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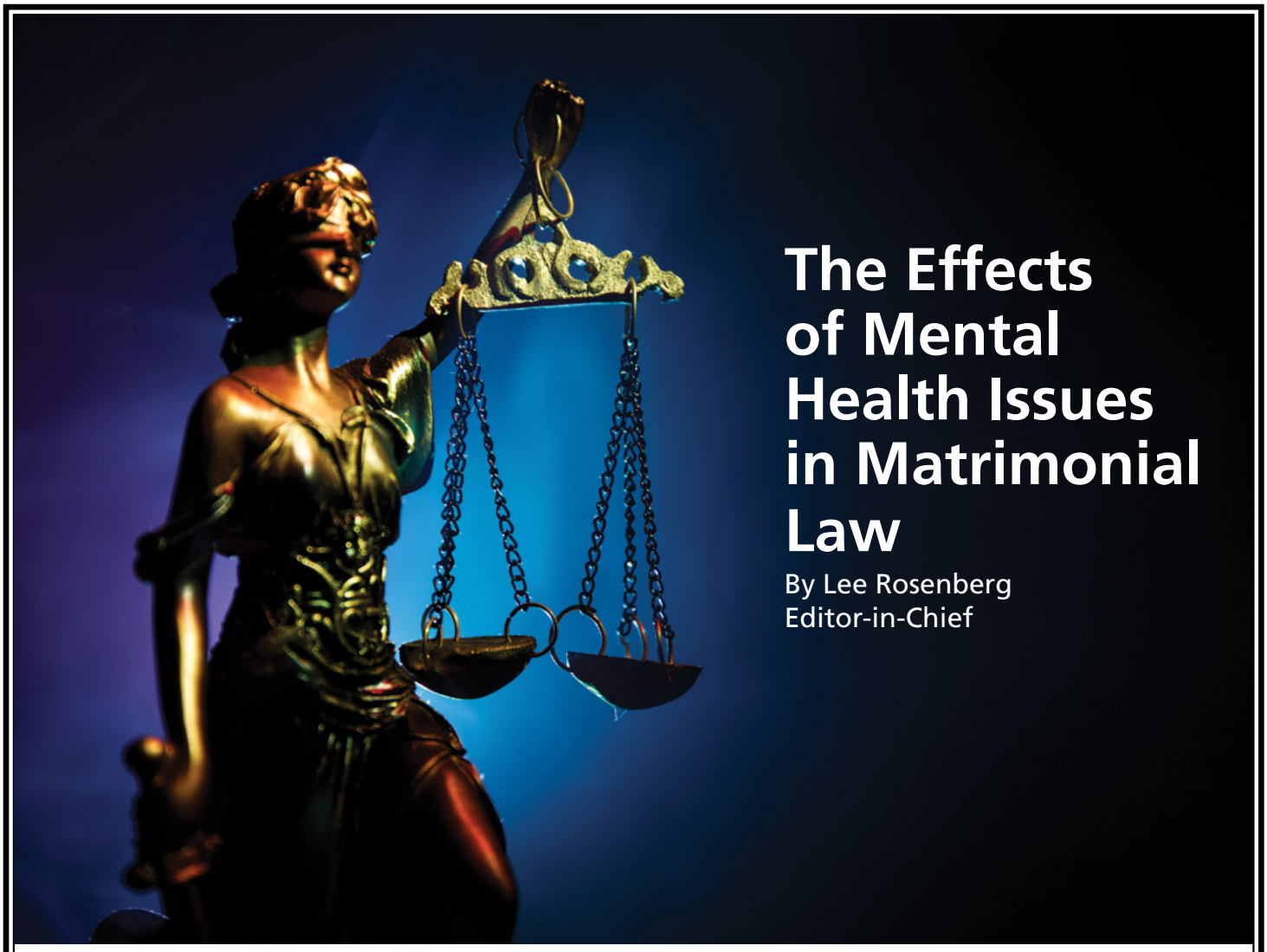

The Effects of Mental Health Issues in Matrimonial Law

By Lee Rosenberg
Editor-in-Chief

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Editor's Note: In the Fall 2018 issue of* Family Law Review, *Elliott Scheinberg's article "The Pitfalls of Appellate Practice From Family Court Dispositions and Orders," was to have included its dedication "In Memory of Gay Woronov." My apologies for the oversight in not including the dedication.

The Effects of Mental Health Issues in Matrimonial Law

By Lee Rosenberg, Editor-in-Chief

It is a regular refrain—"My husband is crazy!," "My wife hasn't been officially diagnosed, but she is bipolar," "The whole family are alcoholics," "He should be on meds. . ."

While it is practically the norm for a spouse to assert that the other has a mental health issue, what if they are right or if our client's own behavior appears to demonstrate impairment? Certainly, the law provides remedies, but they may not be so obvious—particularly given the rules of advocacy and confidentiality owed to one's own client—and asserting or acknowledging the impairment of the other party may have other consequences, which could serve as a double-edged sword. Historically, mental health and addiction issues have had a stigma attached and its demonstration has usually had the most profound effect on child custody. The court system, though, does provide services and there are also various specialty treatment programs designed to assist. Opioid addiction challenges have been part of the public discourse in recent years just as marijuana use has become more legally acceptable. Anxiety and depression seem to almost always appear in some form during forensic custody evaluations and urine testing instantly available in our family courts. Let us look then at some of our challenges.

Our Own Client

Ethically, we are bound to advocate— and, while the word "zealous" no longer appears in the current our professional rules,[1] we must still advance the client's interests and protect their confidences. The Rules of the Chief Judge also provide that attorneys for children serve in the role of advocate— still using the adverb "zealous,"[2] and that they may substitute their judgment only in limited and defined circumstances,

> When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.[3]

Our statewide Rules of Professional Conduct do, however, provide guidelines in Rule 1.14 where there is "diminished capacity":

> Client With Diminished Capacity
>
> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[4]

While the Rule references "minority, mental impairment or...some other reason," only "minority" is readily definable. (DRL §2.) "Capacity" in the Domestic Relations Law is also defined at least in part (see, e.g., DRL § 140,

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but the extent of the diminution of such capacity under Rule 1.14 is based on what the lawyer "reasonably believes." The Domestic Relations Law also provides for annulment or declarations of nullity where a party is "mentally retarded" or "mentally ill" or without "sound mind" [DRL § 140(c)] and where such mental illness is "incurable" for five years or more [DRL § 140(f)], DRL § 141, physical incapacity when continuing and incurable [DRL § 140(d)], and where one's ability to contract the marriage is compromised by "force, duress or fraud" [DRL § 140(e)].

The Mental Health Law also offers some guidance:

> Mental disability is recognized in the Mental Hygiene Law §1.03(3) as "mental illness, intellectual disability, developmental disability, alcoholism, substance dependence, or chemical dependence." Mental illness is also defined therein at §1.03(20), as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation." Under MHL§ 1.03(52), "'Persons with serious mental illness' means individuals who meet criteria established by the commissioner of mental health, which shall include persons who are in psychiatric crisis, or persons who have a designated diagnosis of mental illness under the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders and whose severity and duration of mental illness results in substantial functional disability. Persons with serious mental illness shall include children and adolescents with serious emotional disturbances."

In the area of trusts and estates, the issue of capacity has been discussed as to varying levels depending on the type of document to which the term is being applied—capacity to enter into a trust (similar to a contract, the grantor must comprehend and understand the nature of the transaction and be able to make a rational judgment concerning the particular transaction) *vis-a-vis* execute a deed.[5] The American Bar Association also has promulgated legal standards of diminished capacity.[6]

It would certainly appear that the term "mental impairment" from Rule 1.14 infers a lesser degree of proof than the DRL's mentally ill or mental retardation, and along with "some other reason" would encompass various forms of dependency, addiction, substance abuse, spousal abuse, and depression, for example. Of course, diagnoses by a litigant's therapist, psychiatrist or a finding by TASC or a court-appointed mental health professional based upon DSM testing and clinical findings would lead counsel to have to consider the level, import and impact of the impairment— if the court does not intervene first.

Commentaries to Rule 1.14 guide us, but provide caution given that the risk of disclosure of the condition being potentially adverse to the client's interests. In taking "protective action" though, the Commentary states "the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client."

Two Sides of the Coin

Of course, if there is a sense that the other party suffers from some form of disability of impairment, it becomes fodder for discovery on the financial aspects and possibly custody. But, be careful what you wish for. Given that there is limited disclosure on issues of custody in the First and Second Appellate Divisions[7] a client's developing mental health or addictive condition might not ever officially come to light, but could very well affect their ability to parent a child. That being said, a person's physical and mental conditions are placed at issue in a contested custody matter, a proper showing is needed to warrant that discovery.[8] Opening up the Pandora's Box by asserting incapacity can satisfy that standard.[9] Such a finding, which affects the incapacitated spouse on custody, may also, however, result in the other spouse being subject to a non-durational spousal support award where there is an inability to become self-supporting[10] or having an agreement set aside.

Rule 1.14 offers the possibility of guardian ad litem, conservator or guardian to assist in a proper case. If the impairment is or becomes a disability or complete incapacity, the stakes become higher in the attorney's decision-making process. Barring situations where the condition is blatant, it would appear that the confidences of the client remain paramount and must still be protected and that where disclosure of the client's concoction would affect his/her position in the case, the balancing act ensues. If the situation becomes too problematic, counsel may make application to the court to withdraw, but must again protect the client's confidences in the process.

If it is suspected that there is indeed a real issue of diminished capacity, further inquiry into the mental health past and present should be undertaken, along with the careful determination as to the next steps re-

quired to protect both the client and yourself, if it is your client who is at risk. Ensure others in your office are present and document the discussions, with the client being made aware that you have concerns and what they are. If the client is not in counseling—suggest it, and possible mitigate both the condition and the issue. If it is the other side, explore the issue within the financial aspects of the case where discovery is readily available and also determine if the diminished capacity is one which also requires the court's attention, perhaps with the appointment of an attorney for the children, an order of protection, or the appointment of an guardian ad litem as the lesser avenues to pursue at first.

We live in a stressful world and parties going through divorce are confronted with one of the greatest additional stressors that exist—causing the proverbial distinction between criminal matters "bad people doing bad things vs "good people doing bad things." Navigating the mental health aspects of these matters when true diminished capacity exists encompasses a variety of skills and awareness—yet another function of the many responsibilities of the family lawyer.

Endnotes

1. 22 N.Y.C.R.R. Part 1200—Rules of Professional Conduct; Sanders, Paul C., *Whatever Happened to 'Zealous' Advocacy*, NYLJ March 11, 2011.
2. 22 N.Y.C.R.R. § 7.2.
3. 22 N.Y.C.R.R. § 7.2(d)(3).
4. Rule 1.6 relates to protecting client confidences.
5. See *In re Lewis*, 59 Misc. 3d 1217(A) (Sur. Ct., Kings Co. 2012); *In re Estate of ACN*, 133 Misc. 2d 1043 (Sur. Ct., N.Y. Co. 1986).
6. https://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_aging_capacity_hbk_ch2.authcheckdam.pdf.
7. Discovery as to issues of custody has been historically limited in the First and Second Departments as it was as well on fault. *See,* however, *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010) on the fault issue. *Garvin v. Garvin*, 162 A.D.2d 497 (2d Dep't 1990); *S.R.E.B. v. E.K.E.B.*, 48 Misc. 3d 1217(A) (Sup. Ct., Kings Co. 2015).
8. *Torelli v. Torelli*, 50 A.D.3d 1125 (2d Dep't 2008); *Worysz v. Ratel*, 101 A.D.3d 893 (2d Dep't 2012); *Duval v. Duval*, 85 A.D.3d 1096 (2d Dep't 2011).
9. *Wegman v. Wegman*, 37 N.Y.2d 940 (1975).
10. *Greco v. Greco*, 161 A.D.3d 9525 (2d Dep't 2018); *Tiger v. Tiger*, 155 A.D.3d 1386 (2d Dep't 2018); *Christopher C. v. Bonnie C.*, 40 Misc. 3d 859 (Sup. Ct., Suffolk Co. 2013).

A Clarion Call to Eradicate the Doctrine of Constructive Emancipation

By Marcy L. Wachtel

Introduction

In the law, there are few absolutes. The position advanced in this article is that the parental obligation to provide financial support for a child under 21 years of age should, indeed must, be an absolute. That is, by invoking the doctrine of constructive emancipation, parents cannot be relieved of their support obligation because of a child's potential employability or economic independence, disobedient or objectionable conduct, or lack of affection or companionship. Parents have no legal obligation to love, like, respect, admire, emotionally comfort, display tenderness toward, spend time with, or foster the intellectual or psychological development of, their children. Rather, parents have one obligation under the law: to provide monetary support for their children.[1] August Wilson had it correct in his play, *Fences*.[2] When Cory Maxson asks his father, Troy, "How come you ain't never liked me?," his father responds brutally, but honestly: "What law is there say I got to like you? . . . You eat every day . . . Got a roof over your head . . . Got clothes on your back . . . why do think that is?" Cory replies "Cause you like me." Troy retorts: "cause I like you? . . . It's my job. It's my responsibility! . . . A man got to take care of his family . . . fill you belly up with my food . . . cause you my son. You my flesh and blood. Not 'cause I like you'! Cause it's my duty to take care of you. I ain't got to like you."

Amen to that, Mr. Wilson. A parent's obligation to provide the necessities for his or her child cannot be conditioned on affection, regard or sentiment of any kind, but rather must be an unqualified, immutable legal duty.

The doctrine of constructive emancipation grafts onto the law the premise of reciprocity: a child's right to support and a parent's right to custody are reciprocal. Ergo, if a child "abandons" a parent, by spurning a parent, refusing contact without cause or failing to obey parental rules, then the child forfeits his or her entitlement to support and the parent can be relieved of all financial responsibility.

Search the DRL word for word, and there is no mention of such a two-way street between parent and child. Rather, under DRL § 240(1-b) the basic child support obligation is set forth exactly as it ought to be: a stand-alone, one way payment from the non-primary custodial parent to the primary custodial parent.

Applicability of Constructive Emancipation Doctrine to Incorporated, but Surviving, DRL § 236B(3) Agreements

Child support payments set forth in "opt-out" agreements under DRL § 236B(3) and incorporated by reference in, but not merged with, a judgment of divorce, may be modified only upon a showing that an unanticipated and unreasonable change of circumstances has occurred resulting in a concomitant need.[3] The court in *Mark D. v. Brenda D,*[4] held as a matter of first impression that "an alleged unanticipated and unreasonable abandonment" by a child of a parent seeking to be relieved of a support obligation on the ground of constructive emancipation is not grounds for either modification or re-allocation of the support obligations set forth in a surviving, unmerged stipulation of settlement or separation agreement.[5] Such opt-out agreements include defined emancipation events, which may, if agreed upon, include the abandonment of the payor-parent by a child. However, the court also held "absent a contractual provision defining abandonment of a parent by a child as an emancipation event, a court is not empowered to disturb the provisions of a separation agreement or stipulation of settlement allocating the parties' respective child support obligations."[6]

Accordingly, the constructive emancipation doctrine is largely, if not totally in light of *Mark D. v. Brenda D.*'s holding, inapplicable to incorporated, surviving DRL § 236B(3) agreements. Rather, its applicability is limited to child support awards contained in judicial decrees and decisions, and the modification or termination thereof.[7]

Case Law Origins of the Doctrine

The genesis of the doctrine of constructive emancipation is the Court of Appeals decision in *Roe v. Doe*.[8] In *Roe v. Doe*, the movant-father cut off financial support to his 20-year-old daughter who had moved to an off-campus apartment at her college, sold the car he had gifted her over his objections, and, upon her return home, lived with a friend's family during college summer recess. The court held the daughter was no longer entitled, and forfeited her right to financial support under these circumstances, i.e., "where a minor of employable age and in full possession of her faculties, voluntarily and without cause, abandons the parent's home, against the will of the parent and for the purpose of avoiding parental control."[9] The court's rationale was that:

> . . . the child's right to support and the parent's right to custody and services are reciprocal: the father in return for main-

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tenance and support may establish and impose reasonable regulations for his child (citations omitted). Accordingly, though the question is novel in this State, it has been held, in circumstances such as here, that where by no fault on the parent's part, a child 'voluntarily abandons the parent's home for the purpose of seeking its fortune in the world or to avoid parental discipline and restraint [that child] forfeits the claim to support' (citations omitted). To hold otherwise would be to allow, at least in the case before us, a minor of employable age to deliberately flout the legitimate mandates of her father while requiring that the latter support her in her decision to place herself beyond his effective control.

It is the natural right, as well as the legal duty, of a parent to care for, control and protect his child from potential harm, whatever the source and absent a clear showing of misfeasance, abuse or neglect, courts should not interfere with that delicate responsibility. Here, the daughter, asserting her independence, chose to assume a status inconsistent with that of parental control. The Family Court set about establishing its own standards of decorum, and, having determined that those standards were met, sought to substitute its judgment for that of the father. Needless to say, the intrusion was unwarranted.

We do not have before us the case of a father who casts his helpless daughter upon the world, forcing her to fend for herself; nor has the father been arbitrary in his requests that the daughter heed his demands. The obligations of parenthood, under natural and civil law, require of the child 'submission to reasonable restraint, and demands habits of propriety, obedience, and conformity to domestic discipline' (citations omitted). True, a minor, rather than submit to what her father considers to be proper discipline, may be induced to abandon the latter's home; but in so doing, however impatient of parental authority, she cannot enlist the aid of the court in frustrating that authority, reasonably exercised, by requiring that her father accede to her demands and underwrite her chosen lifestyle or as here, run the risk of incarceration.

Nor can we say that the father was unreasonable or capricious in his request that the daughter take up residence in the college dormitory or return to New York. In view of her past derelictions, and, to use the Appellate Division's words, 'the temptations that abound outside,' (citations omitted) we can only conclude that it was reasonable for her father to decide that it was in her own best interests that she do so. And the fact that the father doggedly persisted in his demands despite similar evils which may have lurked within the campus residence, or psychiatric advice that the daughter live off campus, cannot be said to amount to a showing of misconduct, neglect or abuse which would justify the Family Court's action. The father has the right, in the absence of caprice, misconduct or neglect, to require that the daughter conform to his reasonable demands. Should she disagree, and at her age that is surely her prerogative, she may elect not to comply; but in so doing, she subjects herself to her father's lawful wrath. Where, as here, she abandons her home, she forfeits her right to support.[10]

In *Parker v. Stage*,[11] the Court of Appeals expanded the doctrine, holding that the Department of Social Services cannot compel the father of an 18-year-old girl on public assistance, who moved out to live with her boyfriend and have a baby (against the father's wishes and despite his urging her to remain at home and in school), to support his daughter financially. The daughter was deemed to have emancipated herself by willfully abandoning the father's home, and the father was a supportive and "forgiving parent." The *Parker c*ourt made clear that the constructive emancipation doctrine in *Roe v. Doe* was equally applicable where the suit is brought by a public official—such as the Department of Social Services—and found that the father's obligation to support his daughter was not mandatory where she had flouted all parental control and "abandoned" her father.

Case Law Progeny of the Constructive Emancipation Doctrine

A. Elements of the Analysis

The progeny of both *Roe* and *Parker* encompasses myriad themes and elements that percolate through judicial holdings in constructive emancipation decisions, to wit: the child's potential or actual economic independence and employment; the child's rebellion and withdrawal

from parental supervision and control and the justification therefor; the child's rejection of the parent's overtures and refusal to have contact with a parent and the reasons therefor; the level of hostility and confrontation between the child and parent; the parent's and child's respective culpability in bringing about and/or perpetuating the estrangement and breakdown of their relationship; respective attempts at repair of the relationship and the sincerity and tenacity thereof; and the legitimacy and reasonableness of both the parent's rules and expectations and the child's repudiation thereof.

A review of the cases (set forth cases in alphabetical order in sections B and C below) in which the elements above, *inter alia*, are discussed, elucidates the doctrine.

B. Decisions Finding or Upholding Constructive Emancipation.

- *Bouchard v. Bouchard*[12]—16-year old leaves home to live with friends because of perceived pressure by his father. Parental authority was found to be reasonable and the father stated he would support his son while under his roof. The child is not entitled to support because the child's perception of pressure is irrelevant, and the actual circumstances, i.e., the abuse of malfeasance, misconduct and abuse, must be assessed by the court.

- *Chamberlin v. Chamberlin*[13]—The appellate court reversed the Family Court's denial of the father's petition to terminate support. The court held, a child of employable age has abandoned his parent and forfeited support where the son steadfastly refused contact and visitation without good cause (such as misconduct or abuse), and stated his feelings were hurt and he had no desire for his father to be part of his life. The father had made meaningful overtures to his son, including sending cards, gifts and invitations over a six-year period.

- *Chambers v. Chambers*[14]—Despite the daughter's attendance at college with her father's approval, and her claim to be "unemancipated," the appellate court upheld the Family Court's finding that the daughter was emancipated where she violated her father's legitimate rule that she not have boys in her bedroom with the door closed.

- *Clavijo v. Clavijo*[15]—A 19-year-old was arrested and placed in a drug rehab facility, and would not conform to reasonable parental expectations (such as a curfew), refused to live a lifestyle the parents deemed appropriate, instead chose a lifestyle of drugs and crime, and was beyond his parents' control even prior to arrest. The son was deemed constructively emancipated and Department of Social Services was not entitled to be reimbursed by the parents for the public assistance the son received.

- *Cohen v. Schnepf*[16]—The father was denied access to his son for five years; the son legally changed last name to his stepfather's, refused to see his father, admitted their estranged relationship was partly his own doing, and was over 18 years old. The appellate court upheld the lower court's granting of the father's motion under DRL § 241 to suspend his "support payments," and found there had been a "cavalier rejection" of the father's name, and, because the son had asserted his independence and assumed "a status inconsistent with parental control," he had emancipated himself.

  [Author's Note: This decision illustrates how courts have incorrectly applied DRL § 241 to suspend child support.]

- *Columbia Dept. of Soc. Servs. v. Richard O.*[17]—William O., a homeless 16-year-old on public assistance, had voluntarily left his adoptive parents' home to live with his biological mother. He was denied child support and found to have constructively emancipated himself where his departure was to avoid parental control and the adoptive parents had done everything in their power to help him live a productive life. The court held further that William O.'s receipt of public assistance does not entitle the DSS to support from the parents where it leads to an injustice.

- *Cornell v. Cornell*[18]—A college-aged son was held to have forfeited his right to child support where he engaged in vile disparagement of, and abandoned, his mother by moving out of her home, residing exclusively with his father, calling his mother a "douche bag" and an "asshole," displaying rude, "despicable" and offensive conduct indicative of substantial hatred of and disrespect for his mother, such as declining his mother's invitations to holiday gatherings. The court held a child cannot expect a "maligned parent" to pay any form of child support.

- In *Dobies v. Brefka*[19]—The mother's alienation of the children, interfering with the father's visitation, failing to discipline the children for not seeing their father and frustrating the children's relationship of the children with their father, justified a finding of the children's constructive emancipation, and termination of the father's child support obligation.

  [Author's Note: Alienation and interference with visitation are DRL § 241 issues, not constructive emancipation issues.]

- *Donnelly v. Donnelly*[20]—The child "deliberately flouted" his mother's "legitimate and reasonable household rules and standards of acceptable behavior," stole from his mother, abused and was vi-

olent to his mother, failed to attend school, abused drugs and alcohol, was arrested, barricaded himself and his girlfriend in his room for days, and voluntarily abandoned his mother's home. He was deemed constructively emancipated and forfeited his right to his mother's financial support, being found to be an "unworthy son."

- *E.B. v. M.B.*[21]—A 19-year-old cannot obtain support from his father where he refuses both to get a job or to attend college.
- *Edelman v. Edelman*[22]— Older adolescent children are deemed constructively emancipated and to have forfeited their right to parental support where they showed no regard for their parents, refused to comply with reasonable parental rules and to visit or communicate with parents, and changed their surnames.
- *Jacobi v. Lewis*[23]—Even though the child was not financially self-sufficient, she was held to be emancipated because she left her father's home to live with her boyfriend and to avoid parental authority. While at home, she sneaked in her boyfriend, skipped school, failed to follow curfew, was arrested, and refused to comply with "entirely legitimate" reasonable parental demands.
- *Jones v. Jones-Gamble*[24]—The appellate court upheld the finding of constructive emancipation where the daughter failed to respect her mother's authority, was a truant, resented her mother's rules, unreasonably refused all contact and visitation with her father and told people her father was dead. The court opined that requiring support of a child who had renounced and abandoned her father was an injustice.
- *Jose R. v. Yvette-Ortiz M.*[25]—An 18-year-old son was deemed constructively emancipated and his mother relieved of her child support obligation because the son refused contact with his mother despite her overtures, including calling, and sending letters and cards to, the son, and there was no evidence that the mother had caused the deterioration of the relationship.
- *Jurgielewicz v. Johnston*[26]—The court reversed the Family Court's denial of the father's petition to terminate child support, and found the child was constructively emancipated and therefore the father not required to make child support payments. The child was 18, refused to return the father's calls, to attend counseling with the father, to acknowledge the father's cards and gifts and to engage in therapeutic visits. The father's behavior was not the primary cause of the deterioration of his relationship with the child and the father made serious efforts to maintain the relationship.
- *Mario O. v. Pedro O.*[27]—The parents of a 17-year-old who left home against her parent's wishes to live with her boyfriend and have a baby were relieved of their support obligation despite the daughter's receipt of public assistance.
- *McCarthy v. Braiman*[28]—The appellate court upheld the Family Court's dismissal of a support proceeding and denial of child support request where the daughter was hostile to her father, and did not give her father her new address, tell him of her marriage or invite him, and renounced his religion and name. The daughter was found to have actively abandoned her father.
- *Ontario Dept. of Soc. Servs. v. Gail K.*[29]—The mother was not required to support her 16-year-old juvenile delinquent son, Christopher L., who was expelled from school for threatening students with a knife. He would not obey his mother's lawful directives, ran away from home, called his mother vulgar names, attacked a police officer, was "totally out of control," and was of employable age.
- *Perez v. Perez*[30]—A child of employable age and in "full possession of her faculties" who refuses to have a relationship with her father has forfeited her right to support.
- *Rosemary N. v. George B.*[31]—An 18-year-old who unjustifiably refused to visit with, and stated she has no feelings for, her father, and obtained a court order allowing her to use her stepfather's name, was held to have emancipated herself from her father. She had breached her father's right to control and discipline her, and undertaken "the ultimate act of defiance and denial" in changing her name.
- *Rubino v. Morgan*[32]—Family Court properly relieved father of his support obligation where the daughter refused to see her father for three years, did not answer his letters and cards, and rebuffed his attempts to speak with her. The court did not find the daughter's claim of emotional abuse by her father to be credible.
- *Susan D. v. D.*[33]—A 16-year-old relinquished the right to support where the child refused, without just cause, to obey the lawful, reasonable rules of the parent. The parent did not cause the breach in the relationship, the parent was willing to accept the parental role, and the child was capable of self-support.

C. Decisions Finding or Upholding No Constructive Emancipation.

- *Alice C. v. Barnard G.C.*[34]—A 19-year old son left his father's home to live with his mother after a heated confrontation regarding the son's deteriorating academic performance in which the father threatened

to call the police and barred his son's return. The father was not constructively emancipated because the child was not economically independent and did not leave the house to avoid parental control, and the court rejected the father's claim that the son refused to submit to discipline.

- *Barlow v. Barlow*[35]— A child was found not to have abandoned the father or forfeited child support entitlement where the father caused the breakdown in communication through the father's misconduct toward the mother and child. The child justifiably refused to continue the relationship.
- *Basi v. Basi*[36]—The father was ordered to reimburse the Department of Social Services for public assistance expended for an 11-year old son who was too young to have abandoned his father and was not of employable age, despite the child's refusal to visit, or have anything to do with, the father.
- *Bates v. Bates*[37]—Court did not terminate support even though the son was a poor student, refused to attend school, exhibited hostile, disrespectful and assaultive behavior, was uninterested in finding employment and unreceptive toward father's help in finding a job, withdrew from various colleges, and refused to apply himself to his studies.
- *Brinskelle v. Widman*[38]—The appellate court held there was no constructive emancipation despite the child's rejection of the father's efforts in order to avoid parental control because the child was only 14 years old and not of employable age.
- *Burr v. Fellner*[39]—The father failed to meet his burden of showing that his daughter was emancipated in that the daughter's reluctance to see him did not constitute abandonment. The daughter did not withdraw from parental control and supervision, and she was not economically independent.
- *Christman v. Christman*[40]—The Commissioner of Social Services appealed from the Family Court's decision relieving the father from support. The appellate court held that where the child and father continued to speak and the father was, thus, not abandoned, there was no constructive emancipation and the father would be required to reimburse the Department of Social Services for public assistance expended for the child's support.
- *Daniel N. v. Elizabeth N.*[41]—An 18-year-old residing away from her parents with her baby and the baby's father was found not emancipated.
- *Deluca v. Strear-Deluca*[42]—Where the child testified she did not seek to eliminate contact with her father, responded to some of the father's calls and texts, had in the past withheld her address from him and sought an order of protection, the court held her reluctance to see her father did not constitute emancipation, particularly where father had a role in the breakdown of relationship in that he made sporadic and inconsistent efforts to see his daughter.
- *Dempsey v. Arreglado*[43]—The mother was not abandoned by the child and not relieved of her child support obligation. The mother was told her conduct was traumatizing, counseling was recommended, but not undertaken. Although her conduct was the cause of the fractured relationship, the mother refused to acknowledge her own role in alienating the child and blamed others.
- *Drago v. Drago*[44]—The child left the home of an alcoholic mother, pleaded to live with her father, but her father refused. The father instead unreasonably insisted that she attend boarding school or join the military. The child was not emancipated and remained entitled to support in light of the parental misfeasance and neglect and, inasmuch as the father's home was not open to his daughter, there was no injustice in having him provide for her support.
- *Foster v. Daigle*[45]—Although they had unjustifiably and continuously refused contact with, and were disrespectful and inappropriate toward, their father (despite his earnest and protracted efforts, including letters, cards, calls, offers of help, and attendance at their activities), 14- and 16-year-old children were not of employable age and, therefore, not constructively emancipated.
- *Gansky v. Gansky*[46]—The children's failure to return their father's telephone calls for several weeks shows only the children's reluctance to contact their father, but not abandonment and does not demonstrate constructive emancipation. The father made no serious efforts to maintain his relationship with the children.
- *Glen L.S. v. Deborah A.S.*[47]—The appellate court reversed the lower court's granting of the father's petition to vacate the child support provision of the stipulation of settlement. The son was temporarily reluctant to see his father after an altercation; the father did not contact his son, did not discuss college plans, delivered the son's personal possessions to mother's house and refused an invitation to the son's graduation. The court found that the father did not make serious efforts to see his son and contributed to the deterioration of the relationship. The son's temporary reluctance to see his father was not an active abandonment and refusal of all contact, and, therefore, did not render him emancipated.[48]

- *Gold v. Fisher*, *supra*—The party asserting constructive emancipation carried the burden of proof, and the appellate court confirmed the Family Court's finding that the daughter's testimony regarding the father's culpability for the estrangement was credible.
- *Haleniuk v. Persaud*[49]—Where the child had a "strained relationship" with the father, but did not completely refuse to have contact with him, the court found the father failed to meet his burden of proof that the child was constructively emancipated.
- *Henry v. Boyd*[50]—The appellate court held that a daughter who moved out of the family house with her parents' assistance to have a baby and married the father of the baby, but was under parental control, was not constructively emancipated. A marriage of convenience does not necessarily terminate parents' obligation to support the child.
- *Jaffee v. Jaffee*[51]—Support was not terminated despite the child's part-time and temporary full-time employment where the father left the marital residence and for a six-year period made no effort to establish a relationship with his child other than to seek visitation in court over the child's objection.
- *Kordes v. Kordes*[52]—Where the father caused the alienation between himself and his daughter, and therefore the daughter was reluctant to see her father, there was no abandonment by the daughter or constructive emancipation relieving the father of his support obligation.
- *Labanowski v. Labanowski*[53]—The lower court's termination of the father's support obligation was reversed. The father's parenting time was suspended while the father and children engaged in therapy to repair their relationship. No abandonment by the children occurred during such suspension.
- *Lipsky v. Lipsky*[54]—The father made no effort to see his son, did not exercise his visitation rights, moved to Florida without informing his son of his new address, did not reply to the invitation to, or attend, his son's Bar Mitzvah, and did not invite the son to his home. The father bears responsibility for the lamentable breakdown in communication with his son and for abandoning his son, and showed "a distressing lack of interest in, and concern for his son." The son was not emancipated and the father was not relieved of his support obligation.
- *McCarthy v. McCarthy*[55]—Where the father failed to show he made sufficient attempts to maintain a relationship with the child or that the child abandoned him, and the 19-year-child was not of employable age, there was no constructive emancipation.
- *McCloskey v. McCloskey*[56]—The father could not terminate his child support obligation on the basis of interference with visitation, where the father failed to invite the son to his home, emotionally and verbally abused his son, and he walked away from his relationship with his child.
- *Melgar v. Melgar*[57]—No constructive emancipation was found where, although child was working full-time, there was no proof of his economic independence and the cause of the parent-child rupture was not established. To terminate support, it must be clear that the parent did not cause the communication breakdown.
- *O.O. v. B.T.*[58]—An 18-year-old on public assistance who was excluded from the parents' home by an order of protection was found unemployable and entitled to parental support.
- *P.L. v. R.L.*[59]— The 18- and 20-year olds, although "of employable age," were not constructively emancipated. Their father made only sporadic efforts to arrange visits, never sought court intervention for enforcement or traveled to see the children, and did not demonstrate a desire to maintain a meaningful relationship with his children. The children's legitimate anger and reluctance to see him did not constitute an active abandonment or refusal of all contact.
- *P.S.G. v. J.E.F.*[60]—Where the father contributed to the alienation of, and failed to show he had made serious efforts to maintain a relationship with, his 17-year-old, the court found the child's refusal to visit the father did not constitute constructive emancipation.
- *Radin v. Radin*[61]—The daughters would not return their father's telephone calls after their father told one of them not to call him again. The court held the father contributed to the deterioration of the relationship, and that a few telephone calls cannot be construed as a serious attempt to maintain a relationship. The daughters did not abandon their father and the father was not relieved of his obligation to pay college costs.
- *Sanders v. Aiello*[62]—The appellate court reversed the family court and found that neither a 17-year-old nor a 15-year-old were constructively emancipated. The older child (daughter) and the father had a disagreement. The daughter did not return father's calls and texts, thereby evidencing reluctance to see her father, not abandonment. The father's few calls did not constitute serious effort to maintain a relationship.

- *Schulman v. Schulman*[63]—The father failed to meet his burden of proof that he did not cause the communication breakdown and that he made serious efforts to contact and see the child, or that the child abandoned him.
- *Shirley D. v. Carl D.*[64]— A 17-year-old was forced out of the parental home by her parents' emotional abandonment. The court held that the child remained entitled to financial support.
- *Silva v. Tricoche*[65]— Despite a marriage of minors, parents' support obligation was not terminated due to parents' acceptance of the marriage and failure to prevent two pregnancies.
- *Stabley v. Caci-Stabley*[66]—Even though an 18-year-old refused to abide by the mother's reasonable rules and moved into the father's home, there was no constructive emancipation and the mother was required to provide support.
- *Turnow v. Stable*[67]—The appellate court affirmed the lower court finding that his support obligation was not terminated where the father's behavior was the primary cause of the deterioration of the relationship with his children.

Arguments for the Eradication of the Constructive Emancipation Doctrine

A. Parental, Not Public, Responsibility

The financial support, welfare and survival of a child under the age of 21 years is, under the law, solely the responsibility of the parents. A child deemed constructively emancipated, however, in most instances is incapable of supporting himself or herself and unfairly becomes the financial burden of government agencies, including public assistance and welfare, relying on taxpayers' dollars.

Note the holding in *Columbia Dept. of Soc. Servs. v. Richard O., supra*, where even an emotionally disturbed 16-year-old on public assistance—despite his utter lack of economic self-sufficiency, and the resultant improper shifting of the financial burden to public dole—was found constructively emancipated,. Similarly, in *Ontario Dept. of Soc. Servs. v. Gail K., supra,* as well as *Columbia Dept. of Soc. Servs. v. Richard O., supra*, the courts elevate the purported "injustice" of compelling parents of rebellious children to provide for their support over the indisputable, palpable injustice of shifting the economic responsibility for supporting these children to the taxpayers.

Parents' erratic and inadequate support of their children, causing these children to clog the public welfare rolls, was the strongest impetus behind the passage of the Child Support Standards Act in 1989. Indeed, states that failed to enact appropriate child support statutes requiring predictable, sufficient child support payments faced the withdrawal of funding under the federal welfare acts.

The doctrine of constructive emancipation perpetuates the very ills the CSSA was intended to cure, and allows parents to divest themselves of their obligation toward their own offspring, and, irresponsibly and unfairly, to unload their recalcitrant, difficult children on society's doorstep.

B. Conflation of Constructive Emancipation with Wrongful Interference Under DRL § 241

Under DRL § 241, the court has the right to suspend or terminate spousal maintenance if the recipient "has wrongfully interfered with or withheld visitation rights" of the payor. DRL § 241 is explicitly inapplicable to child support. In enacting DRL § 241, the legislative intent was that child support was not to be cut off, notwithstanding the payor being denied visitation. Significantly, DRL § 241 does not "constitute a defense in any court to an application to enforce payment of child support." Believing that suspension or termination of spousal maintenance would create the desired deterrent and punitive effects, the draftspersons of DRL § 241 determined there was no need to impinge on child support.

However, in several decisions the concepts of frustrated visitation and constructive emancipation have been conflated, resulting in the termination of child support, and thereby, punishing the child rather than the intended target of DRL § 241, i.e., the spousal maintenance recipient.

For example, in *Dobies v. Brefka*, *supra*, where the mother alienated the children from the father and interfered with his access, rather than suspending the mother's spousal support—permissible punishment under DRL § 241—the court found the children were constructively emancipated and terminated the father's child support obligation, thereby acting to the children's detriment.

In *Cohen v. Schnepf*, *supra*, the father moved under DRL § 241 to suspend support payments because of his estrangement from his son. The court mistakenly applied the constructive emancipation doctrine, finding the child emancipated and ending child support, rather than applying the appropriate DRL § 241 remedy of suspending or terminating spousal maintenance.

Parental alienation and wrongful interference with access (or visitation) justifies termination of only spousal maintenance; indeed DRL § 241 prohibits the application to child support.

In light thereof, justifying a finding of constructive emancipation and cessation of child support on the basis of a parent's frustration of visitation flies in the face of the statutory prohibition of the applicability of DRL § 241 to child support.

C. Ineffective Punishment of Children

Withholding financial support as a tool to punish the purported offending child—one of the implicit objectives of a constructive emancipation finding—is not only ineffective but also an improper use of judicial power. The child, in most instances, is incapable of self-support, and falls into one or more of the abysses of poverty: homelessness, public welfare, and criminal activity. The child is not "reformed" by having no financial support, but rather becomes even more at risk, and a greater burden on social services and law enforcement resources.

Furthermore, inasmuch as two of the primary purposes of punishment in our system of justice are deterrence of future misconduct and rehabilitation of the wrongdoer, given that child support is not reinstated once the child is deemed reformed, cutting off a child financially has absolutely no deterrent or rehabilitative effect. Rather it is only punishment for punishment's sake, to the detriment of the child and society.

D. Improper Procedure

A case in point that finding difficult, willful children constructively emancipated is the wrong remedy is *Ontario Dept. of Soc. Servs. v. K. Gail*, *supra.* Permitting parental abdication of financial responsibility for this "at risk" 16-year-old increased the risk that the child will become destitute, homeless or a career criminal. If a child is truly culpable, violent or dangerous, the proper avenue is a delinquency or person in need of supervision proceeding and/or juvenile detention, not the termination of child support.

E. Negative Incentive

Allowing payor-parents the right to terminate child support based upon a breakdown in the parent-child relationship gives payors seeking to shirk their responsibilities a perverse incentive to contrive a conflict and shift blame to the child. Such a scheme rewards deadbeat parents by granting them the ability to evade their support obligation, thereby benefiting from their own shameful misconduct.

F. Unfair Burden on Custodial Parent

An adverse consequence unexplored by the courts' decisions finding constructive emancipation is the grossly unfair transferring of financial responsibility for the child onto the recipient parent who is often blameless, as well as—like many primary custodial parents/recipients of child support—devoid of the resources to provide for the child's financial survival and dependent upon child support to sustain the household.

G. Employable Age

One of the pervasive pretexts for constructive emancipation findings is that the child is "of employable age." It is, however, wholly unrealistic in today's world to deem a child who has not completed college, or even high school, able to earn sufficient wages to support himself or herself. In no segment of contemporary society is a child aged 16 to 20 economically independent or employable in a manner that secures his or her financial survival. Emancipating children of that age cuts them off "at the knees" and deprives them of the educational and training opportunities essential for self-support in adulthood, and increase the chances they will become destitute, homeless, and engaged in criminal activities.

H. Misuse of Judicial Resources

Our judiciary should not be in the business of assessing the merits of parent-child quarrels, or determining either the reasonableness and propriety of parental rules and discipline or the blameworthy party in a deteriorated relationship, or the legitimacy of the children's rebellion and refusal to speak to a parent. In case after case, courts render heavily subjective, value-laden judgments, smacking of outdated paternalism, in which, by an unstated and unknown "divining rod," (a) judges deem parental rules and discipline "reasonable," overtures to an estranged child "meaningful" or "serious," and decide whether parents have contributed to the deterioration of the relationship and have accepted responsibility therefor, and (b) judges determine whether children's refusal to see a parent is "justifiable," their anger "legitimate," their reasons for leaving a parent's home "for sufficient cause," and their treatment of the parent "disrespectful" or evincing "no regard."

The language in *Roe v. Doe, supra*, is noteworthy in its judgmental description of the daughter as having been "[a]fforded the opportunity to attend college away from home" and her moving off campus as a "deception" of a sufficient level to warrant terminating all support. Similarly, in *Chambers v. Chambers, supra*, one must ask if a judge should be deciding if the parental prohibition of a college-age young woman from having a boy in her bedroom is "legitimate."

With the enactment of DRL § 170(7), the irretrievable breakdown ground for divorce, courts are increasingly disinclined to evaluate fault and assign blame in the domestic relations arena. It is, therefore, anathema in the current, no-fault era for courts to decide what parental rules are or are not reasonable or what misbehavior of a child is or is not justifiable—determinations which are essential components of the constructive emancipation analysis.

An Alternative Approach

In the event a parent-child relationship has deteriorated to the extent that a parent is seeking to "wash his (or her) hands" of the child, then before the parents are relieved of their financial responsibility and the support of the child becomes the burden of social services and public assistance programs, there are several avenues to explore.

First, the court should appoint an Attorney for the Child (formerly a Law Guardian) to advocate for, and present the position of, the child. The child has a vested interest in his or her financial survival and currently, in constructive emancipation cases, has little to no voice.

Second, if the child is suffering from mental illness or psychological disturbance, then, under the Mental Hygiene Law, a Guardian Ad Litem should be appointed to "stand" in the child's "shoes" in the proceeding.

Third, as in child custody cases where an estrangement or alienation is present, prior to constructively emancipating the child, the court should use its power to order either therapeutic visits, in which the parent and child are accompanied by a mental health professional, or therapeutic treatment with a mental health professional, to facilitate communication and potentially a reconciliation between the parent and child.

Fourth, if abuse or violence is alleged by the child as the cause of his or her departure from the home and/or refusal to contact a parent, then Administration for Children's Services or Society for the Prevention of Cruelty to Children should be called upon to conduct a formal investigation, or, in extreme cases, law enforcement agencies should be brought in.

Fifth, monetary child support should not be suspended, but rather, as in certain landlord-tenant proceedings, payments should continue to be made either to the Family Court Support Collection Unit or to an account overseen by a receiver appointed by the court with the funds to be utilized for the child's ongoing expenses and needs.

Conclusion

The doctrine of constructive emancipation is a construct of the courts, not the legislature. Therefore, its eradication does not require legislative action or repeal, but rather a re-assessment and reversal by the Court of Appeals of its holding in *Roe v. Doe*, *supra*—a holding which has been exploited by parents shirking their parental obligations—flexing their parental muscle in the face of teenage rebellion, and has placed children in harm's way.

In a system in which constructive emancipation is a thing of the past and the financial support of one's children until their graduation from college[68] is an absolute, immutable obligation, children will not be financially abandoned or placed at risk and will not burden the public welfare rolls, parents will not be permitted to unload recalcitrant children on society's back, withholding child support will no longer be used as a means—currently a totally ineffective means—of punishing children or making them "toe the line," and judges will be spared the indignity of allocating blame and rendering value-laden judgments regarding the deterioration of parent-child relationships and the private management of family households.

Overturning the doctrine of constructive emancipation will allow parental financial support of their children to be the legal absolute intended by the Domestic Relations Law.

Endnotes

1. *See* N.Y. Domestic Relations Law (DRL) § 240(1-b)(b)(1); Family Court Act (FCA) § 413(1)(a); *Gold v. Fisher*, 59 A.D.3d 443 (2d Dep't 2009).
2. A. Wilson, Fences (1985).
3. *See Davis v. Davis*, 13 A.D.3d 623 (2d Dep't 2004); *Boden v. Boden*, 42 N.Y.2d 210 (1977); *Brescia v. Fitts*, 56 N.Y.2d 132 (1982).) The author has long sought—in vain—an explanation of the meaning of "unreasonable" as describing "change in circumstances" in the context of the legal standard for modification.
4. 27 Misc. 3d 713 (Sup. Ct., Nassau Co. 2010).
5. *Id.* at 716.
6. *Id* at 717.
7. *Cf., Glen L.S. v. Deborah A.S., infra* at endnote 47).
8. 29 N.Y.2d 188 (1971).
9. *Id.* at 192.
10. *Id.* at 193,194.
11. 43 N.Y.2d 128 (1977).
12. 115 A.D.2d 887 (3d Dep't 1985).
13. 240 A.D.2d 908 (3d Dep't 1997).
14. 295 A.D.2d 654 (3d Dep't 2002).
15. 172 Misc. 2d 87 (Fam. Ct., Orange Co. 1997).
16. 94 A.D.2d 783 (2d Dep't 1983).
17. 262 A.D.2d 913 (3d Dep't 1999).
18. 47 Misc. 3d 605 (Sup. Ct., N.Y. Co. 2015).
19. 83 A.D.3d 1148 (3d Dep't 2011).
20. 14 A.D.3d 811 (3d Dep't 2005).
21. N.Y.L.J., Apr. 2, 1987 (Fam. Ct., Westchester Co. 1987).
22. 2011 N.Y. Slip Op. 90130 (Fam. Ct., Kings Co.).
23. 92 A.D.3d 1100 (3d Dep't 2012).
24. 227 A.D.2d 618 (2d Dep't 1996).
25. 123 A.D.3d 412 (1st Dep't 2014).
26. 114 A.D.3d 945 (2d Dep't 2014).
27. N.Y.L.J., May 23, 1991 (Fam. Ct., Queens Co. 1991).
28. 125 A.D.2d 572 (2d Dep't 1986).
29. 249 A.D.2d 847 (4th Dep't 2000).
30. 239 A.D.2d 868 (4th Dep't 1997).
31. 103 Misc. 2d 1036 (Fam. Ct., Dutchess Co. 1980).
32. 224 A.D.2d 903 (3d Dep't 1996).
33. N.Y.L.J., Oct. 3, 1990 (Fam. Ct., Suffolk Co.).
34. 193 A.D.2d 97 (2d Dep't 1993).
35. 112 A.D.3d 817 (2d Dep't 2013).
36. 136 A.D.2d 945 (4th Dep't 1988).
37. 62 Misc. 2d 498 (Fam. Ct., Westchester Co. 1970).
38. 137 A.D.3d 1022 (2d Dep't 2016).
39. 73 A.D.3d 1041 (2d Dep't 2010).

40. 125 A.D.3d 1409 (4th Dep't 2015).
41. N.Y.L.J., June 14, 1990 (Fam. Ct., Westchester Co. 1990).
42. 84 A.D.3d 801 (2d Dep't 2011).
43. 95 A.D.3d 1388 (3d Dep't 2012).
44. 138 A.D.2d 704 (2d Dep't 1988).
45. 25 A.D.3d 100 (3d Dep't 2006).
46. 103 A.D.3d 894 (2d Dep't 2013).
47. 89 A.D.3d 856 (2d Dep't 2011).
48. This is a rare case involving an incorporated, surviving stipulation of settlement. Contrary to *Mark D. v. Brenda D.*, *supra*, the Court in *Glen L.S. v. Deborah A.S.*—although decided just one year after *Mark D. v. Brenda D.* in the same Judicial Department—makes no mention of the emancipation standards in the settlement agreement, or the *Boden v. Boden, supra, and Brescia v. Fitts, supra* (both at endnote 3) principles for post-execution modification of child support.
49. 89 A.D.2d 601 (1st Dep't 2011).
50. 99 A.D.2d 382 (4th Dep't 1984).
51. 202 A.D.2d 264 (1st Dep't 1994).
52. 70 A.D.3d 782 (2d Dep't 2010).
53. 49 A.D.3d 105 (3d Dep't 2008).
54. 115 A.D.2d 361 (1st Dep't 1985).
55. 129 A.D.3d 970 (2d Dep't 2015).
56. 111 A.D.3d 1120 (3d Dep't2013).
57. 132 A.D.3d 1293 (4th Dep't 2015).
58. N.Y.L.J., Nov. 27, 1995 (Fam. Ct., Kings Co. 1995).
59. N.Y.L.J., No. 1202760747651 (Sup. Ct., Suffolk Co. 2016).
60. N.Y.L.J., Apr. 29, 2008 (Fam. Ct., Nassau Co.).
61. 209 A.D.2d 396 (2d Dep't 1994).
62. 59 A.D.3d 1090 (4th Dep't 2009).
63. 101 A.D.3d 1098 (2d Dep't 2012).
64. 224 A.D.2d 60 (2d Dep't 1996).
65. N.Y.L.J., July 21, 1986 (Fam. Ct., Suffolk Co. 1986).
66. 68 A.D.3d 1682 (4th Dep't 2010).
67. 84 A.D.3d 1385 (2d Dep't 2011).
68. The author is of the opinion that, inasmuch as a vast number of children turn 21 while attending a four-year college, the legal age to terminate child support should coincide with college graduation so long as the child is matriculating full-time, but not beyond age 23, barring exceptional circumstances, such as a child's illness, injury or an agreed upon "gap year."

Hidden Gems Within the Internal Revenue Code Offer Great Opportunities for Much Needed Liquidity in Divorces

By Denisa Tova

In a commonly cited Private Letter Ruling, depending on your point of view the IRS either brightens or clouds this pretty gray area. A retired husband with several IRAs separated from his wife. The couple entered into what they felt was a separation agreement under which the IRAs would be divided equally with no penalties or taxation. They sought the IRS ruling that ultimately stated that these transfers *would* be taxable to the husband since the separation agreement did not meet the standards of I.R.C. §408(d)(6). It appeared the agreement did not stipulate that the couple was "legally separated," nor did it state the couple would ultimately present this to the courts to obtain a divorce decree. It would seem the couple was simply choosing to separate and live apart without sufficient legal documentation to confirm that arrangement.[1]

Cash is king in divorces! Marital home and retirement assets generally are the two big elephants in the room that need to be dealt with in divorce. And, of course, neither homes nor retirement accounts exactly scream liquidity.

According to Investment Company Institute data, reported by *Pensions & Investment,* in the first quarter of 2018, Americans held a total of $28 trillion in retirement market assets.[2] In this article, we will discuss strategies for dividing 401(k)s and IRAs, two of the largest categories of retirement assets. Defined benefit plans or pensions fall in this category too, but that will be a worthy topic on its own for a future article. More important, we also will describe the unique planning opportunities (some relatively lesser known) that can be helpful to bring the settlement to the finish line. These strategies can be especially appealing for people under 59 ½ who need short-term cash and liquidity.

Is 50/50 Split Without Consideration of Risk a Good Deal?

Splitting up marital assets 50-50 sounds clean and simple but frequently that is far from the truth. As a divorce financial analyst, I often look beyond the numbers and consider things like the client's risk tolerance and financial savvy.

For example, Mary and John, both age 52, own a business, a marital home owned free and clear, a rental property and sizable retirement assets in John's name. They have little cash since they typically reinvest or sink it into the business. Mary does light bookkeeping for the business but is not involved, by choice, in the day-to-day operations. She expresses a need for security and does not feel comfortable with the risks associated with staying involved in the business or the management of the rental property. John, on the other hand, has a high appetite for risk and enjoys pursuing new business and investment opportunities. In order to achieve an equitable distribution, Mary will receive the bulk of the retirement assets and the marital home, while John will keep the business, the rental property and the remainder of his retirement accounts. The bottom line numbers may not exactly shake out 50-50 but it feels equitable to them and they both walk away happy.

Now to the Exotics and the Basics

Once it has been determined how to divide up retirement assets, the next consideration is how to implement the transfer. Some of the typical post-divorce needs that might warrant immediate access to cash are:

- Moving and home rental
- Making a down payment on a home
- Maintaining mortgage payments on a home
- Taking classes or earning a degree to prepare for re-entry into the work world
- Meeting living expenses

A financial divorce expert can develop a strategy for transferring retirement account assets to the non-titled spouse in ways that help him or her achieve these types of goals. Fortunately, the tax code creates windows of opportunity in which to make transfers and strategic distributions while avoiding penalties. But no one should be surprised that these opportunities and windows are different depending on whether one is dealing with an IRA or a 401(k)! Let's tackle IRAs first.

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IRA-Related Transfers and Distributions

General Guidelines

Unlike qualified plans, dividing an IRA does not require a Qualified Domestic Relationship Order (QDRO). We will present more on QDROs later in this article. The agreement or judgment should clearly lay out the terms of the division. The recipient spouse should receive his or her share of the IRA via a transfer or a rollover, rather than a distribution. However, if for some reason the funds are distributed rather than transferred, the recipient spouse will need to deposit the funds into an IRA or other qualified plan account within 60 days to avoid immediate taxation and the pre-59 ½ age, 10 percent early withdrawal penalty. From that point on the recipient assumes responsibility for managing the fund and all future tax liability.

That's the black and white…now let's look at one big gray area.

A Big Fat Question of Timing

When can this transfer happen? Most attorneys and CPAs instinctively say it immediately follows the issuance of a final divorce decree. But can a transfer occur earlier, say when a couple's signed settlement agreement is submitted to the courts? Must the couple indeed wait until the court responds with a divorce decree?

Before we broach that issue, why might an earlier division of an IRA be advantageous to the divorcing couple? The non-titled spouse may want this transfer to happen sooner (with the filing of the separation agreement) rather than later (upon receipt of the divorce decree) due to concerns about market volatility and movement that could affect the value of the account (more on that in the next section). More likely, a non-titled spouse may want or even need to take advantage of certain provisions described further below to add a distribution element to a transfer.

I.R.C. § 408(d)(6) governs the distribution of an IRA in a divorce. The statute states that all or a portion of an IRA can be distributed to a non-titled spouse's IRA without immediate tax consequences as long as there is a "divorce or separation instrument," which is defined in I.R.C. § 71(d)(2) as:

- a decree of divorce or separate maintenance or a written instrument incident to such a decree,
- a written separation agreement, or
- a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

Thus, it would seem that a transfer from an IRA account of a titled spouse to that of a non-titled spouse could occur as soon as the parties have entered into a property settlement agreement, spelling out the terms of their IRA division. In this case, the court is subsequently merely ratifying the agreement by entering a judgment. That could satisfy the requirement for "a written instrument incident to such a decree" related to a divorce or separate maintenance.

In this Private Letter Ruling,[3] does the IRS brighten or cloud this already pretty gray area? A retired husband with several IRAs separated from his wife. The couple entered into what they felt was a separation agreement under which the IRAs would be divided equally with no penalties or taxation. They sought the IRS ruling that ultimately stated that these transfers *would* be taxable to the husband since the separation agreement did not meet the standards of I.R.C. § 408(d)(6). It appeared the agreement did not stipulate that the couple was "legally separated," nor did it state the couple would ultimately present this to the courts to obtain a divorce decree. It would seem the couple was simply choosing to separate and live apart without sufficient legal documentation to confirm that arrangement.

But, erring on the side of caution, because penalties and tax consequences can be significant if there is a misstep, attorneys and financial experts will most likely continue to wait to transfer IRA funds until the final decree is issued. We can only hope this matter is further clarified in the near future through statutory amendments or legal rulings.

Locking in Value

If an early transfer of an IRA is not viable, there are at least two other ways to lock in the value of a fund early in the divorce process to protect a non-titled spouse from market fluctuations between the time of the signed settlement agreement and the divorce decree:

1. The agreement can stipulate a valuation date and whether the non-titled spouse will share any capital gains or losses between that date and the time of distribution.
2. The titled spouse can temporarily adjust his or her IRA account and reallocate funds to fixed instruments or even cash within that account.

These approaches can cut both ways, of course. If an account is primarily equity-based, and the market rises during that period, one or both of the parties likely will lose out on gains that might have accrued until the account gets divided. But again, accommodating the risk tolerance of both parties may create that extra incentive to successfully wrap up the settlement agreement.

Creating Liquidity Without Penalty: SEPPs

This next lesser-known strategy is available to the general public, not just the divorcing population. However, this planning tool can be especially helpful for late-in-life divorces (but pre-age 59 ½) where the couples' primary assets are tied up in retirement accounts and there

is an immediate need for cash. As defined and described in I.R.C. § 72(t), a SEPP (Substantially Equal Periodic Payment) distribution arrangement is a way to tap into an IRA or an "old" 401(k) (from a previous employer) before age 59 ½ without an early-withdrawal penalty.

Under a SEPP arrangement, an account owner elects to receive regularly scheduled taxable payments (at least one per year) of fixed amounts over at least a five-year period or until he or she reaches 59 ½. The IRS offers three approved methods for calculating the required payment amount. The right method should be chosen that best meets the recipient's financial situation. Once the account owner reaches age 59 ½, he or she can stop the distributions until age 70 ½ when minimum required distributions must be taken.

A divorce situation triggers important SEPP-related opportunities for a non-titled spouse who needs immediate access to cash. A recipient can establish a SEPP distribution arrangement from his or her newly formed IRA or even possibly participate in a titled owner's ongoing SEPP.

> *Scenario: At the time of their divorce, John, the titled spouse of an IRA subject to transfer, is in the third year of a SEPP arrangement established to distribute $20,000 per year. Under the separation agreement, John will transfer 75 percent of the account to his ex-spouse, Sally.*
>
> *John has the opportunity at this time to reduce his SEPP distribution amount by 75 percent (to $5,000) or continue the current distributions at $20,000 (provide this will not prematurely deplete the reduced fund).*
>
> *Sally can initiate her own SEPP arrangement within her new IRA (or any other IRA she owns for that matter). She can also opt to assume the portion of the distribution that John may have chosen to forgo, i.e., $15,000. In that case, like John, Sally also would be in the third year of her SEPP arrangement. However, for her SEPP, Sally's age, not John's would dictate when the 59 ½ age threshold is reached.*[4]

401(k)-Related Transfers and Distributions

Divorce-related 401(k) fund transfers and distributions are guided not only by IRS statutes but ERISA (The Employee Retirement Income Security Act of 1974)[5] labor standards, reflecting the fact that these are workplace-based retirement accounts.

One important element that guides ERISA is the principle of "non-alienation": a participant's account cannot be transferred or given to anyone. Until ERISA was amended in 1984, this non-alienation clause conflicted with many state laws that sought to divide retirement plan accounts, including 401(k)s, in the course of a divorce. The 1984 amendments, found in the Retirement Equity Act,[6] allow for divorce-related 401(k) transfers provided they are done through a QDRO, that lays out specific conditions and restrictions for that 401(k) transfer.

QDROs are drafted by attorneys or other qualified specialists and subsequently "qualified" by the courts and the plan administrator as complying with the separation agreement, ERISA, and plan requirements. Among other things, a QDRO stipulates the applicable retirement plans involved and the amount of the transfer (either a dollar amount or a percentage).[7]

In short, when done in compliance with a properly executed QDRO, a 401(k) transfer will not be subject to penalties or taxation.

Timing

Unlike IRAs, there does not appear to be a hint of an opportunity to transfer funds early from a 401(k) since QDROs cannot be approved before the divorce decree. But a QDRO specialist can prepare the order as soon as a separation agreement is finalized, and divorcing couples should make sure this work is ongoing as they wait for a divorce decree so the QDRO can be executed as soon as possible after the decree.

However, there *is* a window of opportunity for an alternate payee to gain some liquidity during this ultimate transfer process. Under lesser-known provisions of I.R.C. § 72(t)(2)(c), an alternate payee can receive a portion of the transfer as a cash distribution penalty free if he or she notifies the plan administrator of that intention. This distribution is not tax free, however, and plan administrators will withhold 20 percent for that purpose.

> *Scenario: Jason is awarded 50 percent of his ex-wife Lori's 401(k) with a total value of $400,000. With a QDRO in place, Lori's employer contacts Jason to see how he would like the $200,000 dispersed. He advises the administrator he would like a $40,000 cash distribution with the remaining $160,000 transferred to his IRA. The administrator issues him a check for $32,000, withholding 20 percent to prepay taxes, and transfers the remaining $160,000 directly into Jason's IRA. Neither of these disbursements trigger the 10 percent penalty for premature 401(k) withdrawals as would otherwise be the case in a non-divorce situation.*
>
> *Alternatively, Lori and Jason could ask that the QDRO require the 401(k) account be divided within the plan (if the plan allows for it)—again, a non-taxable transaction. Jason would now be a participant in Lori's*

employer's plan, but he would not be able to make contributions or receive any matching employer contribution since he is not an employee there.

Follow Specific Steps or the Window to Avoid 10 percent Early Penalty Closes

Following the correct ordered processes is critical. If an alternate payee receives all the 401(k) funds as a transfer, he or she has lost the opportunity to immediately withdraw cash penalty free. Similarly, if a 401(k) is divided (i.e., shifted into a separate account within the same employer plan), an alternate payee cannot make a penalty-free withdrawal.

And Don't Forget 401(k) SEPPS

Finally, and as described in the IRA discussion, upon the transfer of the participant's 401(k) funds to the alternate payee's IRA, that IRA holder can initiate SEPP distributions. This is another, albeit rather roundabout, strategy to generate liquidity from a 401(k) transfer.

Conclusion

A solid divorce team, including an attorney and a qualified financial expert, can ensure that these commonly shared goals are met:

1. There is a fair and logical distribution of the marital assets reflecting as much as possible each person's risk tolerance and preferences.
2. The transfer of retirement account assets to the non-working spouse's retirement account(s) occurs tax and penalty free.
3. If necessary, the recipient spouse takes advantage of opportunities to create liquidity through disbursements made in conjunction with the transfers.

And, of course, the team should take advantage of all the opportunities buried deep in the IRS and ERISA statutes.

Endnotes

1. Private Letter Ruling 9344027.
2. http://www.pionline.com/article/20180621/INTERACTIVE/180629958/us-retirement-assets-at-28-trillion-in-q1-little-changed-from-end-of-2017.
3. See endnote 1.
4. Scenario based on information in *A Practical Guide to Substantially Equal Periodic Payments…*, William Stecker, pp. 86, 87.
5. P.L. 93-406.
6. P.L. 98-397.
7. ERISA 206(d)(3)(C); I.R.C. 414(p)(2).

With All Due Haste: Five Ways to a More Expedient Litigation Strategy

By Meredith L. Strauss

Many lawyers seem to believe that Newton's third law of motion applies to litigation: every action by their adversary requires an equal and opposite reaction. The result is often to extend rather than shorten the process. If your client really needs to move the litigation along—for example, if she is terminally ill or he wants to remarry because his new girlfriend is pregnant—the typical litigation playbook doesn't work. If opposing counsel serves 50 document requests, perhaps you shouldn't serve at least 50 of your own requests plus 15 non-party subpoenas, just because. If they make a motion, your instinct to cross-move, so that you'll get a reply and therefore the last word, doesn't help.

A trickier issue, to borrow another page from the physics textbook, is how to accelerate a case that your client wants wrapped up as quickly as possible, especially when your adversary has a goal of deceleration and delay. Your goal of increasing velocity may be due to a client's age, economic considerations, an anticipated change in the law, or a host of other reasons. At every step in this situation, you must keep the forward momentum and consider how to do less to achieve more.

"If your client is over the age of 70, you may apply for a statutory preference pursuant to CPLR 3403, which allows cases to be heard out of turn rather than in the order in which the note of issue is filed."

Here are five quick tips on how to streamline your approach when time is of the essence:

I. Jump the Line

If your client is over the age of 70, you may apply for a statutory preference pursuant to CPLR 3403, which allows cases to be heard out of turn rather than in the order in which the note of issue is filed. CPLR 3403 also provides that a preference may be granted under several other specific circumstances including where "the interests of justice will be served by an early trial." The preference request must generally be made at the time of the filing of the Note of Issue or within 10 days thereafter.

A preference will significantly shorten your case. Make a motion for a preference early in the case, then use it for leverage: insist on a conference with the judge in lieu of motion practice, and keep the pedal to the metal with short deadlines for discovery, pre-trial filings, and trial. Ask the court to eliminate rebuttal reports and expert depositions. This can cut months off of the timeline. For trial, ask the judge to allow the expert reports to serve as direct testimony so that you will only have to use up valuable court days for cross and re-direct.

II. Don't Take the Bait

If your adversary sends a blistering letter to the judge as a sur-reply on a motion or to complain about a discovery issue, your first instinct is probably to respond with an equally scathing letter which brilliantly skewers your opponent. But, before you send a messenger off to court with that letter, take a moment to reflect on whether this is the best move.

Many judges simply have their part clerks discard all incoming letters from counsel. It is worth a call to the part clerk to find out whether the opening salvo from your opponent will ever be read. The part may even have a rule forbidding letters to the court. But even if the judge may read the letter, sending a response will likely open a can of worms, inviting a flurry of further correspondence.

A letter-writing sideshow will take up valuable time and will not serve your ultimate goal. Having the last word is not the same as being the most effective. Sometimes, silence can be the most powerful response of all.

III. Ask Less, Give More

When it comes to discovery in a case that you're trying to accelerate, the best approach may be one that feels like acquiescence: ask for little while producing a lot. Your marching orders are to prevent the other side from claiming they don't have all the documents or testimony they need and therefore seeking to drag out discovery until kingdom come. If they're asking for receipts for every paper clip your client's business has ever purchased, just produce them and move on.

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Of course, if their requests are truly out of bounds, you will have to push back while still trying to avoid motion practice; otherwise, for every request that isn't harmful, just give them what they're asking for. Asking for a court conference can be the best alternative to a motion and if the opposition is particularly persistent, asking the court to appoint a special master to supervise discovery can short-circuit motion practice. Conversely, your own discovery requests should be fine-tuned to elicit only the most essential documents from the other side, making your preparation for depositions and dispositive motions or trial much more streamlined while also giving them no grounds for any motions.

IV. Drive the Bus

Everyone on your team, from your experts to your support staff, must be on board with your fast-track timeline. Make this clear when you are retaining appraisers and other testifying experts; they must be able to make your case their top priority. Next, create a spreadsheet that works backward from trial and sets hard deadlines for every task and identifies the person responsible. Circulate this task matrix on a weekly basis and require updates from every team member to confirm that they are on top of their benchmarks. Also, ensure that every expert has everything she needs to do her job.

At all times, you must be prepared to oppose any request for an extension of time by the other side. The best way to do that is to be ready yourself to meet every deadline.

V. Be the Voice of Reason

When time is of the essence, you may have to make compromises that you would not otherwise have considered, such as taking less discovery and letting provocative letters go unanswered. If your case goes to trial, you may also have to adapt your presentation of evidence to the timeline you want. Your opponent, on the other hand, will be trying to run out the clock.

If faced with a choice of adding trial days, inevitably spread over several weeks or even months, versus shortening the trial, consider capitulating on any points where the time saved will outweigh any compromise or accession. For example, it may be to your advantage to simply adopt the other side's expert's conclusions so that you can skip days of expert testimony and end the trial. This will have the added benefit of simplifying the judge's job and therefore will get you a decision sooner.

Overall, think of yourself as an *amicus curae*. The judge would like nothing more than to have your case come to a conclusion, so on this you are allies. Take care to remind the court whenever possible that you're just trying to move the case along—unlike your opponent.

Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

New CPLR 4540-a, Effective Jan. 1, 2019

The new CPLR 4540-a establishes a rebuttable presumption of authenticity for any documents that one party produces for the other during discovery. Under this new provision, discovery documents are presumed authentic when a party requests the discovery documents from the opposing party, and then offers those documents into evidence.

CPLR 2305 Amended, Effective Aug., 2018

CPLR 2305 has been amended to allow attorneys who are subpoenaing materials for trial to have those materials delivered directly to them, rather than to the court.

"The new CPLR 4540-a establishes a rebuttable presumption of authenticity for any documents that one party produces for the other during discovery."

Recent Cases

Child Support

Court Orders Father to Pay *Pro Rata* Share of Child's Private College Education Based on Child's Reliance on Father's Promise to Pay for Same

***Manfrede v. Harris*, 162 A.D.3d 1035 (2d Dep't 2018)**

The child's mother sought judicial intervention for the father to pay his *pro rata* share of the child's private college education. The father requested a SUNY cap. The court below directed the father to pay his *pro rata* share of the parties' combined income of the child's private college education based on the child's allegation that the father promised to pay for private college and he chose to attend a private college in reliance on such promise. The appellate division affirmed.

An Award of Carrying Costs on Marital Home and Direct Expenses on Vehicle in Addition to *Pendente Lite* Maintenance and Child Support Is Improper Without Further Explanation

***Blake v. Blake*, 164 A.D.3d 1111 (1st Dep't 2018)**

On the wife's motion for *pendente lite* support, the court granted the relief, ordering the husband to pay *pendente lite* maintenance, child support, and 78 percent of child care, all school-related expenses, extracurricular activities, and 78 percent of the carrying costs of the marital residence and the wife's vehicle. The husband appealed, claiming that the court erroneously recorded his financial status. The court had attributed $833,605 in annual income to the defendant, while he claimed that his income from his investment banking firm was actually only $226,340.

While the appellate court refused to challenge the lower court's assessment of the defendant's income, the appellate court ruled that the Supreme Court erred in ordering him to pay carrying costs on the marital residence and vehicle expenses in addition to maintenance and child support, without any explanation. The court reasoned that such carrying costs are encompassed in the child support and maintenance award.

Counsel Fees

$3.5M Interim Counsel and Expert Fee Award

***Trafelet v. Trafelet*, 162 A.D.3d 518 (1st Dep't 2018)**

Midway through an epic legal battle between wealthy divorcing spouses, the wife brought a *pendente lite* motion for her husband to pay for her counsel and expert fees. The court awarded her $3.5 million in counsel and expert fees, subject to reallocation at trial. The husband appealed, and the appellate court unanimously affirmed.

The case involved "expansive issues" including the validity of a $150 million trust, the alleged commingling of

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marital and non-marital assets within the trust, and the scope and size of the parties' assets. This naturally called for the acquisition of legal experts, accounting experts, and property valuation experts. The appellate court held that the lower court had quite a firm grasp of the scope of the case after it presided over a seven-day *pendente lite* hearing and was therefore in a position to properly evaluate the necessity of each party's legal and expert services. In addition, the wife's expert accountant submitted an "exhaustive affidavit" detailing the complexities of the financial issues, including that substantial fees were incurred defending against the husband's separate property claims regarding the trust.

Beyond challenging the wife's need for large legal fees, the husband also questioned whether a large award would foster her "extreme litigiousness" and spur her to pursue "meritless" legal strategies meant only to drain his coffers. In dismissing those arguments, the appellate court noted that the wife had not yet made a "meritless" argument and that the husband had been channeling his own litigious spirit by initiating just as many motions as his wife. Moreover, the court noted that since the fees are subject to reallocation at trial, it provides her with little incentive to bring meritless claims.

Changing Lawyers Nine Times Triggers Court Order to Pay for Opposing Party's Counsel Fees

***Behan v. Kornstein*, 164 A.D.3d 1113 (1st Dep't 2018)**

In this eight-year marriage, the trial court awarded the wife and the parties' child exclusive occupancy of the parties' marital apartment for three years, and ordered the husband to pay the mortgage, maintenance and assessments on the apartment as a form of maintenance. The court also ordered the husband to pay the wife 15 percent of the fair market value of his medical practice and 70 percent of her counsel fees. The husband appealed. In affirming the lower court's granting of exclusive occupancy to the wife, the appellate court cited the lower court's broad discretion in ruling on what is in the best interest of the child. However, the appellate court shortened the length of time that the mother and child would have exclusive occupancy to one year. The appellate court reasoned that the wife is a 49-year-old college educated professional, and $80,000 of income was imputed to her based on her work history, even though she has earned $175,000 in the past. The wife received a "substantial sum" in equitable distribution and had been receiving maintenance, both temporary and permanent, for eight years, which is equivalent to the length of the marriage.

The appellate court affirmed the award to the wife of 25 percent of the husband's brokerage account which he owned prior to the marriage, but commingled with marital assets. The appellate court also affirmed the court below's ruling on counsel fees. The plaintiff accumulated enormous counsel fees as the defendant dragged out the proceedings, changing attorneys nine times, failing to comply with court orders, and needlessly extending the trial with what the court called "belligerent behavior."

The appellate court vacated the lower court's ruling on the husband's medical practice. The husband started the practice prior to the marriage, and the wife would be entitled to the appreciation of the practice during their eight year marriage. However, since the wife failed to establish a baseline pre-marital value of the practice, no appreciation could be determined, and therefore, the award was reversed.

Child Custody

A Child's Witnessing of Domestic Violence Does *Not* Equal Neglect Without a Showing of Mental or Physical Impairment to the Child

***In re Nevin H.*, 164 A.D.3d 1090 (4th Dep't 2018)**

Two separate appeals were brought concerning custody and visitation of the parties' children, which were consolidated. In the first appeal, the Department of Children and Family Services (DOCS) alleged that the mother neglected the parties' children because the children witnessed their mother being physically abused by her boyfriend. The court ruled that the mother neglected the children. The mother appealed. In the second appeal, the father brought a motion for a change in custody of the parties' daughter to him, which was granted, based on the mother's loss of employment, inability to support the child, and the lack of suitable housing for the parties' daughter. The mother appealed this decision as well.

The appellate court reversed the finding of neglect. DOCS failed to present evidence that the children's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" by witnessing the domestic violence. Merely establishing that the children were present during domestic violence is not sufficient to establish neglect. See also *Nicholoson v. Scopetta*, 3 N.Y.3d 357 (2004). The appellate court affirmed the custody ruling, since the mother's financial hardship severely impacted the child's best interests.

Same-Sex Marriage

Divorcing Same-Sex Couple Must Equitably Distribute Property Obtained Since Civil Union

***O'Reilly–Morshead v. O'Reilly–Morshead*, 163 A.D.3d 1479 (4th Dep't 2018)**

In a case of first impression, the Fourth Department held that the property acquired during the parties' civil union and prior to their marriage should be equitably distributed based on comity of the Vermont civil union statute.

In June 2003, long before same-sex marriage was permitted in New York, a lesbian couple residing in New York traveled to Vermont to obtain a civil union. Three years later, in June 2006, they got married in Canada. By

2014, their relationship had become irretrievably broken. After the plaintiff filed for divorce in New York, the defendant counter-claimed, demanding that the couple's property be equitably distributed dating back to June 2003, the date of their civil union. The Supreme Court ruled that property acquired during the civil union is not subject to equitable distribution due to the court's lack of authority to distribute such property. The defendant appealed. In its ruling, the Fourth Department struck an intriguing middle ground. It embraced the lower court's reasoning that a civil union is not a marriage and should not be regarded as one. Nonetheless, the court ruled that the parties should equitably distribute the property they had acquired dating back to their civil union in June 2003 due to the principle of comity. Under the Vermont civil union statute, the parties are to receive the same benefits, protections and responsibilities under the law that are provided to spouses in a civil marriage, which includes the rights to distribute property.

Taking into account that the expressed intent of the Vermont civil union statute was to set up a marriage equivalent, the court ruled that comity required New York to treat the parties' Vermont civil union in that spirit and enforce equitable distribution of the parties' property acquired during their civil union.

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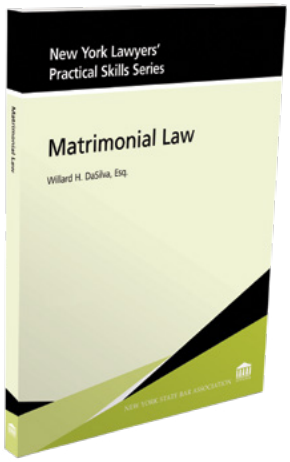

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"This book is very helpful in preparing all legal documents for a divorce action."

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