's health might exist when children were exposed to regular and continuous extremely violent conduct between their parents, several times requiring official intervention, and where caseworkers testified to the fear and distress the children were experiencing as a result of their long exposure to the violence. But, courts have held that an incident of domestic violence witnessed by a child is not enough to establish neglect.[37] In *Matter of M.S. (B.J.)*,[38] the Court noted that a child's crying during a parent's fight does not support a finding of "substantially diminished psychological or intellectual functioning" as described in the statute. The court highlighted cases in which something more substantial is required.[39]

However, the neglect standard involving the impact of domestic violence on children, borrowed from the Family Court Act, seems inappropriate in the setting of pendente lite choices regarding exclusive use of a marital residence. First, the Legislature, in amending DRL §240(1)(a) in the 1990s, did not require that proof of mental or emotional harm be offered before a court could consider the impact of domestic violence in divorce disputes. Because the Legislature declined to include that language in the statute, the New York courts should shy away from appending such rigorous proof requirements to judicial decision-making when pendente lite choices arise involving disputatious and stressful home environments. In addition, the lesser demanding standard can be justified because the neglect findings carries substantial collateral consequences to a parent, whereas the temporary relocation, mandated by a finding of exclusive use of a residence, does not impair a parent's access to children or foreclose further litigation over the aggressor in such cases or the exact nature of the domestic violence.

Public Policy Considerations and the Trial Court's Practical Challenges

The New York courts have long been on the forefront of detecting domestic violence, enforcing the strong public policy to protect children from exposure to domestic violence. The Second Department, more than a decade ago, recognized:

> The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.
>
> Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded.[40]

But, in almost all of these cases, the considerations of domestic violence occur *after* a trial or hearing and perhaps well after the commencement of the action and years after abuse begins, when a trial has produced substantial evidence of the conduct and its harm and a final custody/residence determination is made. Children, trapped in a hostile environment during their parents's divorce, may not be able to wait that long for relief.

Now, New York's courts need to incorporate the expert language of professionals on domestic violence

and its broad articulation in the Domestic Relations Law when evaluating applications for exclusive use and possession during the pendency of a divorce.

First, it is readily apparent that most couples do not seek judicial intervention until their relationship has reached a boiling point. Verbal abuse, put-downs, name calling and humiliation between spouses often may have reached the point of constituting domestic violence before a complaint is filed. Children, exposed to this pre-complaint rage, may already be experiencing the consequence of observed and lived-through abuse and violence. By the time any matter gets before the Court on a temporary motion, the violence may be well-established and even tolerated by a spouse, despite its impact on the children. Worse yet, by the time the action is resolved—perhaps a year later—the abusive environment may be second nature to all of its participants and the emotional damage—documented in countless studies—will have taken firm root, especially in the younger children.

Second, a court must deal with the reality of readily available orders of protection, often routinely granted on an ex parte basis based on sworn statements.[41] In this Court's experience, the race to obtain an ex parte order of protection, which can include the "stay away" from the home provisions, often moots the application for exclusive use and possession. But even the winner of the race to the courthouse and a successful applicant for a protection order needs to provide, in short notice, sworn facts that support the commission of domestic violence, sufficient to justify exclusion of an owner from the residence. As a consequence, the matrimonial trial court must be prepared to evaluate the continuing viability of such orders of protection, even at the preliminary conference stage.

Third, the court needs to determine, usually on relatively short notice, the critical differentiation between what courts have previously referred to as "petty harassments" or "marital strife" and acknowledged forms of domestic violence. It is easy to characterize this difference as one "in the eyes of the beholder" but, given the well-established progression of domestic violence—from simple verbal comments to more serious depression and anxiety-producing turmoil—a court needs to carefully sift through the allegations and, if necessary, require an immediate hearing at the time of the application for exclusive use and possession.

Fourth, it seems that while the standard for determining the extent of domestic violence necessary to justify exclusive use should be a uniform one, the impact of easily perceived intra-family verbal assaults, foul language and other demeaning behavior on children would appear to require more discerning criteria. Mild marital strife—caustic verbal exchanges, vulgarity, put-downs—may be tolerable between two hardened adults, but corrosive when overheard by children and directed against a parent they love. Waiting for the parents' conduct to escalate into the crime of harassment or worse before granting exclusive use may be self-defeating: the children will have already endured—and learned—the demeaning and destructive conduct of their parents. The presence of any forms of domestic violence, even what may appear to be the lesser no-physical-contact form, could seem to justify granting exclusive use when children are involved.

Fifth, the court must contemplate whether expert witnesses—or, at least third-party witnesses (or affidavits)—are essential in establishing a hostile environment in the home. New York courts have concluded that expert testimony is not required to establish the harmful emotional impact on children who witness such abuse.[42] While non-party affidavits or expert testimony would be helpful to courts, practical factors—the lack of therapeutic intervention prior to commencement, the length of time needed for expert assessment of the family environment—suggest that when considering a request for exclusive use, courts will be relying often on accounts from the parties alone and may need to rely on credibility evaluations of the parties to temporarily resolve such applications. Importantly, courts need to consider that even involving experts—appointing a psychological evaluator, for example—or requiring parental attendance at "parenting classes" will delay any decision regarding intra-family violence by weeks or months and leave children exposed to accelerating steps of violence in the home.

In that regard, in considering domestic violence as a basis for granting exclusive use, courts may be caught between competing versions of facts: couples often have widely varied views of the same incident and its origin. In some instances, the instigator may not be the actual perpetrator, as the level of agitation may have caused an outburst. However, regardless of the fault, the consequence—verbal and physical violence directed against a parent and observed by the child—erodes the child's sense of home life. In this regard, doing nothing—sending the parties back to the neutral corner, so to speak, in the home—may send a deleterious message to the parents and the child. The parents assume that their behavior is permissible to the court: the children assume that such behavior is acceptable within a family. Neither conclusion is in the best interests of the family unit.

Sixth, courts, in contemplating a request for "excessive use," may not expect parental cooperation or even appreciation from a child. The notion of "exclusive use" of a marital residence runs contrary to the usual advice given to divorcing couples by their counsel. Attorneys often caution a spouse that leaving the home can be interpreted as relinquishing the title of primary residential parent or conceding residence or custody to the other spouse. In that regard, a voluntarily departing spouse should not have the inclination to avoid family conflict in front of the children—regardless of who is at fault—held against them by the courts in subsequent primary residence, custody or visitation decisions. Conversely, even if a parent is excluded temporarily by a court order in an abundance of

caution, the Court may need to carefully consider proof at a hearing before drawing any final conclusions.

Seventh, some courts, as an alternative to granting exclusive use, have considered "nesting" arrangements, which recognize that the children "possess" the marital residence and the parents alternate entering the residence. Under the typical "bird-nesting" arrangement, the parents alternate living in the house and the children remain in their own bedrooms. Under this alternative, the parents' inter-personal conflict in the presence of the children may be substantially reduced and the children have the security of remaining in their own rooms and share the same routines. While almost never mentioned in New York cases, the concept has been entertained, pendente lite, in other states and judicial comment seems divided.[43] [44] In one of these cases, *In re Marriage of Levinson*,[45] the father articulated the rationale for the bird-nesting arrangement:

> Well, the children have the continuity of their home, what's clearly their home. And it's a very comfortable home for them. And it's the only home they've ever known. They were brought from the hospital, each of them, to this home. And they each have their own bedrooms, their playroom, their kitchen. And the nesting arrangement allows for the children to have that stability of the home. And the only difference is, which they understand, is that mommy and daddy take turns in being with them when in the home. So they're not subjected at this point to the disruption of having to pack up and move out for periods of time and to go to an inferior environment, by every measure, size, quality, just in every way. It's a small apartment compared to a large, luxurious home. So my belief is that it is best for the children to have the stability and this continuity and to minimize the disruption and the impact of our divorce. And I believe that the nesting arrangement allows for that. It also allows for the stability of the children to have substantial amounts of time with each parent and to enjoy the bond and the love that they receive from each parent. So it's my belief that it is the best—excuse me, that it is the best of the alternatives that we have available.[46]

Notably, the court-appointed evaluator in that instance also testified to benefits of the nesting arrangement—"they're in one location, not packing a little bag, going back and forth. From their perspective life is consistent"—but concluded that the separate residences, ultimately, were in the children's best interests.[47]

The only New York mention of the nesting approach, pendente lite or otherwise, is found in *A.L. v. R.D.*[48] Whatever its merits, nesting arrangements are a stop-gap measure and require that the parents have an alternative residence "outside the nest." But, in high-conflict divorces, the lack of daily personal contact between the litigants while the children have continued parental contact with both litigants separately in the marital residence may defuse the potential for violence between the parents. Any court considering this option should be mindful that violent tendencies not be displaced from the now-absent spouse to the children.

Lastly, practical financial considerations no doubt impact any decision on "exclusive use." Seldom can a parent immediately leave a home. Finding close-by accommodations, to facilitate any visitation, can be a substantial challenge. Suitable accommodations of sufficient size, to accommodate overnight visitation with children, can be tough to attain in short order. A couple's ability to finance two households—the marital residence and the new off-site lodging for the departed spouse—may make the transition virtually impossible. A court will need to investigate resources—borrowing from retirement accounts, cashing stocks, withdrawing funds from a home equity line of credit, or preliminary orders for equitable distribution of marital assets—to finance these new accommodations and the court will need to permit such actions as exceptions to the automatic orders in divorce matters.

In addition, any court, calculating the consequences of granting exclusive use, must acknowledge that the temporary decision—resulting in the eviction of one parent from the family home—could easily make matters worse. By siding with one party based on less than a full airing of proof, any judge could easily err. But in considering the possibility, a court should err on the side of reducing the family's exposure to violence, regardless of whether it has properly and justifiably pinpointed the perpetrator. If the violence subsides, even for the few months that the divorce progresses, the litigants and the children will have a sense that a lack of violence should be norm in their lives, regardless of whether they ultimately live with their mother or father. A final factor should make a grant of exclusive use more appealing: when the divorce is over, the households will be divided and the husband and wife separated. While accelerating that division through the grant of exclusive use is difficult, nonetheless the separation of parents involved in all forms of domestic violence as soon as practically possible must be considered beneficial to the children.

A Zero-Tolerance Approach

In the face of all of these complications, New York's judicial decision-making on applications for exclusive use during the pendency of an action should still reflect the state's "zero-tolerance" policy on domestic violence. If there is evidence of domestic violence—of any variety—in a home with children, there should be a presumption

that a non-offending parent should be granted exclusive use and possession pendente lite.[49] The current standard—safety of persons or property—is cast in the language and images of 1970s and even unfortunately implies that "persons" and "property" have equivalent weight in any "exclusive use" determination. The use of the word "necessary to protect" the safety of a person suggests that physical harm—an advanced form of domestic violence—is somehow a prerequisite to granting exclusive use and ignores the impact of abusive—but not physically threatening—behavior on children. The mere suggestion that "exclusive use" should hinge, in any fashion, on the "voluntary establishment of an alternative residence" suggests that preventing domestic violence may depend, in part, on the untenable notion that the convenience of one party's ability to secure short-term housing away from the home is somehow decisive for a court or the litigants. The preliminary conference forms for matrimonial matters should contain an attestation by clients, confirmed by counsel, that the parties have been informed of range of conduct constituting domestic violence and affirm that is does not exist and, if it does, what steps are being taken to prevent it in the future. Finally, matrimonial court calendars should recognize a preference for hearings on "exclusive use" applications and some standard—perhaps hearings within 10 days of application or a temporary grant of exclusive use—should be implemented.

Recognizing that all forms of domestic violence should trigger consideration of a grant of exclusive use during the pendency of an action presents an enormous challenge to New York's judges and the entire matrimonial litigation system. Expedited hearings, decisions based on disputed affidavits, wading through the inevitable finger-pointing between the couple, discerning the impact of abusive behavior on children, evaluating orders of protection, finding resources to create alternative accommodations: the challenges to the judiciary can be, simultaneously, immediate and endless as well as costly in time and effort.

But if New York is a "zero tolerance" zone for domestic violence, these challenges must be overcome and the new language, incorporating the notions of domestic violence to insulate families from destructive abuse during the pendency of an action, must become a part of judicial decision-making.

Endnotes

1. See *Leibowits v. Leibowits*, 93 A.D.2d 535, 550 (2nd Dept 1983) (discussing the legislative intent of DRL §234).
2. *Kahn v. Kahn*, 43 N.Y.2d 203, 208 (1977).
3. *Id. See, e.g., Rowley v. Rowley*, 6 A.D.2d 1049 (2nd Dept 1958) (declining to award exclusive possession without a hearing).
4. 26 Misc 2d 6, 8 (Sup. Ct. Nassau County 1960).
5. 122 P.2d 346 (Ct. App. 1st Dist. Cal. 1942).
6. Civil Practice Act §848 (1960).
7. *Scampoli v. Scampoli*, 37 A.D.2d 614 (2nd Dept 1971).
8. *Minnus v. Minnus*, 63 A.D.2d 966 (2nd Dept 1978).
9. *Kristiansen v. Kristiansen*, 144 A.D.2d 441 (2nd Dept 1988).
10. *J.L. v. A.L.*, 28 Misc. 3d 1239(A) (Sup. Ct. Nassau County 2010).
11. *See, e.g., Amato v. Amato*, 133 A.D.3d 695 (2nd Dept 2015).
12. 120 A.D.2d 238 (1st Dept 1986).
13. *Id* at 241.
14. 154 A.D.2d 250 (1st Dept 1989).
15. 13 A.D.3d 52 (1st Dept 2004).
16. 152 A.D.2d 802 (3rd Dept 1989) (presence of marital strife can be a recognized standard for an award of exclusive possession).
17. *See Dachille v. Dachille*, 43 Misc. 3d 241, 249 (Sup. Ct. Monroe County 2014).
18. NYLJ October 4, 2002 (Sup. Ct. Nassau County, LaMarca, J.).
19. *Id.* at 6.
20. *Id* at 6-7.
21. *Id* at 8.
22. NY Family Ct Act § 154-c (3).
23. 18 U.S.C. §2265.
24. Feder, *Women and Domestic Violence: An Interdisciplinary Approach*, Routledge, 1999.
25. Zora, *What Is Wrong with Mutual Orders of Protection?* Domestic Violence Rept 4(5), 67-8 (June/July 1999).
26. *T.D.F. v. T.F.*, 32 Misc. 3d 1205(A) (Sup. Ct. Nassau County 2011).
27. See *Gutherz v. Gutherz*, 43 Misc. 3d 1225(A) (Sup. Ct. Kings County 2014) (although some discord, absence of children, militated against granting the relief).
28. See New York State Office for Prevention of Domestic Violence website, http://www.opdv.ny.gov/whatisdv/about_dv/index.html (last visited on 2/1/16); United State Department of Justice, Office on Violence Against Women, http://www.justice.gov/ovw/domestic-violence (last visited on 2/1/16); see *Wheel of Power & Control, Domestic Abuse Intervention Project*, Duluth, Minn, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf (Last Visited 2/1/16).
29. Larkin & Records, *Adverse Childhood Experiences: Overview, Response Strategies and Integral Theory*, Journal of Integral Theory and Practice, Fall 2007, Vol. 2, No. 3, p. 1.
30. Cummings, et al., *Children and Violence: The Role of Children's Regulation in the Marital Aggression–Child Adjustment Link,* Clin. Child Fam. Psychol Rev. 2009 Mar; 12(1): 3–15.
31. Amato & Cheadle, *Parental Divorce, Marital Conflict and Children's Behavior Problems: A Comparison of Adopted and Biological Children*, Faculty Publications, University of Nebraska, Sociology Department, Faculty Publications. Paper 91; http://digitalcommons. unl.edu/sociologyfacpub/91 (2008).
32. Legislative History, Laws 1994, ch 222, §§ 1, 2, eff Jan 1, 1995.
33. DRL §236(5)-a(e)(1)(h); DRL §236(6)(e)(1)(g).
34. *Joanne M. v. Carlos M.*, NYLJ, April 28, 2006 (Sup. Ct. Suffolk County, Farnetti, J.); *Matter of Aleksander K. v. Elena K.*, 2 Misc. 3d 1005(A) (Fam. Ct. Richmond County 2004).
35. FCA §1012(f); *Matter of M.S. et al.*, 49 Misc. 3d 1214 (Fam. Ct. Kings County 2015) (an incident of domestic violence witnessed by a child is not enough to establish because harm or danger to the child's mental or emotional condition must be shown to establish neglect).
36. *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 370 (2004).
37. *Matter of Theresa CC.*, 178 A.D.2d 687, 689 (3rd Dept 1991); *Matter of Hannah L. (Dwayne L.)*, 113 A.D.3d 1137 (4th Dept 2014) (evidence shows that [the oldest girl] suffers from extreme distress, the source of which is her home environment, and neglect found).
38. 49 Misc. 3d 1214 (Fam. Ct. Kings County 2015).

39. *In re Lonell J.*, 242 A.D.2d 58 (1st Dept. 1998) (repeated vomiting, soiled bedding, poor health, eating problems); *In re Theresa "CC,"* 178 A.D.2d 687 (3rd Dept. 1991) (behavioral problems, anxiety, bed-wetting, rebellion, withdrawal); *but see Matter of Madison M. (Nathan M.)*, 123 A.D.3d 616 (1st Dept 2014) (police observations that the children were crying sufficient).

40. *Wissink v. Wissink*, 301 A.D.2d 36, 40 (2nd Dept 2002); *see also Matter of Jacobson v. Wilkinson*, 128 A.D.3d 1335 (2nd Dept 2015).

41. DRL §252.

42. *See Matter of Shanayane C.*, 2 Misc 3d 887 (Fam Ct. Kings County 2003) (reasonable inferences and common sense dictate that all three children are at risk for protracted impairment of emotional health, by virtue of witnessing the domestic violence); *see also Justin R. v. Niang*, 2010 US Dist LEXIS 143991 (S.D.N.Y. 2010) (expert testimony is not necessary to establish emotional harm to children as a result of domestic violence).

43. *Carmen v. Carmen*, 2014 Pa. Super. Unpub. LEXIS 2716 (Sup. Ct. Pa 2014) (court cited with approval a two-year post-separation nesting arrangement); *Grass v. Grass*, 2014 Ohio Misc. LEXIS 3154 (Ct. Com. Pleas Union Cty 2014) (court rejecting a plan for nesting mas unsupported by proof in the record); *Key v. Key*, 2012 Conn. Super. LEXIS 2347 (Sup. Ct. New London, Conn. 2012) (court, after a hearing, rejected plan for continued "nesting arrangement" in favor of permanent parenting plan, holding the nesting plan was "not working well"); *In re Marriage of Levinson*, 975 N.E.2d 270 (App. Ct. Ill. 2012) (appeals court upholds denial of exclusive use and possession under Illinois statute and approves interim "bird-nesting arrangement" in the absence of jeopardy to physical or mental well-being of parent or child as required by statute); *Wilson v. Wilson*, 2011 Mich. App. LEXIS 1118 (Ct. App. Mich 2011) (Until the marital home was sold, the court concluded that the children should remain in the home during that rotating schedule, with each parent moving in and out as scheduled); *Londergan v. Carrillo*, 2009 Mass. App. Unpub. LEXIS 662 (Ct. App. Mass 2009) (finding the bird-nesting schedule was in the best interests of the children); *In re Graham*, 2007 Cal. App. Unpub. LEXIS 3242 (Ct. App. Cal. 2007) (citing with apparent approval a nesting arrangement based on a week-in, week-out plan); *Fiddelman v. Redmon*, 656 A.2d 234 (App. Ct. Conn 1994) (affirming decision that trial court, in essence, awarded possession of the marital home to the children, giving each parent during his and her time of legal custody the right to occupy the house with the children exclusive of the other parent until the house is sold).

44. *See also* Flannery, *Is "Bird Nesting" in the Best Interest of Children?* 57 SMU L. Rev. 295 (2004) (claims bird nesting is inappropriate, ineffective and unnecessary because joint custody is "sufficient to promote positive developmental adjustment" and explains residential insecurity is only one factor affecting children and bird nesting is appropriate only when parents are not remarried, have no previous or subsequent children, can communicate about child's needs and where it is economically feasible, and concludes that such situations are rare and "bird nesting only tends to magnify the pre-separation conflict between parents").

45. 975 N.E.2d 270 (App. Ct. Ill. 2012).

46. *Id.* at 280.

47. *Id.* at 277-78.

48. 46 Misc. 3d 1221(A) (Sup. Ct. NY County 2015) (noting that prior court order required each of the parties spend alternating weeks in a continued nesting arrangement in the marital apartment).

49. *See Wissink v. Wissink*, 301 A.D.2d 36, 40 (discussing that other states have a rebuttable presumption that an abuser cannot be eligible for custody).

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Galetta v. Galetta: Methodology of Acknowledgment vs. Evidence of a Lengthy Decision with No Contributions to Substantive Law

By Elliott Scheinberg

Domestic Relations Law § 236B(B)(3) provides that an agreement made before or during the marriage must comply with three procedural formalities to be valid and enforceable in a matrimonial action. Such agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.

The Elements of a Proper Acknowledgment Derive from Three Statutes in the Real Property Law

Three provisions of the Real Property Law must be read together to discern the requisites of a proper acknowledgment:[1]

- RPL § 292:[2] the party signing the document must orally acknowledge to the notary public or other officer that he or she in fact signed the document;
- RPL § 303:[3] an acknowledgment may not be taken by a notary or other officer "unless he [or she] knows or has satisfactory evidence [ ] that the person making it is the person described in and who executed such instrument"; and
- RPL § 306: the notary or other officer must execute "a certificate…stating all the matters required to be done, known, or proved" and to endorse or attach that certificate to the document.
- The purpose of the certificate of acknowledgment is to establish that these requirements have been satisfied: (1) that the signer made the oral declaration compelled by RPL § 292; and (2) that the notary or other official either actually knew the identity of the signer or secured "satisfactory evidence" of identity ensuring that the signer was the person described in the document.

Matisoff v. Dobi, Galetta v. Galetta

Notwithstanding long and ample statutory and decisional authority, including that from the Court of Appeals, that allows rectification of late date or otherwise imperfect acknowledgments,[4] the Court of Appeals has, in the past two decades, harshly treated flawed acknowledgments in marital agreements, having twice denied enforceability of correctable acknowledgments. The first case was *Matisoff v. Dobi*.[5] The second, *Galetta v. Galetta*,[6] is more troubling and the subject of this article.

Galetta arose from exceptionally unique circumstances. Although the husband had gone to a notary to have the prenuptial agreement properly acknowledged, his right to enforce the agreement was upended by a typographical error on the acknowledgment page, which error had originated in the attorney's office, and by an unforgiving high court. The husband did not attempt a late date cure of the acknowledgment, but rather only sought to submit evidence that the notary had fully complied with the statutory requirements.

The Purpose of the Acknowledgment

"Generally, [an] acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person."[7] *In re Maul's Estate*,[8] cited in *Matisoff* in support of late-date acknowledgments, states: "The acknowledgment is an authentication or verification of the signature of the petitioner…. It establishes merely that the petition was 'duly signed.' It proves the identity of the person whose name appears on the petition, and that such person signed the petition."

The acknowledgment and record also secure title, prevent fraud in conveyancing, and furnish proof of due execution of conveyances.[9] Concern over fraud was also expressed in *People ex rel. Erie Railroad Co. v. Board of Railroad Commissioners*:[10] "The purpose of an acknowledgment is to require greater formality in the execution of an instrument, and by not only requiring greater formality, but by thus obtaining an official act of a disinterested person, prevent, so far as possible, the perpetration of fraud." Other courts have stated that the purpose of an acknowledgment is not to facilitate the recording of an instrument, but rather to establish an authentication of an act and the identity of the actor to prevent fraud.[11]

Interestingly, *Matisoff* underscored that "DRL § 236(B)(3) refers *only* to the recordation requirements for deeds,"[12] which suggests concern over the administrative process necessary to protect the sanctity of land titles, rather than concern over hasty transfers by grantors. The acknowl-

edgment process is identical for deeds, wills, and marital agreements.

The Facts

In *Galetta,* the plaintiff-wife moved for a summary judgment determination that the parties' prenuptial agreement was invalid due to the husband's defective acknowledgment. Each party had separately signed the agreement before a different notary public.

The acknowledgment associated with the husband's signature was defective because the key phrase "to me known and known to me"—validating that the notary confirmed the identity of the person executing the document to also be the individual described in the document—had been inadvertently omitted during the typing of the document by his attorney's office. The signatures and the certificates of acknowledgment were set forth on a single page, and "appear to have been typed at the same time."[13] Absent the omitted language, the certificate did not indicate either that the notary knew the husband or had ascertained through some form of proof that he was the person described in the agreement. The certificate of acknowledgment thus had not even complied with the statutory "substantial compliance" requirement,[14] because the certificate failed, as required by RPL § 306, to "stat[e] all the matters required to be done, known, or proved on the taking of such acknowledgment or proof."

The husband submitted an affidavit from his notary, a bank employee where he then did business, who averred that it was his custom and practice, prior to acknowledging a signature, to confirm the identity of the person named in the document. The notary's affidavit stated that he presumed that he had similarly followed that practice before acknowledging the husband's signature.[15] Supreme Court denied the wife's motion.

In a divided decision, 3-2, the Appellate Division affirmed.[16] The majority held that the deficiency could be cured after the fact and that the notary's affidavit raised a triable question of fact as to proper acknowledgment. The dissenters deemed the defect fatal, that the notary's affidavit was insufficient to raise a question of fact to the possibility of a cure.

Critical to *Galetta* was that the husband had taken all steps within *his* power to have the agreement properly acknowledged; the husband was not trying to cure any omissions attributable to either him or the notary but rather only sought to prove that the notary had, in fact, complied with the two-step process.

The Fourth Department noted that, while *Matisoff* specifically declined to resolve the issue "whether and under what circumstances the absence of acknowledgment can be cured,"[17] the Court of Appeals observed that courts have been divided on the issue.[18] The Appellate Division emphasized that defects in an acknowledgment required by EPTL 5-1.1-A(e)(2) [referencing EPTL 5-1.1(f)(2)], concerning waivers of the spousal right of election, which may be cured; the Appellate Division drew a parallel between the Domestic Relations Law and the EPTL underscoring that "the language of the EPTL contains the same 'restrictive acknowledgment language as the Domestic Relations Law discuss[ed] in the Matisoff case.'"[19]

In 2002, the Fourth Department, in *Filkins v. Filkins*,[20] reiterated the ruling, in *Arizin v. Covello*,[21] a 1998 New York County decision which upheld late date acknowledgments, thereby "implicitly endors[ing] the possibility that a defect in a technically improper acknowledgment c[an] be cured."[22] Critically, the agreement, in *Filkins,* had no written certificate of acknowledgment attached to the parties' prenuptial agreement for which reason the agreement could not be cured "by [first] having the agreement notarized and filed after commencement of [the] divorce action [] because the agreement was never reacknowledged."[23]

The Court of Appeals

The Court of Appeals reversed the majority opinion in the Fourth Department, declared the agreement invalid, and granted the wife's motion for summary judgment.[24] The Court, effectively: (1) denied the husband due process by disallowing the application of a settled principle of evidence; (2) incorrectly applied its own precedent authority regarding the standard to defeat a motion for summary judgment; and (3) conflated methodology and rules of evidence.

The Court, referencing *Matisoff*, emphasized that an unacknowledged agreement is invalid because "the statute recognizes no exception to the requirement that a nuptial agreement be executed in the same manner as a recorded deed and 'that the requisite formality explicitly specified in Domestic Relations Law § 236(B)(3) is essential.'"[25] The Court compared the situation in *Galetta* to those in *Matisoff*:

> In *Matisoff*, a case where the parties had not attempted to have their signatures acknowledged, defendant husband *similarly* contended that the lack of certificates of acknowledgment had been cured by testimony both the husband and wife presented at the matrimonial trial admitting that the signatures were authentic and that the postnuptial agreement had not been signed under fraud or duress.[26]

The word "similarly" is of concern because the acknowledgment in *Galetta*, unlike that in *Matisoff,* was contemporaneous with the execution of the agreement. Mr. Galetta did all he could have done and asked no more than to prove that the notary had complied with the required two-prong process.[27]

Furthermore, as in *Matisoff*, the Court, again, declined to "definitively resolve the question whether a cure is possible because, *similar* to what occurred in *Matisoff*, the proof submitted here was insufficient."

The "Bade Deliberate, Check Haste, and Foster Reflection" Concern

Citing *Matisoff, Galetta* noted two "important purposes"[28] "fulfilled" by an acknowledgment:

- It proves the identity of the person whose name appears on an instrument and authenticates the signature of such person.
- It also "necessarily imposes on the signer a measure of deliberation in the act of executing the document. Just as in the case of a deed where the law puts in the path of the grantor 'formalities to check haste and foster reflection and care… [h]ere, too, the formality of an acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care.'"

Matisoff quoted *Chamberlain v. Spargur*,[29] an 1881 decision, involving the sale of real property, where the Court of Appeals explained that the purpose of the formalities was to direct the grantor who was parting with his freehold to "check haste and foster reflection and care."[30]

> It required him not only to sign, but to seal, and then to acknowledge or procure an attestation, and finally to deliver. Every step of the way he is warned by the requirements of the law not to act hastily, or part with his freehold without deliberation.[31]

Additional objectives of the acknowledgment process are to secure title, prevent frauds in conveyancing, furnish proof of due execution of conveyances,[32] and prevent overreaching.[33]

It is, however, most seldom that a seller of a home, the "grantor," does not engage counsel. Logic dictates that, since "bade deliberate" is the driving fuel behind the acknowledgment process, if the mere formalities of a pro se appearance before a notary who is not an attorney and unqualified to offer legal guidance instills deliberation, reflection, and awe, per *Chamberlain* and *Matisoff*, representation by counsel must certainly qualify as exponential compliance with the "bade deliberate" admonition, irrespective of whether counsel is the ultimate notary.

Who Should Have Standing to Assert a Defective Acknowledgment?

The history of the "bade deliberate" concern invites the further question: who *should* have standing to raise the issue of a defective acknowledgment? The aforementioned authority unequivocally makes clear that the acknowledgment process was intended to shield the grantor against his own "haste" in the conveyance of land, not the haste of the other party; notably, the caselaw expresses no concern about the conveyee of the property. Because settled law prohibits a party from asserting the rights of another,[34] Mrs. Galetta and Ms. Matisoff should have been precluded from inherently arguing that their husbands had not deliberated.

Is the Acknowledgment in DRL § 236B(3) "Onerous and in Some Respects More Exacting Than the Burden Imposed When a Deed Is Signed"? The Implications of an Unacknowledged Agreement as Between the Parties

Galetta, referencing *Matisoff*, states: "the acknowledgment requirement imposed by DRL § 236(B)(3) is onerous and, in some respects, more exacting than the burden imposed when a deed is signed."[35] This is so, *Galetta* says, because "although an unacknowledged deed cannot be recorded (rendering it invalid against a subsequent good faith purchaser for value) it may still be enforceable between the parties to the document (i.e., the grantor and the purchaser). The same is not true for a nuptial agreement which is unenforceable in a matrimonial action, even when the parties acknowledge that the signatures are authentic and the agreement was not tainted by fraud or duress."

Caselaw, however, holds that a marital agreement that is defective due to the absence of an acknowledgment nevertheless remains viable and enforceable in other non-matrimonial litigation between the parties themselves.[36] Does *Galetta sotto voce* reverse these cases?

The Methodology of Acknowledgment by a Subscribing Witness; Methodology Is Unrelated to Proffering Evidence of Compliance

The Legislature provides that a deed or instrument of conveyance may also be alternatively acknowledged by a person who witnessed such execution and who simultaneously subscribed the conveyance as a witness[37]—even the notary who acknowledged the signature may be a subscribing witness.[38] Nevertheless, statute and its own precedent notwithstanding, the Court of Appeals infused an evidentiary condition into RPL § 291:[39] "Because this case involves an attempt to use the acknowledgment procedure, we focus on that methodology."[40]

The methodology of an acknowledgment is wholly distinct from any rule of evidence. It is illogical to condi-

tion the introduction of evidence upon methodology. Compliance with methodology creates a jural right, evidence does no more than to prove that the jural act of the methodology had been properly complied with. There is no foundation that supports the notion that statutory intent is violated when a party is given an opportunity to present evidence of proper compliance.[41]

Nor is methodology of acknowledgment statutorily resistant to either cure or the submission of evidence to establish compliance with the statute. Nothing in the statutory scheme even remotely suggests a contrary conclusion—the canons of statutory construction forbid the extension and expansion of words to include that which the Legislature could have said but did not.[42]

The converse is, however, true: the statutory scheme shows that the Legislature has always preserved the opportunity to prove a proper acknowledgment. The decisional authority cited in *Matisoff* referenced an estate matter where a defective acknowledgment was cured by way of the testimony of a subscribing who testified under compulsion per RPL §305, land conveyances.[43]

It is, therefore, unreasonable to posit that the Legislature would only allow the production of evidence of a proper acknowledgment based on the methodology of acknowledgment.

The Court Conceded That the Typographical Error Did Not Mean That the Notary Had Not Fully Discharged His Task

The *Galetta* Court's concession that the defective acknowledgment, attributable to the typographical error, did not signify that the notary had failed to "to engage in the formalities required when witnessing and acknowledging a signature"[44] defeats the notion that the aforementioned "important purposes" are somehow transgressed when a party is given an opportunity to establish evidence of proper compliance with a statute. To the contrary, the Court said, "it may well be that the prerequisites of an acknowledgment occurred but the certificate simply failed to reflect that fact."[45]

Nevertheless, the Court unreasonably sealed the evidentiary door to the submission of evidence at trial because of a perceived future concern that "parties would be permitted to conform the certificate to reflect that their agreement had been properly acknowledged years earlier."[46] This reasoning is sustained by a seemingly irrefutable *ab initio* presupposition of collusion, which is defensively impervious to any quantum evidence.

"Flexible" Standard Applied to Party Opposing Summary Judgment Motion

CPLR 3212(b) provides that summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." In *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*,[47] the Court of Appeals summarized the rule regarding summary judgment motions:

> [T]he moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact"…If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party " 'to establish the existence of material issues of fact which require a trial of the action'… Viewing the evidence "in the light most favorable to the non moving party," if the nonmoving party, nonetheless, fails to establish a material triable issue of fact, summary judgment for the movant is appropriate…

In the landmark decision on summary judgment motions, *Zuckerman v. City of New York*,[48] the Court of Appeals held that "to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' [CPLR 3212, subd. (b)]. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form."[49] The Court, however, underscored that, although the opponent to "a summary judgment motion must make his showing by producing evidentiary proof in admissible form…the rule with respect to defeating a motion for summary judgment is more flexible, for the opposing party, as contrasted with the movant."[50]

Prof. David Siegel[51] capsulized summary judgment thus:

> The grant means that the court, after going through the papers pro and con on the motion, has found that there is no substantial issue of fact in the case and therefore nothing to try…It does not deny the parties a trial; it merely ascertains that there is nothing to try. Rather than resolve issues, it decides whether issues exist. As is often said of the motion, issue finding rather than issue determination is its function[52]… If an issue is arguable, trial is needed and the case may not be disposed of summarily.[53] "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."[54]

Citing Siegel,[55] the Second Department, in *Daliendo v. Johnson*,[56] held: "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Under the circumstances, an issue existed once the court conceded that the error in the acknowledgment was attributable to no more than a typographical error and that such error did not mean that the notary had failed "to engage in the formalities required when witnessing and acknowledging a signature," which was further supported by the notary's averment. There was thus a sufficient and necessary basis to deny the wife's motion for summary judgment and dispatch the matter to the trial court for further determination.

The Court of Appeals Declined to Apply the Settled Rule of Evidence of Custom and Practice

"Custom and practice evidence draws its probative value from the repetition and *unvarying* uniformity of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time relevant to the litigation."[57] So said *Galetta*.

While acknowledging its own precedent authority that a party can rely on custom and practice to spackle evidentiary gaps "where the proof demonstrates a deliberate and repetitive practice by a person in complete control of the circumstances thereby creating a triable question of fact as to whether the practice was followed on the relevant occasion,"[58] and notwithstanding the notary's statement that he makes inquiry into a person's identity, the Court, nevertheless, rejected the notary's averments as "too conclusory to fall into this category."[59]

But *Galetta* observed that a notary might vary the method, "depending on the circumstances":

> any number of methods a notary might use to confirm the identity of a signer he or she did not already know, such as, requiring that the signer to display at least one current form of photo ID (a driver's license or passport). *It is, also, possible that a notary might not employ any regular strategy but vary his or her procedure for confirming identity depending on the circumstances*.[60]

But the Court of Appeals cited its precedent authority, *Rivera v. Anilesh*,[61] and stated:

> Custom and practice evidence draws its probative value from the repetition and *unvarying uniformity* of the procedure involved as it depends on the inference that a person who regularly follows a strict routine in relation to a particular repetitive practice is likely to have followed that same strict routine at a specific date or time…

However, in 1977, in *Halloran v. Virginia Chemicals Inc.*,[62] the Court of Appeals held:

> Evidence of habit or regular usage, if properly defined and therefore circumscribed, involves more than unpatterned occasional conduct, that is, conduct however frequent *yet likely to vary from time to time depending upon the surrounding circumstances*; it involves a repetitive pattern of conduct and therefore predictable and predictive conduct.

The Court is not only not keeping with its own precedence but is also not internally consistent in the same decision.

Nevertheless, with the same stroke of the pen, the Court conflictingly emphasized that the notary's affidavit did not "describe a specific protocol that the notary repeatedly and invariably used." This could have been fleshed out during trial.

Moreover, although having conceded that the notary "understandably had no recollection of an event that occurred more than a decade ago,"[63] for which reason the notary relied upon custom and practice evidence, the Court, nonetheless, simultaneously faulted his affidavit for "not stat[ing] that he actually recalled having acknowledged the husband's signature, nor that he knew the husband prior to acknowledging his signature. The notary averred only that he recognized his own signature on the certificate and corroborated the husband's statement concerning the circumstances under which he executed the document" at the bank.[64] These statements conflict: if the notary had remembered his having taken the acknowledgment, the husband would not have had to resort to the indirect route of custom and practice, especially if he may have resorted to different methods.

The Court, also, stated that "the affidavit by the notary public…merely paraphrased the requirement of the statute—he stated it was his practice to ask and confirm the identity of the signer—without detailing any specific procedure that he routinely followed to fulfill that requirement." The notary had averred that he was "confident" that he "ask[ed] and confirm[ed] that the person signing the document was the same person named in the document."[65] Averring compliance with a statute by reciting the full elements complied with constitutes an affirmative defense sufficient to defeat a motion for summary judgment. This is especially in light of the fact that the notary recognized his own signature, and the Court's concession of an apparent typographical error.

Denying Mr. Galetta the Opportunity to Prove the Notary's Compliance Under These Circumstances Denied Him Due Process

Under the unique circumstances of *Galetta*, summary determination, which barred the husband from doing no more than submitting evidence of the notary's full compliance with the statute, denied him due process[66] and vacated a valid agreement, a most unfortunate outcome in light of the caselaw that "the function of the officiating person in taking the acknowledgment of a party to an instrument and certifying thereto is ministerial/administrative and not judicial."[67]

CPLR 2309(c), Real Property Law § 299–a

In a line of cases arising from CPLR 2309(c), which states that an out-of-state oath or affirmation is valid in New York if it is "accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state"[68] (regarding certificates of conformity),[69] the First, Second, and Third Departments have routinely allowed *nunc pro tunc* cures as a matter of course.[70]

In *Indemnity Insurance Corp., Risk Retention Group v. A 1 Entertainment LLC*,[71] decided about one month after *Galetta*, the First Department, without acknowledging *Galetta*, upheld a late date cure of an acknowledgment in a 2309(c) matter: "Courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oath giver's authority can be secured later, and given *nunc pro tunc* effect if necessary."[72] Therein the plaintiff-insurer had submitted an affidavit of its vice president of claims, which had been sworn to before an out-of-state notary, but lacked the authenticating certificate required by CPLR §2309(c).

Indemnity Insurance Corp quoted *Matapos Tech. Ltd. v. Cia. Andina de Comercio Ltda*,[73] which included a late date cure of the "certification required by CPLR and Real Property Law § 299–a."[74] The affidavit, in *Matapos*, had also been sworn to before a notary in Maryland, but lacked the authenticating certificate required by CPLR 2309(c).

In *Smith v. Allstate Ins. Co.*,[75] the Second Department held that the "omission" of an "accompan[ying] certificate authenticating the authority of the notary who administered the oath (CPLR 2309[c]), [] was not a fatal defect."[76]

Conclusion

It was undisputed that Mr. Galetta had gone to a notary and had therefore complied with the "bade deliberate" admonition to the best of his ability; there was nothing more for him to have done. The process itself had to be completed by the notary. Under these unique circumstances, which were further complicated by Mr. Galetta's counsel's and the notary's collective failures to spot the typographical error in the acknowledgment, it was unreasonable not to have to permitted Mr. Galetta to call the notary as a witness during trial to confirm that the notary had properly carried out his charge that day. Mr. Galetta was penalized for the inadvertent omissions of his attorney and the notary.

The decision is draconian, unreasonably unforgiving, and adds nothing new to existing substantive law, essentially leaving matters as they were after *Matisoff*. In the aftermath of this lengthy decision, all that remains clear is the Court's continuing refusal to "definitively resolve the question whether a [late date] cure is possible,"[77] notwithstanding the fact that prior precedent authority holds otherwise.

The rigidity of and resistance to curing or even confirming the acknowledgment process survives as an anachronistic relic that has outlived its purpose. It is time to legislatively amend the harsh body of decisional authority and render it consonant with the legislative intent so as to specifically allow late date cures or, at least, late date evidence of compliance.

Endnotes

1. *Galetta v. Galetta*, 21 N.Y.3d 186 (2013).
2. § 292. By whom conveyance must be acknowledged or proved:

   > Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

3. § 303. Requisites of acknowledgments

   > An acknowledgment must not be taken by any officer unless he knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument.

4. The historical development and application of this point of law in other cases is fully developed in E. Scheinberg, Contract Doctrine and Marital Agreements in New York, Chapter 4, which is a blueprint of how to defend an imperfect acknowledgment from attack.
5. 90 N.Y.2d 127, 135 (1997), analyzed in detail in Chapter 4, E. Scheinberg, Contract Doctrine and Marital Agreements in New York.
6. 21 N.Y.3d 186 (2013).
7. *Matisoff*, 90 N.Y.2d at 133.
8. 176 Misc. 170 (Sur. Ct., Erie Co.), *aff'd*, 262 A.D. 941 (4th Dept 1941), *aff'd*, 287 N.Y. 694 (1942); *In re Kazuba*, 9 Misc. 3d 1116(A) (Sur. Ct., Nassau Co. 2005).
9. *Armstrong v. Combs*, 44 N.Y.S. 171 (3d Dept 1897).
10. 105 A.D. 273 (3d Dept 1905). *See Van Cortlandt v. Tozer*, 17 Wend. 338 (N.Y. Sup. Ct. 1837) (regarding a brief history of the practice on acknowledgments in New York).
11. *Hazell v. Bd. of Elections*, 224 A.D.2d 806 (3d Dept 1996); *Garguilio v. Garguilio*, 122 A.D.2d 105 (2d Dept 1986).
12. *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997); *cf., Hazell v. Bd. of Elections*, 224 A.D.2d 806 (3d Dept 1996) (The function of the acknowledgment is not to facilitate the recording of an instrument but rather to establish an authentication of an act and the identity

of the actor to prevent fraud, citing RPL § 298-303; *Garguilio v. Garguilio*, 122 A.D.2d 105 (2d Dept 1986); *see Bristol v. Buck*, 201 App. Div. 100, *aff'd*, 234 N.Y. 504 (1922).

13. *Galetta*, at 190.

14. See discussion of *Weinstein v. Weinstein*, 36 A.D.3d 797 (2d Dept 2007), Chapter 4, "Agreement Acknowledged Using Pre-1997 Amendment Language Held in Substantial Compliance with the Statute," E. Scheinberg, Contract Doctrine and Marital Agreements in New York.

15. *Galetta*, 21 N.Y.3d at 190.

16. *Galetta v. Galetta*, 96 A.D.3d 1565 (4th Dept 2012).

17. *Galetta*, 96 A.D.3d at 1567.

18. *Id.*

19. *Id.*

20. 303 A.D.2d 934 (4th Dept 2003).

21. 175 Misc. 2d 453, 457 (Sup Ct. NY Co., 1998).

22. *Galetta*, 96 AD3d at 1567.

23. *Galetta*, 96 AD3d at 1567.

24. 21 N.Y.3d 186 (2013).

25. *Galetta*, 21 N.Y.3d 186 at 191.

26. *Galetta*, 21 N.Y.3d 186 at 194-95.

27. "[T]hat an oral acknowledgment be made before an authorized officer and that a written certificate of acknowledgment (as evidence that the named declarant made the requisite declaration] be attached," *Matisoff*, at 137.

28. *Galetta*, 21 N.Y.3d at 191-92.

29. 86 N.Y. 603 (1881).

30. *Chamberlain*, at 607.

31. *See Fasano v. DiGiacomo*, 49 A.D.3d 683 (2nd Dept 2008), quoting Senate Introducer Mem. in Support, Bill Jacket, L. 1997, child. 139, at 8) (In enacting EPTL 7-1.17, the Legislature recognized that "[s]ome degree of formality helps the parties involved realize the serious nature of the instrument being executed and reduces substantially the potential for foul play").

32. *People ex rel. Erie Railroad Co. v. Board of Railroad Commissioners*, 105 A.D. 273 (3d Dept 1905); *Armstrong v. Combs*, 15 A.D. 246 (3rd Dept 1897); *Hazell v. Board of Elections*, 224 A.D.2d 806 (3rd Dept 1996); *Garguilio v. Garguilio*, 122 A.D.2d 105 (2nd Dept 1986).

33. *In re Nurse*, 35 N.Y.2d 381 (1974).

34. *Socy. of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991); *Cardo v. Bd. of Managers, Jefferson Vil. Condo 3*, 67 A.D.3d 945 (2nd Dept 2009); *Lyman Rice, Inc. v. Albion Mobile Homes, Inc.*, 89 A.D.3d 1488 (4th Dept 2011); *People v. Jenkins*, 290 A.D.2d 573 (3rd Dept 2002).

35. *Galetta*, 21 N.Y.3d at 192, quoting *Matisoff*, at 134-35.

36. *In re Estate of Sbarra*, 17 A.D.3d 975 (3rd Dept 2005) (The agreement was held acknowledged by way of judicial estoppel in a nonmatrimonial action even though the wife had not acknowledged it:

> Respondent asserts that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. We cannot agree. A separation agreement must be properly acknowledged only in order to be enforceable in a matrimonial action (Domestic Relations Law § 236[B][3]; *Matisoff v. Dobi*, 90 N.Y.2d 127, 135, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997)). Since respondent does not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement is enforceable in other types of actions despite the alleged insufficiency of the acknowledgment (*Rainbow v. Swisher*, 72 N.Y.2d 106, 109, 531 N.Y.S.2d 775, 527 N.E.2d 258 (1988); *Singer v. Singer*, 261 A.D.2d 531, 532, 690 N.Y.S.2d 621 (1999); *Geiser v. Geiser*, 115 A.D.2d 373, 374, 495 N.Y.S.2d 401 (1985)). Moreover, since respondent affirmatively alleged in the divorce action that the separation agreement was valid, she is judicially estopped from now challenging its validity. Having received the benefit of the separation agreement's provisions for division of marital property in the earlier divorce action, respondent may not now assume a contrary position here simply because her pecuniary interests have changed.).

Wetherby v. Wetherby, 50 A.D.3d 1226, n. 2 (3rd Dept 2008); *Moran v. Moran*, 77 AD3d 443 (1st Dept 2010) (Plaintiff properly commenced a plenary action to enforce the separation agreement, since no matrimonial action was then pending. The court did not improvidently exercise its discretion by denying defendant's request, made after it had rendered an oral decision on the motion, to transfer this case to the matrimonial part presiding over the divorce action that she commenced during the pendency of this motion. However, following remand, if the divorce action is still pending, this matter should be reassigned to the matrimonial part in the interests of judicial economy and efficiency.); *Geiser v. Geiser*, 115 A.D.2d 373 (1st Dept 1985) ("While a separation agreement which has not complied with the legislative mandate as to acknowledgment would not constitute the basis for a divorce action (Domestic Relations Law § 170[6]) 'as to the parties themselves, the instrument…may be effective without any acknowledgment…and may be the proper basis for other action.'"); *Singer v. Singer*, 261 A.D.2d 531 (2d Dept 1999); *Mojdeh M. v. Jamshid A.*, 36 Misc. 3d 1209(A) (Sup Ct. Kings Co. 2012).

37. RPL § 292; see RPL § 304:

> When the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and if his place of residence is in a city, the street and street number, if any thereof, and that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance.

See *In re Maul's Estate*, 176 Misc. 170, 172 (Sur. Court, Erie Co.), *aff'd*, 262 A.D. 941(4th Dept 1941), *aff'd*, 287 N.Y. 694 (1942); *In re Green*, 16 Misc. 3d 1113(A) (Sur. Court, Suffolk Co. 2007); RPL § 306.

38. *In re Estate of Menahem*, 16 Misc. 3d 1125(A) (Sur. Court, Kings Co. 2007), *aff'd*, 63 A.D.3d 839 (2nd Dept 2009), citing *In re Felicetti*, N.Y.L.J., Jan. 22, 1998, p. 31, choice of law. 3 (Sur. Court, Nassau Co.) (motion to dismiss based on invalidity of waiver of right of election as a result of improper acknowledgment denied because notary could supply necessary proof as subscribing witness); *Estate of Beckford*, 280 A.D.2d 472 (2nd Dept 2001) (deposition testimony of the attorney who notarized the spouse's signature on the prenuptial agreement created an issue of fact as to whether waiver of right of election is valid)).

39. RPL § 291:

> [A] conveyance of real property…on being duly acknowledged by the person executing the same, or proved as required by this chapter…may be recorded in the office of the clerk of the county where such real property is situated.

40. *Galetta*, 21 N.Y.3d at 191.

41. In *In re Saperstein*, 254 A.D.2d 88 (1st Dept 1998), the surviving husband brought an application for permission to file late notice of election against the estate of his deceased wife. The surrogate dismissed the application. The Appellate Division affirmed the

dismissal because proof of execution prepared after the wife's death by the attorney who had signed the husband's waiver of the right to elect as the subscribing witness was sufficient to establish the validity of the waiver:

> While there was no acknowledgment by the subscribing spouse during the decedent's lifetime—and any attempt to manufacture such an acknowledgment post mortem would be ineffective…the waiver is nonetheless susceptible of being "proved" in the manner required for the recording of a conveyance of real property, as set forth in Real Property Law § 304. The proof of execution prepared after the decedent's death by the attorney who signed the waiver as a subscribing witness is sufficient to comply with Real Property Law § 304…As the subject waiver was, accordingly, valid, petitioner's application to elect against his spouse's estate was properly dismissed.

42. N.Y. Statutes § 94 (Stat.), comment:

> The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction.
>
> Words will not be expanded so as to enlarge their meaning to something which the Legislature could easily have expressed but did not…
>
> A statute should not be extended by construction beyond its express terms or reasonable implications to its language.

43. RPL § 305, Compelling Witnesses to Testify:

> On the application of a grantee in a conveyance, his heir or personal representative, or a person claiming under either of them, verified by the oath of the applicant, stating that a witness to the conveyance, residing in the county where the application is made, refuses to appear and testify concerning its execution, and that such conveyance can not be proved without his testimony, any officer authorized to take, within the state, acknowledgment or proof of conveyance of real property may issue a subpoena, requiring such witness to attend and testify before him concerning the execution of the conveyance. A subpoena issued under this section shall be regulated by the civil practice law and rules.

44. *Galetta*, 21 N.Y.3d at 196-97.

45. *Galetta*, 21 N.Y.3d at 197.

46. *Id.*

47. 26 N.Y.3d 40 (2015).

48. 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979).

49. *Zuckerman*, at 562.

50. *Id.*

51. Siegel, NY Practice § 278 (5th ed).

52. Citing *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957); *Esteve v. Abad*, 271 A.D. 725, 727 (1st Dept. 1947).

53. Citing *Barrett v. Jacobs*, 255 N.Y. 520 (1931).

54. Citing *Daliendo v. Johnson*, 147 A.D.2d 312 (2nd Dept 1989); also *Barr v. Albany County*, 50 NY2d 247 (1980).

55. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B, CPLR C3212:1, at 424.

56. 147 A.D.2d 312 (2nd Dept 1989).

57. *Galetta*, 21 N.Y.3d at 197-198. Habit means a person's regular practice to act or behave in the same way in the same or similar circumstances. One's habit or custom of doing or not doing an act in question increases or diminishes the probability of the act being done (Farrell, Richardson on Evidence (11th ed, 4-601); Martin, Capra, Rossi, New York Evidence Handbook (2d ed.), § 4.8.3 citing 1McCormick § 195, at 686-687; Martin, § 4.8.3, at 206-07: "Although closely related to a character trait, a habit is more restrictively defined: the focus is on a narrows set of circumstances, and the conduct in those circumstances must be almost invariable."; Barker and Alexander, New York Practice Series, Evidence in New York State and Federal Courts, § 4.12: "Sometimes it is difficult in civil cases to distinguish between character evidence and evidence of habit."

Halloran v. Virginia Chemicals Inc., 41 NY2d 386 (1977):

> Evidence of habit or regular usage, if properly defined and therefore circumscribed, involves more than unpatterned occasional conduct, that is, conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances; it involves a repetitive pattern of conduct and therefore predictable and predictive conduct.
>
> * * *
>
> Because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again, evidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions.

Also see generally Barker and Alexander, § 4:41:

> Character, on the other hand, goes to a person's general personality traits such as peacefulness or violence, carefulness or carelessness, honesty or dishonesty, sobriety or drunkenness. When a person is characterized as having a habit of carelessness, the word "habit" is really being used to show the person's general trait.

58. *Galetta*, 21 N.Y.3d at 197; *Rivera v. Anilesh*, 8 NY3d 627 (2007):

> In *Halloran v. Virginia Chems.*, 41 N.Y.2d 386, 391, 393 N.Y.S.2d 341, 361 N.E.2d 991 (1977), we explained that evidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again.

See Barker and Alexander, New York Practice Series, Evidence in New York State and Federal Courts, § 4:42. New York—Business and professional habit.

59. *Galetta*, 21 N.Y.3d at 197.

60. *Galetta*, 21 N.Y.3d at 198:

> [F]or example, a notary who works in a bank, law firm or other similar institution might occasionally rely on another employee who knew the signer to vouch for the signer's identity.

61. 8 N.Y.3d 627, 634 (2007).

62. 41 N.Y.2d 386 (1977).

63. *Galetta*, 21 N.Y.3d at 198.

64. *Galetta*, 21 N.Y.3d at 197.

65. *Id.*

66. *People by Abrams v. Apple Health and Sports Clubs, Ltd., Inc.*, 80 N.Y.2d 803 (1992) (The Supreme Court has stated that due process

requires an opportunity to be heard "at a meaningful time and in a meaningful manner" (*Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62). The opportunity must be appropriate to the nature of the case (*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed. 865). The concept of due process is flexible, however, and calls for the procedural protection the particular situation demands (*Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18).); *Weeks Marine Inc. v. City of New York*, 291 A.D.2d 277, 737 N.Y.S.2d 92 (1st Dept 2002); *State v. Farnsworth*, 75 A.D.3d 14, 900 N.Y.S.2d 548 (4th Dept 2010).

67. *In re Warren's Estate*, 16 A.D.2d 505 (2nd Dept), aff'd, 12 N.Y.2d 854 (1962); *In re Howland's Will*, 284 A.D. 306 (4th Dept 1954) ("The taking of an acknowledgment is an administrative rather than a judicial act."); *Lynch v. Livingston*, 6 N.Y. 422 (1852); *Albany Co. Sav. Bank v. McCarty*, 149 N.Y. 71 (1896) ("It is settled in this state that the act of taking and certifying an acknowledgment is not judicial, but ministerial, in character; and this accords with the rule in most of the states."); *Armstrong v. Combs*, 44 N.Y.S. 171 (3d Dept 1897); Chapter IV, The Role and Purpose of an Acknowledgment, Contract Doctrine and Marital Agreements in New York.

68. CPLR 2309(c):

> An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

69. *Midfirst Bank v. Agho*, 121 A.D.3d 343 (2nd Dept 2014):

> A certificate of conformity speaks to the manner in which a foreign oath is taken, whereas a certificate of authentication speaks to the vested power of the individual to administer the oath… CPLR 2309(c) requires that even when a notary is the foreign acknowledging officer, there must still be a "certificate of conformity" to assure that the oath was administered in a manner consistent with either the laws of New York or of the foreign state. In other words, a certificate of conformity is required whenever an oath is acknowledged in writing outside of New York by a non–New York notary, and the document is proffered for use in New York litigation.

70. *Fredette v. Town of Southampton*, 95 A.D.3d 940 (2nd Dept 2012); *Fuller v. Nesbitt*, 116 A.D.3d 999 (2nd Dept 2014); *Mack Cali Realty, L.P. v. Everfoam Insulation Sys., Inc.*, 110 A.D.3d 680 (2nd Dept 2013); *Nandy v. Albany Med. Ctr. Hosp.*, 155 A.D.2d 833 (3rd Dept 1989) (Ideally, both pages of an out-of-State affidavit should be accompanied by a certificate authenticating the authority of the one who administered the oath. Rejecting the document, however, would only result in further delay because it can be given nunc pro tunc effect once properly acknowledged (*Raynor v. Raynor*, 279 App. Div. 671; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2309:3, at 267).); *Moccia v. Carrier Car Rental, Inc.*, 40 A.D.3d 504 (1st Dept 2007); *Sparaco v. Sparaco*, 309 AD2d 1029 (3rd Dept 2003).

71. 107 A.D.3d 562 (1st Dept 2013); *Hall v. Elrac, Inc.*, 79 AD3d 427 (1st Dept 2010) ("Plaintiff's claim that the affidavit was not in admissible form because it was signed outside New York State but notarized by a New York notary, without providing a certificate of conformity as required by CPLR 2309(c) and Real Property Law § 299–a, is unpreserved…In any event, as long as the oath is duly given, authentication of the oathgiver's authority can be secured later, and given nunc pro tunc effect if necessary.").

72. Indem. Ins. Corp., 107 A.D.3d at 563; *Midfirst Bank v. Agho*, 121 A.D.3d 343 (2nd Dept 2014) ("The Appellate Division, Second Department, has typically held, since 1951, that the absence of a certificate of conformity is not, in and of itself, a fatal defect. The defect is not fatal, as it may be corrected nunc pro tunc…or pursuant to CPLR 2001, which permits trial courts to disregard mistakes, omissions, defects, or irregularities at any time during an action where a substantial right of a party is not prejudiced.").

73. 68 A.D.3d 672 (1st Dept 2009).

74. RPL § 299-a, Acknowledgment to conform to law of New York or of place where taken; certificate of conformity (referring to RPL § 299, Acknowledgments and proofs without the state, but within the United States or any territory, possession, or dependency thereof].

75. 38 A.D.3d 522 (2nd Dept 2007); *also Gonzalez v. Perkan Concrete Corp.*, 110 A.D.3d 955 (2nd Dept 2013); *Matos v. Salem Truck Leasing*, 105 A.D.3d 916 (2nd Dept 2013); *U.S. Bank Nat. Ass'n v. Dellarmo*, 94 A.D.3d 746 (2nd Dept 2012); *Recovery of Judgment, LLC v. Warren*, 91 A.D.3d 656 (2nd Dept 2012); *Betz v. Daniel Conti, Inc.*, 69 A.D.3d 545 (2d Dept 2010).

76. Internally citing: "(CPLR 2001; *Sparaco v. Sparaco*, 309 A.D.2d 1029, 765 N.Y.S.2d 683; *Nandy v. Albany Med. Ctr. Hosp.*, 155 A.D.2d 833, 548 N.Y.S.2d 98; see also Siegel, Practice Commentaries, McKinney's Cons. Laws. of N.Y., Book 7B, CPLR C2309:3)."

CPLR 2001 addresses "mistakes, omissions, defects and irregularities":

> At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.

77. *Galetta*, at 197.

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The Inequity of *Keane v. Keane*: A Call for Corrective Action

By Robert W. Jones

Say what you will about *O'Brien v. O'Brien's*[1] concept of enhanced earnings capacity as a marital asset, the notion of value being ascribed to human capital in the form of academic or professional training is economically and financially accurate and has been recognized by economists for more than two centuries.[2] Nonetheless, the concept of an enhanced earnings capacity as a marital asset subject to equitable distribution has been abolished by New York's legislature.[3] In contrast, the bastardized concept of duplication promulgated by the Court of Appeals in *O'Brien*'s great-grandchild, *Keane v. Keane*,[4] continues to inflict inequity on divorcing business owners. With *O'Brien*'s legislative repeal, the matrimonial bar should turn its attention to rectifying the inequity of the *Keane* decision. This article examines the genesis and inconsistent application of *Keane's* duplication approach, demonstrates its financially flawed logic, and proposes strategic alternatives for practitioners in the absence of its repeal.

The Path to *Keane* (and Beyond)

O'Brien gave us the concept of an enhanced earnings capacity as a marital asset. The courts subsequently recognized that in situations where a professional license was being employed in a professional practice there was the potential for a "double recovery," or, more colloquially, "two bites of the apple," if both the value of the enhanced earnings capacity attributable to the professional license and the value of the practice were distributed.[5] In response to this concern, the concept of "merger" arose as a tool to prevent double recovery based on reasoning that the license no longer held any discernible value independent from that of the professional practice in which it was applied.[6]

In *McSparron v. McSparron,*[7] the Court of Appeals recited the contortions that were necessary to implement the merger doctrine, with modifications to the doctrine being made when the practice was "too new,"[8] had not "stabilized sufficiently,"[9] had been dissolved and relocated,[10] or when the license had merged and then "reemerged,"[11] before rejecting the concept of merger on the basis that it "injects an artificial and unnecessarily confusing element into an already difficult assessment process." Although the Court of Appeals excised the merger argument, it ratified the concern with double recoveries based on the valuation of professional licenses and professional practices, calling for a valuation approach to professional licenses that avoided duplicative awards.[12]

Grunfeld v. Grunfeld[13] presented the Court of Appeals with an opportunity to expound upon the duplicative award issue. That decision established the governing principle of the *McSparron* duplication prohibition, quite succinctly, stating "once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout."[14] The court also recognized the logical contrapositive that "there is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property."[15] This reasoning, as will be discussed below, is financially sound. However, we will see that the court sowed the seeds of future financial fallacy when it offered its justification for the anti-duplication rule, first contrasting the value of a professional license with "passive income-producing marital property," and then emphasizing that the license's value "is a form of human capital dependant upon the future labor of the licensee," and that "the asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived."[16] While the distinction between intangible assets, such as human capital, and tangible assets with physical manifestations, is valid, it will be shown that the implication that the value of the latter is any less dependent upon the future income generated is false.

By the time *Keane v. Keane* reached the Court of Appeals in 2006, the court was no stranger to financial fallacy, having found in *Holterman v. Holterman*[17] that requiring Dr. Holterman to pay child support based on income that had been awarded to his wife pursuant to equitable distribution of his medical license did not constitute duplication. After first seeking shelter for its decision under the Child Support Standards Act, the court then revealed its financial blindspot when it attempted to buttress its ruling with the explanation that the proposed methodology for preventing duplicative awards of child support was unworkable because the anti-duplication analysis would be dependent upon the approach, i.e., the timing of the payments, used to satisfy the distributive award.[18] In doing so, the court failed to distinguish between the income stream used to value the license and the payments being made to satisfy the distributive award.

In *Keane* the Court of Appeals once again miscomprehends the significance of the income stream used to value a marital asset. Here, the marital asset being valued is not a professional license, but rather a rental property. The court rejects Mr. Keane's argument that the anti-duplication precedents from *McSparron* and *Grunfeld* prohibit an award of spousal maintenance based on income derived from the rental property that was equitably distributed. Initially, the court seems to be heading down the right path, recognizing that any method for valuing an income-producing property would take into consideration the income-producing capacity of the property. But then, rather than concluding that the source of the rental income, i.e., the rental property, should be excluded from equitable distribution regardless of the

valuation method used, it reaches the opposite conclusion: regardless of the valuation method the value of the rental property will not be protected from duplication.[19] The court first offers the feeble justification that broadly enforcing the anti-duplication precedent would limit the court's discretion[20] in equitably distributing marital property and determining maintenance, before attempting to ground the decision in the distinctions between tangible versus intangible assets and between service businesses versus passive income producing assets.[21]

In addressing the potential duplication of income generated by Mr. Keane's rental property, the Court of Appeals characterizes its *Grunfeld* analysis as a differentiation between intangible assets, such as a professional license, and tangible income-producing property.[22] While the tangible-intangible distinction is easily inferred from the language in the *Grunfeld* decision, referring to an asset with no existence separate from the earnings from which it is derived, the explicit language in *Grunfeld* also contrasts the intangible professional license with a passive income-producing property.[23] So, in *Keane*, the Court of Appeals creates a disjunctive test for whether the court needs to be concerned with duplication: duplication must be avoided if the source of the income being considered for purposes of spousal maintenance is an intangible asset or a service business. The logical extension is that duplication is not a concern if the source of income is a tangible income-producing property and a non-service business.

As of January 25, 2016, there is the possibility that the newly released standards for the determination of post-divorce maintenance will effectively repeal *Keane's* flawed duplication analysis. Whereas the pre-2016 Domestic Relations Law directed the court, when setting spousal maintenance, to consider "the income and property of the respective parties including marital property distributed,"[24] the new legislation calls for the consideration of "the equitable distribution of marital property and the income or imputed income on the assets so distributed."[25] It can be argued that the inclusion of the word "equitable" as a modifier to "distribution" in the revised statute indicates that the legislature intended for income to be reallocated between the parties when property, such as income producing real estate, was equitably distributed, even if the titled spouse retained physical possession of the property (i.e., the property was not physically distributed). Nonetheless, until the court adopts such an interpretation or otherwise overturns *Keane*, we are left to manage its consequences.

Keane Applied

The *Keane* decision has been cited on the subject of duplication in at least ten published decisions,[26] with eight of the ten originating in the Second Department and the other two from the Third Department. Generally speaking, the Second Department has focused on the tangible versus intangible distinction, while the Third Department has focused on the service nature of the business. The Second Department has declared the following businesses as "tangible income-producing assets" and therefore exempt from *Grunfeld's* duplication protection: pharmacy businesses (*Sutaria*);[27] a consumer electronics company (*Shah*);[28] a plumbing and fire sprinkler contracting company (*Weintraub*);[29] a home improvement contracting business (*Groesbeck*);[30] a chemical distribution company (*Kerrigan*);[31] and a medical practice (*Griggs*).[32] The Second Department has also declared a medical practice (*Rodriguez*),[33] dental practice (*NK v. MK*),[34] and an accounting practice (*Greisman*)[35] to be service businesses. However, in April 2016 the Second Department issued an opinion in *Palydowycz v. Palydowycz*,[36] overturning *Rodriguez*, and declaring that medical practices and an ambulatory surgery center were not intangible assets. In the Third Department, an accounting practice (*Gifford*)[37] and an engineering firm (*Mula*)[38] have been declared service businesses and therefore covered by *Grunfeld's* anti-duplication rule.

An analysis of the classifications is very informative. First, it is apparent that the categories of "tangible income-producing assets" and "service" businesses are not mutually exclusive. Pharmacies, contracting companies, and medical practices are all service businesses[39] as well as, according to the Second Department, being tangible income-producing assets. In fact, highlighting the potential for overlap between the two categories, the Second Department had prior to its *Palydowycz* decision treated medical practices as a tangible income-producing asset in one instance (*Griggs*)[40] and as a service business in another (*Rodriguez*).[41] It is not difficult to foresee the challenge of classifying service businesses that own tangible assets, such as, for example, medical imaging centers. Imaging equipment can cost hundreds of thousands of dollars per unit, yet medical imaging centers fall under the North American Industrial Classification Code 621512,[42] which is a service business classification code.[43] The Second Department, in *Palydowycz*, appears to be discarding the "service" exclusion altogether, declaring that "a business is a tangible, income-producing asset." While it is conceivable that a classification rule could be devised that would consider the proportion of the asset's value being derived from tangible versus intangible assets, and therefore eliminate arbitrary classification results, it is important to recognize that such a rule would not address the underlying financial fallacy that duplication cannot occur when tangible assets are involved. An understanding of asset valuation makes this clear.

Asset Value

It is a fundamental principle of finance and accounting that the value of an asset equals the present value of the future benefits that the asset will confer upon its owners. These benefits may be tangible, such as dividend or interest payments on a financial security, or intangible, such as the pleasure one experiences from viewing artwork.[44] Because duplication can only occur when an asset produces income that can be used as a source of spousal maintenance payments, only income producing assets are of interest in this analysis.[45]

Consider the value of a rental property, as the Court did in *Keane*. What are the future benefits that this asset will confer upon its owner? The owner can receive rental income, less expenses, over the life of the rental property. *This income stream is the basis of value for the rental property.*[46] Stated more concisely, using mathematical notation, the present value of the rental property, $PV_{property} = \sum_{i=1}^{T} \frac{NRI_i}{(1+r)^i}$, where NRI_i is the net rental income received at time period i; T equals the life of the rental property; and r is the discount rate used to convert future net rental income to its present value.

The formula above accounts for the net rental income, but what about the value of the physical structure itself? In *Keane*, the Court points out that "the property will continue to exist, quite possibly in the husband's hands, long after the lease term has expired, as a marketable asset separate and distinguishable from the lease payments." The Court then contrasted the rental property with the mortgage note being held by the Keanes, writing "the mortgage payments, in contrast, were properly distributed as an asset and not counted for maintenance purposes because the payments themselves *were* the marital asset." The only logical inference to be drawn from this statement is that the Court believes that the real property has an existence, and therefore a component of value, distinct from the value derived from the net rental income that the rental property generates for its owners. However, the notion that the value of rental property is the value of the benefits, i.e., net income, it generates for its owner *plus* some additional value based on its physical existence after the end of a lease term, contradicts the very definition of property value as being based on *all* future benefits that accrue to the owner, not just those benefits accruing through the end of the existing lease period. In other words, the value of the property is based on its income over the life of the property, not just until the current lease ends.

What would be the value of the real property "long after the lease term has expired," as the Court considered in *Keane*? Referring back to the mathematical notation used above, let's assume that there was a lease with a term of *j* periods, so that the lease will end long before the end of the property's life at time *T*. In mathematical terms, *j*<<*T* (*j* is much less than *T*). We can therefore separate the value of the real property into two components: the first being the present value of future benefits received until the end of the lease at time period j; and the second being the present value of the future benefits received after the lease term has ended until the end of the property's life, i.e., from time period *j+1* to *T*. Mathematically, the value of the property through the end of the lease is $PV_{lease} = \sum_{i=1}^{j} \frac{NRI_i}{(1+r)^i}$, and the value post-lease is $PV_{post\text{-}lease} = \sum_{i=j+1}^{T} \frac{NRI_i}{(1+r)^i}$. Since, by construct, the overall value of the property, $PV_{property}$, is the sum of the lease value, PV_{lease}, and the post-lease value $PV_{post\text{-}lease}$, it is apparent that if the real property has been appraised as the present value of all future benefits, the equitable distribution of that property value would necessarily include any value ascribable to the post-lease value of the property.

Avoiding Duplication and Preserving Discretion

If the court wishes to preserve its discretion in fashioning awards of spousal maintenance and avoid the duplicative assessment of income, such an outcome can be achieved through a straightforward mathematical bifurcation of the property value: one component that recognizes the net income generated by the property over the duration of the maintenance award and another that establishes the present value of the income generated by the property after the award of maintenance has terminated. The corresponding mathematical expressions follow directly from the present value formulas set forth above for the lease and post-lease values.

Assume the court establishes maintenance for a period of *m* years, where *m* is not necessarily equal to the length of any existing lease term for the property. The non-duplicative value of the property would be the present value of the post-maintenance net rental income, $PV_{post\text{-}maintenance} = \sum_{i=m+1}^{T} \frac{NRI_i}{(1+r)^i}$.

If the property has been appraised at a value, say *V*, then $PV_{post\text{-}maintenance}$ can also be written as $PV_{post\text{-}maintenance} = V - \sum_{i=1}^{m} \frac{NRI_i}{(1+r)^i}$, reflecting the appraised value of the property less the present value of the net rental income realized during the period over which spousal maintenance is being paid.

Consider an example: a commercial property is expected to generate net rental income of $100,000 annually, beginning in year 1. Income is expected to increase by 2.5% per year and the appropriate discount rate for future income is 12.5% per year. Finally, assume spousal maintenance has been awarded for seven years. The combination of the 12.5% discount rate and 2.5% growth rate produces a capitalization rate of 10%, which, when applied to the annual rental income, results in a value of $1,000,000 for the commercial property.

If the court wishes to base spousal maintenance on the rental income for years 1 through 7, then the value of the property available for a *non-duplicative* distributive award would be $1,000,000 - $\sum_{i=1}^{7} \frac{(100{,}000)\ 1.025^{i-1}}{(1.125)^i}$ = $521,194. A distributive award based on this amount would be based solely on rental income earned after maintenance had ended, precluding the possibility of a duplicative award, but still preserving the court's flexibility to award maintenance and distribute property. This example was based on commercial property, but a similar computation could be performed for business interests as well.

Strategic Alternatives

When representing a client with a business interest, the first line of defense against a duplicative award is to have your client's business interest identified as a service business. Line 2a on Schedule K of Tax Form 1120 calls for the

business activity code number of the filing business.[47] The activity codes are based on the North American Industrial Classification System (NAICS).[48] The Bureau of Labor Statistics classifies industries into two sectors: the goods-producing sector and the service-providing sector.[49] Two-digit Industry codes 11 through 33 cover the goods-producing sector and codes 42 to 81 cover the service-providing sectors (excluding public administration, which is code 92).[50] Recognition of the business as a service business by the court could preclude a duplicative award.

In the event that the court concludes that the business is not a service business, or instead focuses on the tangible nature of the business, an argument can still be made that the new post-maintenance statute requires the consideration of the income implicitly reassigned by the equitable distribution of the marital asset. An analysis that distinguishes between the income being considered for maintenance and the value of the remaining income after the maintenance period ends, such as presented in the example above, would provide the court with the information necessary to render an equitable and non-duplicative distribution of the marital asset.

Optimally, the Court of Appeals will revisit the flaws in *Keane* and rectify its financial error. Absent that, it is up to practitioners to craft approaches that mitigate its harm. With an understanding of the financial theory that refutes *Keane* and an awareness of the recent revisions to the post-divorce maintenance laws, practitioners will be in a better position to guide the court to a more equitable distribution of income producing marital assets.

Endnotes

1. 66 N.Y.2d 576 (1985).
2. A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Volume 1, Oxford University Press, 1776) reprinted in 1904) p. 308.
3. Domestic Relations Law § 236 [B] [5] [d] [7] post January 25, 2016.
4. *Keane v. Keane,* 8 N.Y.3d 115 (2006).
5. *Marcus v. Marcus,* 137 A.D.2d 131 (2nd Dept 1988); *Vanasco v. Vanasco*, 132 Misc. 2d 227, 229 (Sup Ct NY County 1986).
6. *Vanasco, Id.*
7. *McSparron v. McSparron,* 87 N.Y.2d 275 (1995).
8. *Shoenfeld v. Shoenfeld*, 168 A.D.2d 674 (2nd Dept 1990).
9. *Phelps v. Phelps*, 199 A.D.2d 608 (3rd Dept 1993).
10. *Aborn v. Aborn,* 196 A.D.2d 561 (2nd Dept 1993).
11. *Behrens v. Behrens*, 143 A.D.2d 617 (2nd Dept 1988).
12. *McSparron,* at 285.
13. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Holterman v. Holterman*, 3 N.Y.3d 1 (2004).
18. *Id.* at 12.
19. *Keane* at 121.
20. Any adherence to precedent will limit the court's discretion.
21. *Keane* at 121.
22. *Keane* at 122.
23. *Grunfeld* at 704.
24. Domestic Relations Law § 236 [B][6][a][1] prior to January 25, 2016.
25. Domestic Relations Law § 236 [B][6][e][1][m] post January 25, 2016.
26. *Mula v. Mula*, 131 A.D.3d 1296 (3rd Dept 2015); *Sutaria v. Sutaria*, 123 A.D.3d 909, 2nd Dept 2014); *Shah v. Shah*, 100 A.D.3d 734 (2nd Dept 2012); *Weintraub v. Weintraub*, 79 A.D.3d 856 (2nd Dept 2010); *Groesbeck v. Groesbeck*, 51 A.D.3d 722 (2nd Dept 2008); *Griggs v. Griggs*, 44 A.D.3d 710 (2nd Dep't 2007); *Gifford v. Gifford*, 132 A.D.3d 1123 (3rd Dept 2015); *Greisman v. Greisman*, 98 A.D.3d 1079 (2nd Dept 2012); *NK v. MK*, 17 Misc. 3d 1123(A) (Sup Ct Kings County 2007); *Kerrigan v. Kerrigan*, 71 A.D.3d 737 (2nd Dept 2010).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Author's personal email exchange with counsel.
32. *Id.*
33. *Rodriguez v. Rodriguez*, 70 A.D.3d 799 (2nd Dept 2010).
34. At endnote 26.
35. *Id.*
36. 2016 NY Slip Op. 02793, (2nd Dept 2016).
37. *Id.*
38. *Id.*
39. The Bureau of Labor Statistics classifies industries into two sectors: the goods-producing sector and the service-providing sector. Bureau of Labor Statistics, Industries at a Glance, Industries by Supersector and NAICS Code, http://www.bls.gov/iag/tgs/iag_index_naics.htm#service-providing_industries. Two-digit Industry codes 11 through 33 cover the goods-producing sector and codes 42 to 81 cover the service-providing sectors (excluding public administration, which is code 92).
40. At endnote 26.
41. At endnote 33.
42. United States Census Bureau, Industry Statistics Portal, 2012 NAICS: 621512 – Diagnostic Imaging Centers, https://www.census.gov/econ/isp/sampler.php?naicscode=621512&naicslevel=6.
43. Bureau of Labor Statistics, Industries at a Glance, Industries by Supersector and NAICS Code, http://www.bls.gov/iag/tgs/iag_index_naics.htm#service-providing_industries.
44. *See* S. Smart and W. Megginson, *Introduction to Corporate Finance*, 2nd Edition, 2009 South-Western, p. 152; *Conceptual Framework for Financial Reporting 2010*, International Accounting Standards Board, September 2010, Section 4.55(d), p. 37.
45. If there is no income generated by the asset then no spousal maintenance payments can be extracted from the non-existent earnings, unless the court decides to impute income.
46. Internal Revenue Manual, Section 4.48.6.2.4, para. 6. https://www.irs.gov/irm/part4/irm_04-048-006.html.
47. For S-Corporations, line 2 of Schedule B shows the same business activity code on Form 1120S. Box C at the top of the first page on Form 1065 contains this information for partnerships.
48. Instructions for Form 1120 – Additional Material. https://www.irs.gov/instructions/i1120/ar03.html.
49. Bureau of Labor Statistics, Industries at a Glance, Industries by Supersector and NAICS Code.
50. See http://www.bls.gov/iag/tgs/iag_index_naics.htm#service-providing_industries.

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The Valuation of Start-Up or Early Stage Companies: Marital Dissolution Considerations

By David Rudman

The valuation of start-up companies often involves unique complexities that must be considered by an expert when undertaking such an engagement. In the context of a divorce proceeding, there are two valuation issues that must be addressed:

1) What is the value of the company in its entirety?
2) What is the value of an interest in the Company that is subject to equitable distribution?

Generally, start-up companies are often innovators in their field, developing new technologies, therapies, processes or products. While some start-up companies look to replicate well-known existing business strategies, many start-ups explore new business models in an attempt to disrupt existing markets.

In most cases, such ventures are accompanied by a high degree of risk and speculation, with a significant need for capital as entrepreneurs look to build their first viable product and reach commercialization. By their very nature, such companies usually incur significant losses in early years of operation and survival rates tend to be low.

Standard of Value

In the context of equitable distribution for marital dissolution cases in New York, experts can take divergent views regarding the valuation of such companies. At the conservative extreme, a divorcing party (and their expert) might argue that value should not exceed the actual costs and expenses incurred by a company to date. Alternatively, one might argue that value is significant and should be based on the company's expected future cash flows, which are often difficult to predict and highly speculative. So which argument holds ground?

While the valuation of start-up companies sounds complex, such companies are regularly valued for many purposes including transactions between shareholders, capital raises, public offerings, tax compliance and financial reporting. As with any business or asset, the fundamentals of valuation still apply, beginning with the selection of the appropriate standard of value.

For New York marital dissolution cases, the appropriate standard of value is "Fair Market Value," which is most frequently defined in reference to IRS Revenue Ruling 59-60 as "the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts."

The fair market value standard requires the expert to assess "what is known or knowable" about the company to knowledgeable parties as of the valuation date. In New York marital dissolution cases, the date of filing generally sets the valuation date. We are asking ourselves, "what can one reasonably expect as of this point in time?" The value of any business today is a forward-looking concept. Stated differently, the central concept of value for any enterprise is that the value of that business today is equal to the present value of that business' expected future cash flows into perpetuity or over its expected life.

For many stable companies, it is common to rely on past performance as an indicator of what a company's performance might look like in the future. However, for start-up companies, relying on the past is less meaningful, as such periods are often characterized by little or no revenue and economic losses. Start-up companies tend to fall within a spectrum of progress, ranging from the "idea stage" to a "commercialization stage." The mere fact that a company has no revenue or is losing money does not, however, mean that there is no value associated with a company. To assess value, we must take an objective look at where the company stands with regard to the implementation of its business plan. Examples of the questions that we must ask are as follows:

1) How far past the "idea" stage has the company progressed? How much progress has been made toward the company's research and development activities?
2) How much capital is required by the company to continue its operations for the next 2 to 5 years?
3) Has the company been successful in raising capital to support its ongoing activities?
4) In the case of pharmaceutical or biotechnology companies, how much progress has been made toward obtaining FDA approvals?
5) What is management's timeline toward achieving commercialization or exploring potential exit opportunities?

As shown by the questions listed above, for start-up companies the reliance on management's projections and probabilities of future outcomes is very important.

Case Study

Consider a hypothetical pharmaceutical company, Pharma-X, which is in the process of developing a vaccine for breast cancer. The Company believes it has a highly promising vaccine and has already completed preclinical

animal testing and Phase 1 human testing. Pharma-X has begun clinical human trials and is now working on Phase 2 of its FDA studies. Table 1 below summarizes all the steps that a pharmaceutical company must go through to get a drug approved.

Table 1 - FDA Review Steps Simplified

1. Preclinical (animal) testing.
2. An investigational new drug application (IND) outlines what the sponsor of a new drug proposes for human testing in clinical trials.
3. Phase 1 studies (typically involve 20 to 80 people).
4. Phase 2 studies (typically involve a few dozen to about 300 people).
5. Phase 3 studies (typically involve several hundred to about 3,000 people).
6. The pre-NDA period, just before a new drug application (NDA) is submitted. A common time for the FDA and drug sponsors to meet.
7. Submission of an NDA is the formal step asking the FDA to consider a drug for marketing approval.
8. After an NDA is received, the FDA has 60 days to decide whether to file it so it can be reviewed.
9. If the FDA files the NDA, an FDA review team is assigned to evaluate the sponsor's research on the drug's safety and effectiveness.
10. The FDA reviews information that goes on a drug's professional labeling (information on how to use the drug).
11. The FDA inspects the facilities where the drug will be manufactured as part of the approval process.
12. FDA reviewers will approve the application or issue a complete response letter.

Source: www.fda.gov

As evidenced by the table above, Pharma-X faces a long road to the approval of its vaccine. Currently, the Company has not earned any significant revenue and operates at a net loss. Like many start-up companies, Pharma-X has raised capital from a small number of outside investors. One investor contributed funds in exchange for convertible preferred stock with an annual cumulative dividend and a liquidation preference, and two others made loans to the Company in the form of convertible debt. The Company's founder, Bill Smith M.D., holds common stock in the Company. Regardless of form, the outside capital that has been raised has enabled the company to continue its research and development activities and pursue the FDA review and approval process.

Dr. Smith is now getting divorced and his interest in Pharma-X is subject to valuation and equitable distribution. Mrs. Smith knows how hard Dr. Smith has been working and believes there is significant value to the Company and Dr. Smith's interest. Is she right? Possibly, but the answer is not known without further investigation. Following the advice of counsel, Mrs. Smith retains a well-known valuation firm to value Pharma-X and Dr. Smith's interest.

It is at this point that one must assess the facts of the situation in order to determine if value has been created. Clearly, the Company has spent a significant amount of money pursuing its research and development activities and the FDA approval process. The Company has also been able to raise capital from outside investors. Through discussions with management, it is learned that the Company also has developed a series of projections, showing losses for three more years prior to achieving commercialization and eventually becoming profitable.

From the perspective of Pharma-X, clearly there is some value associated with its in-process research and development and related intellectual property. Mrs. Smith believes the same. At this point, the first question that must be asked is, "Is there value that exceeds the sunk costs incurred to date?" In other words, is there value that would exceed the valued arrived at via an asset or cost approach to valuation?

Valuation Methodology

In order to answer this question, we look to the discounted cash flow method ("DCF") of valuation, the most common valuation method applied to the valuation of start-up companies. The discounted cash flow method is a valuation method that relies on a projection (or series of projections) of future cash flows for the Company.

The divorce courts are very familiar with the capitalized earnings and excess earnings methods of valuation. These methods generally use past performance as a proxy for the future, and are applied when a company has a stable level of earnings or operating cash flow. Conceptually, the capitalized earnings method is a single period model that captures the present value of all the expected future annual income or cash flow benefits of the business into perpetuity. The DCF method also captures the present value of all the expected future annual cash flows of the business into perpetuity. The main difference between these two methods is that the DCF method allows for variation in the projected cash flows during a multi-period projection window, whereas the capitalized earnings method assumes the projected cash flow will remain stable subject to a constant rate of growth.

The single period capitalized earnings method is best applied to stable profitable companies. In contrast, start-up companies rarely have stable earnings. Rather, most start-up companies experience significant losses for a reasonable period of time before reaching profitability and eventually achieving stability. As a result of variations in profits and cash flows during the early years, the DCF is the most commonly accepted valuation method by the valuation and investment community for the purpose of valuing start-up companies. In order to apply this method, it is necessary to obtain or develop cash flow projections.

Cash flow projections are typically available for start-up companies in business plans prepared by management. Such plans are often used by the Company to raise capital. As part of the DCF method, the risk-adjusted present value of these projections can be determined by applying appropriate rates of return that capture the risk inherent in the Company's operations and projections. Obviously, the process of creating projections requires management to make educated guesses as to the future performance of a Company. Given the inherent uncertain-

ties in this process, it is also possible to use a series of projections in lieu of a single projection, (i.e., a high case, base case and low case projections). When a series of projections is used, probabilities of success can be assigned to each case in order to achieve a weighted blend of the range of possible outcomes.

Valuation of the Company *vis-a-vis* the Individual's Interest

Continuing along with our case study, to date Pharma-X has burned through half of its capital as it continues to operate and work through the FDA approval process. Management believes that it will eventually be granted FDA approval, but the ultimate success of the Company is unclear, as there are other competing vaccines in development by other unrelated companies. As with any group of competing products, often the first to market is most visible and has the greatest probability of success.

Pharma-X management has provided a series of projections with assigned probabilities based on its perception of likely outcomes. Next, the Company was valued using a DCF methodology that incorporates the projections and respective probabilities to arrive at a weighted indication of value for the Company.

Under the fair market value standard, we are tasked with determining the value of Dr. Smith's interest in the Company. Like many start-up companies, Pharma-X has the complex capital structure, with Dr. Smith holding common stock. So what is the value of Dr. Smith's interest in the Company?

As discussed previously, the Company's capital structure is comprised of convertible debt, convertible preferred stock, and common stock. Typically, when valuing companies with complex capital structures, value is first allocated to holders of convertible debt, followed by preferred shareholders who will receive their preferred dividends and then their stated liquidation preference. Thereafter, if any unallocated value remains, the common shareholders will receive their share of the value of the Company. As a result, the value of the common stock is dependent on the rights of, and value allocated to the other share classes and convertible debt. The common stock might have value, or it is entirely possible that the common shares are worthless because all of the value is embedded in the convertible debt and preferred stock.

After valuing Pharma-X in its entirety, if the determined value is significant enough, then one can assume the holders of convertible debt and convertible preferred stock would be incentivized to convert their shares into common stock because the value of the common stock would be greater than their unconverted holdings. Under this fact pattern, the value of Dr. Smith's (undiscounted) interest would be equal to his pro-rata share of the fully diluted common stock of Pharma-X, multiplied by the value of the Company in its entirety.[1]

Alternatively, if the value of Pharma-X is not significant enough, we can assume that rational investors holding convertible debt or convertible preferred stock would choose not to convert their debt or preferred shares. In this situation, it is necessary to allocate the value of the Pharma-X to the various capital classes by taking into account priority rights and liquidation preferences of the convertible debt and preferred stock.

Conclusions

1. The mere fact that a start-up company is pre-revenue or not profitable is not a sufficient basis to conclude that the company has no value beyond the sunk costs incurred to date. The valuation of a company is based on expected future cash flows of a company, and as a result, the company's projections are of critical importance.

2. From a valuation perspective, the most appropriate and commonly used method for the valuation of startup companies is the discounted cash flow method. This method is commonly applied and can be modified to incorporate multiple case scenarios and assigned probabilities.

3. Start-up businesses often have significant valuations, which are evidenced by capital raises and outside investments. While a startup company may have significant value in the aggregate, the allocation of positive value to an interest held by a common stockholder is not a certainty. Outside investments/investors are often protected via preferential rights and/or liquidation preferences over the rights of common stockholders. Therefore, one cannot assume that just because a company has raised capital, and investors have made investments in a company, that the interest held by a spouse for equitable distribution purposes will have value. Accordingly, it is important to have a formal valuation prepared so that the extent of value assigned to a spouse's shares in a company can be determined.

Endnote

1. For purposes of this example, valuation discounts have been ignored. It is, however, important to note that under the fair market value standard applied in New York marital dissolution matters, case law supports the application of valuation discounts for lack of control and lack of marketability when valuing non-controlling interests in a company.

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Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

New Maintenance Legislation Signed Into Law

On June 25, 2015, the New York State Legislature passed the Office of Court Administration's Maintenance Guidelines Legislation. Governor Cuomo signed the bill into law on Friday, September 25, 2015. The temporary maintenance provisions became effective 30 days thereafter (i.e., Sunday, October 25, 2015, but effective Monday, October 26, 2015), and the permanent maintenance provisions and balance of the law (i.e., eradication of valuing degrees and licenses) became effective 120 days after signing (i.e., Saturday, January 23, 2016, but effective Monday, January 25, 2016). The legislation amended Domestic Relations Law § 236 and the Family Court Act § 412.

The new legislation changes the way temporary maintenance is calculated, provides a formula for post-divorce maintenance, different calculations for households with and without children, as well as advisory guidelines as to the duration of support based on the length of the marriage. It initially capped income at $175,000 with bi-annual CPI increases (reduced from the current cap of $543,000), although the court has discretion to go above the cap.

Effective March 1, 2016, the income cap rose from $175,000 to $178,000.

The court will no longer distribute the value of the enhanced earnings of a license, degree, or celebrity goodwill, but shall consider the direct or indirect contributions of one spouse to the enhanced earning capacity of the other spouse for purposes of equitable distribution. Actual or partial retirement is now a grounds for modification. Temporary and post-divorce maintenance shall be calculated prior to child support, because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

Social Services Law § 111-I amended, effective October 14, 2015: Calculating Child Support Orders

Beginning in 2016, Social Services Law § 111-I was amended to provide that the Combined Parental Income Amount (CPIA), as set forth in the Child Support Standards Chart for the purpose of calculating child support, will be updated on March 1st every two years, rather than January 31st. The purpose of this amendment is to coordinate the effective date of the updated CPIA with the effective date of annual updates to the Poverty Level and Self-Support Reserve. This modification will promote increased accuracy and consistency in the calculation of support obligations.

The CPIA has increased from $141,000 to $143,000 effective March 1, 2016.

Family Court Act § 413(1)(b)(5)(iii) and Domestic Relations Law § 240(1-b)(b)(5)(iii) amended, effective January 24, 2016: Spousal Maintenance and Child Support

The Family Court Act § 413(1) and Domestic Relations Law § 240(1-b) were amended to add a new subclause (I) to each, which requires that spousal maintenance actually paid to a spouse, who is a party to the action, must be added to the recipient spouse's income, and that the order contains an automatic adjustment in the amount of child support payable upon the termination of the maintenance award. This addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return, and would not simply be an estimate of future payments. This relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance.

Family Court Act § 413(1)(b)(5)(vii)(c) and Domestic Relations Law § 240(1-b)(5)(vii)(c) amended, effective January 24, 2016: Termination of Spousal Maintenance and Modification of Child Support

Subsection c of the Family Court Act § 413(1) and Domestic Relations Law § 240(1-b) were amended to clarify that the specific adjustment in the amount of child support payable upon the termination of maintenance is without prejudice to either party's right to seek a modification of the child support award.

Family Court Act Article 5-B repealed and amended, effective January 1, 2016: Uniform Interstate Family Support Act (UIFSA)

Family Court Act Article 5-B was repealed and amended, and the 2008 Uniform Interstate Family Support Act (UIFSA) will replace the 1996 version of UIFSA. In summary, the 2008 UIFSA further clarifies issues relating to the duration of support orders, choice of law considerations, order determinations, telephonic testimony, and redirection of support payments.

Domestic Relations Law § 237(a) amended, effective November 20, 2015: Counsel Fee Application for *Pro Se* Litigants

Domestic Relations Law § 237(a) was amended to include that, when making an application for counsel fees

and expenses, an unrepresented litigant, unlike a represented litigant, is not required to file an affidavit detailing fee arrangements, so long as that litigant submitted an affidavit of their inability to afford counsel with a statement of net worth, W-2 statements, and income tax returns annexed to the application.

Civil Practice Law and Rules § 5231 amended, effective December 11, 2015: Service of an Income Execution

CPLR 5231 was amended to clarify that in the event of a default by the judgment debtor after s/he was served with a notice of income execution, service of an income execution upon the person or entity from whom the judgment debtor is receiving or will receive money *must* be within a county that the person or entity operates a business.

Civil Practice Law and Rules 3212(b) amended, effective December 11, 2015: Motion for Summary Judgment

CPLR 3212(b) was amended to include that, where an expert affidavit is submitted in support of, or in opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit on the basis that an expert exchange was not furnished prior to the submission of the affidavit.

Court of Appeals Roundup

Civil contempt

El-Dehdan v. El-Dehdan, 26 NY3d 19 (2015)

The trial court found the husband in civil contempt for failing to deposit the proceeds of sale of various properties in the wife's escrow account as required by a court order. The Appellate Division affirmed. The Court of Appeals affirmed. The husband argued that a finding of civil contempt requires a "wilful violation of the underlying order" and that his invocation of his Fifth Amendment right against self-incrimination at the contempt hearing could not result in the trial court drawing a negative inference against him. The Court of Appeals, noting that a finding of wilfulness is not a required element of civil contempt, found that the wife met her burden of establishing that a lawful order of the court was in effect; the husband disobeyed the order; the husband had knowledge of the court's order, and the wife was prejudiced by the husband's non-compliance.

Abuse and neglect

Matter of Trenasia J., 25 NY3d 1001 (2015)

Affirming the decision of the Appellate Division, the Court of Appeals held that an 11-year-old child's uncle constituted a "person legally responsible" for the child as defined by the Family Court Act and a finding of derivative neglect was supported by the evidence. According to the evidence presented during a child protective proceeding, the uncle allegedly entered the bathroom, while the subject child was in the shower, and attempted to have sexual intercourse with her. In determining whether the uncle was a person legally responsible for the child, the Court of Appeals considered "the frequency and nature of the contact," "the duration of the [uncle's] contact with the child," and "the nature and extent of the control exercised by the [uncle] over the child's environment."

The responding police officer testified that the child was staying at the uncle's home for a week prior to the incident in question and the child's mother testified that the child visited the uncle's home approximately nine times, four of those visits being overnight, in the year preceding the incident. On these bases, the Family Court correctly found that the contacts between the uncle and the child were significant. With respect to the extent of the uncle's control over the child's environment, the evidence demonstrated that the uncle was the only adult present at the time of the incident and that he was expected to care for the child in the mother's absence.

Other Cases of Interest

Grounds/Residency Requirement

No-fault divorce ground does not constitute a "cause" sufficient to satisfy the duration residency requirement in DRL § 230(3)

Stancil v. Stancil, 47 Misc. 3d 873 (Sup. Ct. New York County 2015)

The parties were married in Norfolk, Virginia. The marital residence was located in South Carolina, the wife was domiciled in South Carolina, and the husband was a resident of Virginia. The wife moved to New York for a graduate school internship 14 months prior to filing for divorce, using New York's no-fault divorce ground.

In a matter of first impression, the wife argued that she met the residency requirements of DRL § 230(3), which provides that an action for divorce may be maintained when "the cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action." She claimed that the parties' marriage had broken down for a period of six months or more and the breakdown (the "cause") occurred in New York. However, the court held that the irretrievable breakdown of marriage did not amount to "cause" within the meaning of the statute, and that the legislature did not intend for no-fault divorce to be considered a "cause" for this purpose. The court reasoned that:

> Unlike an act of adultery or abandonment, which objectively occurs at a specific time and place, an irretrievable breakdown is in the eye of the beholder, a subjective state of mind....From the plain meaning of DRL § 230(3), which simply says "cause" rather than "cause of action" or "grounds for divorce," the legislature was referring to a specific act or acts which must be pled. Based on the plain meaning of DRL § 170(7) and the case law interpreting it, irretrievable breakdown is not a specific act.

It is contrary to the purpose of New York's no-fault statute to seek to determine when a marriage actually broke down. In addition, the court stated:

> If almost every divorce is commenced using § 170(7), and if irretrievable breakdown of the marriage could be construed as a specific act or "cause" under § 230(3), then DRL § 230(5), which now sets the prevailing standard of two years, would be rendered obsolete and the residency requirement would effectively be reduced to one year.

Therefore, the action was dismissed for lack of jurisdiction.

Child Support

Emancipation not found despite daughter working full-time

***Melgar v. Melgar*, 132 AD3d 1293 (4th Dept. 2015)**

In this post-judgment matrimonial proceeding, the father moved to terminate child support for his daughter on the ground of emancipation. The court below erred in granting that part of the motion without conducting a hearing and the matter was remitted to the trial court. On remittal, the father submitted proof that the child was working full-time, but the court declined to deem the child emancipated, because the father failed to submit proof that the child was economically independent, including failing to provide proof of where she lived or who paid her bills. Additionally, as the cause of the lack of communication between the father and the daughter was not established, a hearing is required to determine whether there was constructive emancipation.

Child support modification

***Lueker v. Lueker*, 132 AD3d 739 (2d Dept. 2015)**

The parties were divorced, which judgment incorporated, but did not merge a parenting agreement executed by the parties in 2006. The agreement provided that the parties intended that their children continue to attend private school through grade 12, subject to an order of the court or a financial agreement between the parties. In addition, each party was responsible for paying their *pro rata* share of the children's private school education. In 2013, the mother moved for an order directing the father to post a bond to guarantee payment of his *pro rata* share of the daughter's private school tuition, and in turn, the father cross-moved for a downward modification of his child support obligation and to vacate the judgment's provision that required him to pay a *pro rata* share of the cost of the children's private school educations.

The trial court granted the mother's motion and denied the relief requested in the father's cross-motion. On appeal, the Second Department found that, while the father's financial situation had declined since 2008, he still had sufficient means available to him to permit him to comply with his child support obligation.

However, the Appellate Division reversed the trial court's decision to direct the father to post a bond to guarantee payment of his *pro rata* share of the daughter's private school tuition and vacated the provision requiring the parties to pay their *pro rata* shares of the children's private school educations. The court reasoned that the children had been attending public school in a neighborhood that the mother relocated to in 2009, the parties had already agreed on the public high school that their son would attend, and neither party had the means to afford private school tuition.

Child Custody

Modification of grandparent visitation

***Matter of Ordona v. Campbell*, 132 AD3d 1246 (4th Dept. 2015)**

The Family Court properly determined that it was not in the children's best interests to continue visitation with their grandmother because the grandmother failed to abide by court orders, had significant animosity toward the father (who was the residential custodial parent), and frequently undermined the children's relationship with their father.

Supervised visitation based on parent's use of illegal drugs

***Matter of Creek v. Dietz*, 132 AD3d 1283 (4th Dept. 2015)**

Based on the father's use of illegal drugs, including marijuana, heroin, and cocaine, the mother petitioned the Family Court for modification of a child custody and visitation order by directing that the father's visitation with the parties' child be supervised. The mother established that the father had a long history of substance abuse and that recent changes in the father's behavior, such as failing to exercise parenting time with the child, were similar to behavioral patterns that the father exhibited while using illegal drugs on prior occasions. Moreover, the father admitted to using illegal drugs just a few weeks before the hearing. Therefore, the mother established a sufficient change in circumstances "that reflects a genuine need for the modification so as to ensure the best interests of the child." The father appealed, and the Appellate Division, explaining that the Family Court made specific findings relating to the potential danger of unsupervised visitation to the child, affirmed the Family Court's decision.

Where a parent relocates in an initial custody proceeding, the court does not need to strictly apply the factors relevant to relocation and may instead use the "child's best interests" standard

***Matter of Wright v. Stewart*, 131 AD3d 1256 (2d Dept. 2015)**

The parties were never married and have one child in common. Without any formal custody arrangement in place, the mother, the father and the child all resided

with the child's paternal grandmother in Queens, New York for approximately six years. Thereafter, the mother moved to Texas and then to Georgia, leaving the child in Queens with the father and paternal grandmother. Upon the mother's out-of-state move, the father petitioned for custody of the parties' child, and in response, the mother filed a separate petition for physical custody of the child and permission to relocate to Georgia. While the mother's out-of-state relocation prompted the start of the proceedings, the Family Court ultimately found that the central focus of the case was an initial custody determination, not a relocation petition. Thus, the court was not bound by the factors applicable to relocation proceedings, and instead, used the best interests of the child standard in reaching its decision to grant the parties joint legal custody of the child, with physical custody to the father. The Appellate Division affirmed the Family Court's decision.

Custody based on off-the-record conferences with counsel is error

***Minjin Lee v. Jianchuang Xu*, 131 AD3d 1013 (2d Dept. 2015)**

In a divorce action, both the mother and the father sought sole custody of the parties' child. The trial court awarded the mother sole legal and residential custody of the parties' child based on lengthy *in camera* discussions with counsel concerning controverted allegations of excessive corporal punishment and parental alienation. The trial court refused to permit testimony on the controverted allegations and directed that only positive aspects of the parties' parenting be presented on the record. On appeal by the father, the Appellate Division held that this was error, and reversed and remitted the matter for a new trial on the issue of custody.

The trial court declined to rule on whether the husband was entitled to a $27,000 credit against equitable distribution for a loan he made to his wife. On appeal, the appellate court held that, since the issue remains pending and undecided, it is not properly before the appellate court and should be decided by the trial court on remittal.

Equitable Distribution

Spouse's wasteful dissipation of marital assets entitled other spouse to 70% of marital assets where there were insufficient liquid assets to make her whole

***Kerley v. Kerley*, 131 AD3d 1124 (2d Dept. 2015)**

The parties to this divorce action were married for sixteen years and have three unemancipated children. The husband was employed as an account executive for a television network, earning between $270,000 and $450,000 per year, and the wife worked as a public school teacher, earning between $125,000 and $150,000 per year. From the commencement of the action in 2009 to the time of trial, the husband was in and out of rehabilitation for substance abuse, frequently traveled to gambling casinos, and withdrew over $200,000 from various accounts without any explanation as to the use of such funds. After considering the statutory factors relevant to an equitable distribution determination, the trial court concluded that the wife was entitled to 70% and the husband was entitled to 30% of the marital assets, based on the wife's health problems, the husband's substance abuse issues, the husband's wasteful dissipation of marital assets, the substantial disparity in income between the parties, and the lack of liquid marital assets.

In addition, the trial court awarded the wife $80,000 in counsel fees to compensate for the prolonged trial and substantial attorneys' fees she incurred as a result of the husband's "erratic, unpredictable, and uncooperative behavior throughout the litigation…and his lack of candor with respect to finances and his drug addiction."

On appeal, the Appellate Division affirmed, stating that the absence of an award of maintenance to the wife as well as the husband's wasteful dissipation of marital funds on gambling and drugs warranted the wife's receipt of a greater share of the remaining marital assets, and that the trial court providently exercised its discretion in awarding counsel fees to the wife on the basis of the husband's litigious behavior. It should be noted that the case does not specify the totality of the remaining marital assets.

Wasteful dissipation of marital assets: wife's egregious economic fault in transferring millions in assets

***Stewart v. Stewart*, 133 AD3d 493 (1st Dept. 2015)**

The trial court properly awarded the husband a greater share of the marital estate in light of the wife's "egregious economic fault" in claiming to have given away jewelry and property worth over $10 million, failing to disclose her offshore and foreign accounts, and secreting millions more in assets. The court below properly awarded the wife stock based on the parties' agreement to adopt their son-in-law's valuation of the shares. Additionally, the wife took issue with the court's distribution of only $8,520,000 of jewelry to her. Based on the evidence at trial, the wife's jewelry collection, which was kept in Switzerland and New York, amounted to over $18 million. However, the wife testified that she transferred her jewelry to either another entity or her daughter-in-law, but offered no documentary proof of such transfers. Notably, even if the wife did transfer the jewelry, this would constitute a wasteful dissipation of marital assets. The trial court correctly relied on a "hypothetical fair market value" jewelry appraisal to value the jewelry that was missing from the valuation since the wife secreted the jewelry. Similarly, the trial court did not err in awarding the wife two Swiss chalets worth a total of $4 million, because there was no evidence to support the wife's claim that she transferred one of the chalets, and even if she had, this would be an improper dissipation of marital assets.

Moreover, based on the substantial award of equitable distribution to the wife, the income she would continue to receive from her ownership interest in stock and the parties' income trust, and the wife's secreting of millions of

dollars in marital assets, the trial court properly denied the wife's request for an award of maintenance.

Finally, considering the husband's payment of counsel fees on behalf of the wife in the amount of $410,000 and the financial positions of both parties, the court providently exercised its discretion in denying the wife's request for an additional award of counsel fees from the husband.

Wife's pre-marital residence transferred into a partnership with dentist husband during the marriage deemed separate property

***Cohen-McLaughlin v. McLaughlin*, 132 AD3d 716 (2d Dept. 2015)**

The wife owned the marital residence prior to the marriage. During the marriage, the wife managed the husband's dental practice. The wife transferred the deed into a partnership owned by her and her husband as a form of asset protection. The court below properly found that the home remained the wife's separate property, because the transfer was only intended to protect it from third parties and not to change the character of the residence from marital to separate. In addition, since the husband failed to present any proof of his contributions to the appreciation in value of the residence, the court properly declined to award any appreciation.

It is unclear from this decision why the wife needed to transfer the house into a partnership when she was not the owner of the dental practice, and therefore, it does not appear that this transfer was necessary to protect against malpractice suits.

9% post-judgment interest on award of law practice

***Cohen v. Cohen*, 132 AD3d 627 (2d Dept. 2015)**

The court below properly awarded the wife a 25% share of the husband's law practice, but erred in awarding the wife 5% post-judgment interest on the award, rather than the statutorily prescribed 9%. The case does not state the length of the parties' marriage nor the contributions the wife made towards the husband's law practice.

50% distribution of CPA license and practice to housewife

***Mula v. Mula*, 131 AD3d 1296 (3d Dept. 2015)**

The parties were married for forty-three years and have three emancipated children. Over the course of the marriage, the husband was the primary wage earner, earning his certified public accountant license in 1981 and becoming the sole proprietor of an accounting practice in 1997. The wife was a homemaker and the primary care giver of the parties' children. In consideration of the parties' lengthy marriage and the wife's contributions to the establishment of the husband's professional practice, namely caring for the home and the children to permit the husband to pursue his career, the trial court correctly distributed 50% of the husband's certified public accountant license and practice to the wife. The court improperly double-counted the husband's income stream by failing to reduce the maintenance award to the wife by the amount of the distributive award of the husband's CPA license and practice. This case bucks the trend of awarding housewives less than 40% of the husband's license and practice, but perhaps the court relied on the fact that the parties were married for over 40 years.

The wife's father conveyed real estate to the wife during the marriage. Prior to the conveyance, the parties lived in the home for ten years and paid $250/month to the father with marital funds, which funds were used to pay the real estate taxes and utilities. The wife claimed the house to be her separate property. However, the husband testified that the $250 fee that the parties paid to the wife's father each month for ten years was in an effort to purchase the property, and that the deed was solely in the wife's name as a matter of convenience to reduce any personal risk should the husband be sued in his capacity as a CPA. Despite the court determining that the home was marital property, the wife was awarded 100% of this asset.

Where wife failed to timely submit QDRO, court awarded arrears

***Kraus v. Kraus*, 131 AD3d 94 (2d Dept. 2015)**

The parties were married for approximately thirty-three years and have four emancipated children. In 1996, the parties were divorced by judgment, which incorporated, but did not merge, the parties' stipulation of settlement, which provided that the husband's and the wife's pensions were to be divided pursuant to the *Majauskas* formula and Qualified Domestic Relations Orders (QDROs) were to be prepared. Unlike the husband, however, the wife failed to submit a QDRO to the court in order to effectuate payment of her share of the husband's pension.

The husband later remarried, proceeded to take a loan against his pension, elected a survivorship benefit in favor of his second wife, and ultimately retired in 2008. In 2012, approximately 16 years after the parties' judgment of divorce was entered and 4 years after the husband's retirement, the wife submitted a QDRO to the court for signature, claiming that she was never notified of the husband's retirement.

The QDRO submitted by the wife proposed that her share of the husband's pension be calculated based on the maximum potential annual allowance, rather than the actual annual allowance, which had been reduced by the husband's loan and survivorship deductions. Additionally, the wife proposed that the husband pay the pension arrears that accrued between the date of the husband's retirement and the date that the wife submitted her proposed QDRO to the court. The husband opposed the wife's proposed QDRO. The trial court, ruling in favor of the husband, signed a QDRO that would make payments to the wife based on the reduced, actual annual allowance and declined to direct the husband to pay arrears to the wife.

In a matter of first impression, the Second Department held that the wife was entitled to an award of the arrears

that accumulated from the date of the husband's retirement to the date that the QDRO was signed, and that the QDRO was to be modified to the extent of calculating the wife's share of the husband's pension benefits against an amount unreduced by the husband's loan. However, since the parties' stipulation of settlement did not prohibit the reduction in monthly payments resulting from survivorship benefits provided to either party's second spouse, the trial court properly determined that the wife's share of the husband's pension benefits would be calculated against an amount reduced by the survivorship benefits to the husband's second wife.

Counsel Fees

Waiver of equitable distribution of asset does not limit ability to collect against said asset when enforcing a money judgment

***Ioppolo v. Ioppolo*, 132 AD3d 727 (2d Dept. 2015)**

The parties were married in 1995 and divorced pursuant to a judgment entered in 2013, which incorporated, but did not merge, the parties' stipulation of settlement. According to the parties' stipulation, the wife waived any interest in the proceeds of an Allstate life insurance annuity, which was received by the husband in 1998 upon settlement of a personal injury action, and the wife's request for counsel fees would be determined by the Supreme Court. Subsequently, the Supreme Court awarded the wife $75,000 in counsel fees to be paid by the husband in three scheduled installments of $25,000 and provided the wife with permission to file a money judgment against the husband without leave of court in the event that the husband failed to make timely payment.

Thereafter, the husband failed to make the three scheduled payments and three separate money judgments in the amount of $25,000 each were entered against the husband. Upon information that the next installment payment due to the husband under the life insurance annuity was in the amount of $75,000, the wife then moved for an order directing Allstate to pay the $75,000 annuity payment due to the husband directly to her in satisfaction of the counsel fees. The Supreme Court granted the wife's motion without a hearing and the husband appealed.

On appeal, the husband argued that a hearing was required and that the wife "expressly waived her right to enforce the judgments entered against the [husband] using funds due to the [husband] under the Allstate annuity contract" in the parties' stipulation of settlement. Affirming the decision of the Supreme Court, the Second Department found that the wife only waived an interest in the annuity as equitable distribution, but did not waive the right to enforce money judgments against the husband from said funds.

Attorney for party has standing to appeal denial of counsel fees even after withdrawal from the case

***Saunders v. Guberman*, 130 AD3d 510 (1st Dept. 2015)**

Following the trial court's denial of the husband's motions for $75,000 in interim counsel fees and $150,000 in interim counsel fees for trial, the law firm that represented the husband appealed the decision on the husband's behalf, and after withdrawing as counsel based on nonpayment of counsel fees, the non-party law firm maintained the appeal for $225,000 in counsel fees from the wife. In opposition, the wife contended that the non-party law firm lacked standing to appeal.

The Appellate Division held that the non-party law firm had standing to maintain the appeal that was filed on behalf of the husband even after the law firm was granted leave to withdraw from representation. DRL § 237(a) provides that where an attorney of the less-monied spouse is discharged without cause, the former attorney may seek counsel fees from the monied spouse, and further, that any application for fees may be maintained by the attorney in his or her own name. This right includes the right to appeal the denial of such fees.

After reaching this conclusion, the First Department turned to the merits of the case, and held that the trial court improperly denied the husband's applications for counsel fees. Notably, the Appellate Division found that by incorrectly focusing on the current incomes of the parties, rather than the parties' earning history and earning potential, the trial court gave excessive weight to the fact that the wife was unemployed at the time of trial, and failed to consider that the wife earned substantially more than the husband over the course of the parties' marriage. Moreover, the trial court did not give sufficient weight to the value of each party's assets, and instead, exempted the wife's assets from the analysis on the basis of being non-income producing assets. The appellate court found that the trial court severely distorted the financial position of each party, and in so doing, erroneously failed to designate the husband as the less-monied spouse. The appellate court, therefore, awarded the husband's counsel $125,000 in counsel fees.

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