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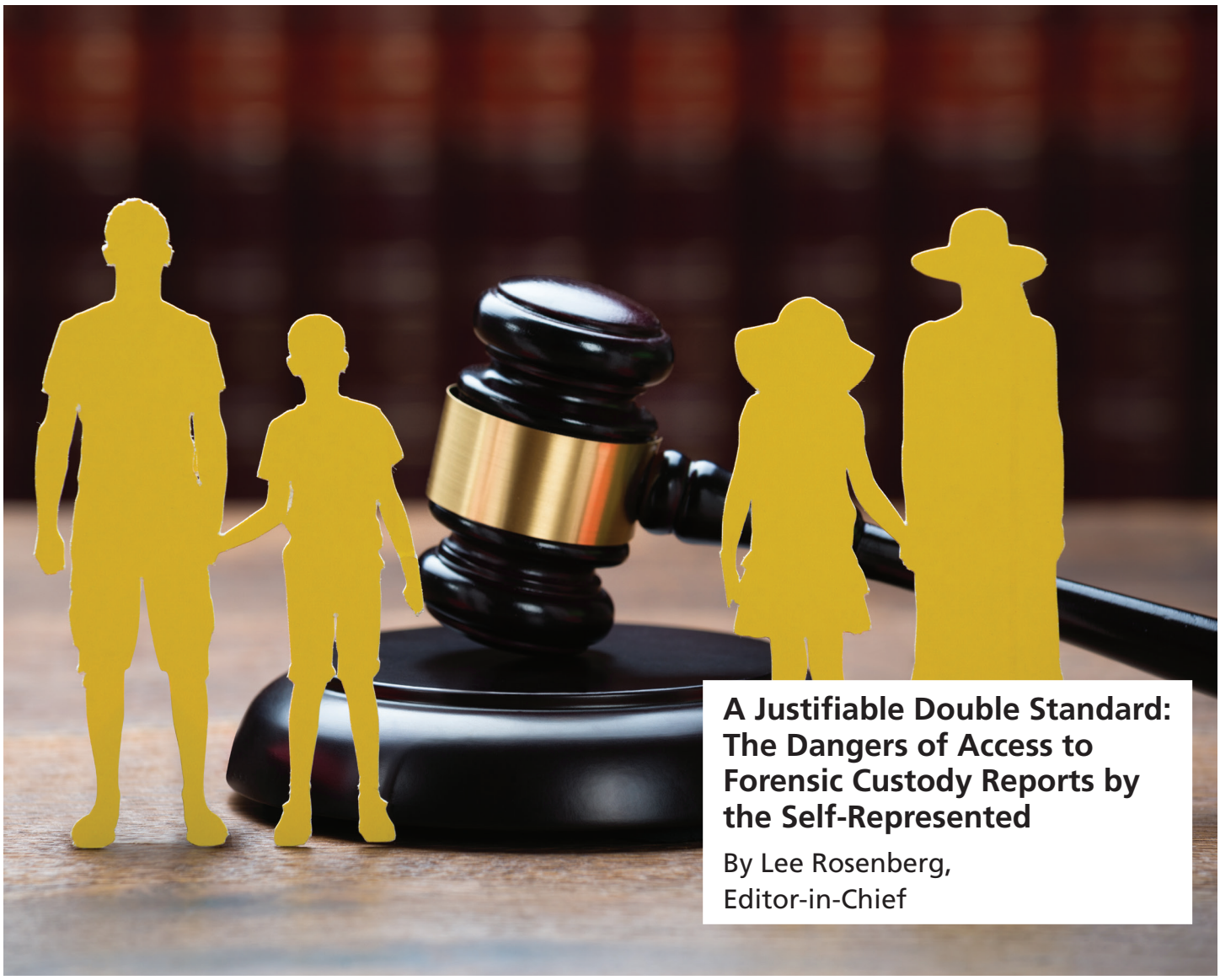

A Justifiable Double Standard: The Dangers of Access to Forensic Custody Reports by the Self-Represented

By Lee Rosenberg,
Editor-in-Chief

Also in This Issue

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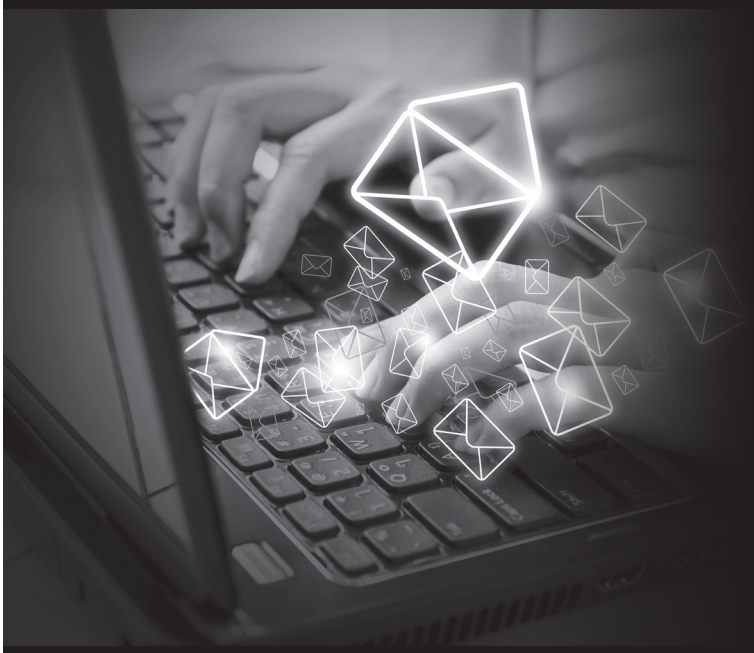
Table of Contents

SUMMER/FALL 2019 • Vol. 51, No. 1

Page

NEW YORK STATE BAR ASSOCIATION



The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to:

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REQUEST FOR ARTICLES

NYSBA

Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Family Law Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

• According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.

• Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.

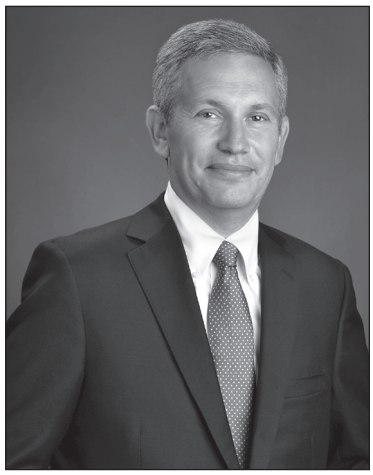
• Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.

• Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.

• Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads on Diversity



Hank Greenberg

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. (See http://www.nysba.org/diversitychairs)

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

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A Justifiable Double Standard: The Dangers of Access to Forensic Custody Reports by the Self-Represented

By Lee Rosenberg, Editor-in-Chief

In the category of what goes around comes around, another piece of proposed legislation regarding access to forensic reports is back on the table in the New York State Legislature. These Bills– A.5621 and S.4686 – serve to wrongfully and unwisely elevate the "self-represented" to equal status of attorneys.[1] While prior versions of the proposed law have been rejected by the New York State Bar Association's Family Law Section, the Women's Bar Association of the State of New York, and the American Academy of Matrimonial Attorneys New York Chapter, the new bills are *again* making the rounds despite being *again* justifiably rejected by these bar associations. Alternative solutions have also been historically advanced by the Office of Court Administration's Matrimonial Practice Advisory and Rules Committee.[2] This proposed legislation, in sum and substance, provides for pro se litigants and attorneys to be similarly situated and permitting release of forensic custody reports, as well as the underlying raw data, and records, not only to counsel of record, but *to the litigants themselves*.

Constitutionally, the right to custody and parenting is a fundamental right[3] and circumstances exist – particularly in low income/financially disadvantaged cases – where we must protect parents who cannot avail themselves of counsel from being doubly disadvantaged.[4] Of course, courts acting in *parens patriae* and seeking to make best interests determinations,[5] must balance equities and fairness while considering the appropriate factors in making those determinations.[6] Placing lawyers, with ethical and licensure constraints on the same footing as pro se litigants, however, creates undue risk to the process, undermines the system, and allows a false equivalency to exist which may have lasting repercussions

Courts have broad powers to make custody decisions[7] and trial courts are provided with great deference on appeal– particularly, as the trial court is in the best position to determine credibility.[8] Courts may appoint attorneys for children,[9] direct ancillary components such as parenting coordinators[10] and therapeutic intervention,[11] provide for supervised parenting,[12] alcohol and drug testing,[13] and– of course– forensic evaluation.[14] The court may not, however, delegate its ultimate responsibility to make custodial determinations.[15]

Practically speaking, it *appears* that the predilection for forensic evaluation is on the decline and many judges are feeling less reliant on costly and time-consuming forensics unless there is a credible allegation of psychological or psychiatric impairment, since the court can otherwise render its own factual determinations.[16] Prior debate on whether or not the evaluator should or should not even make recommendations in his/her report further informs the court's role as trier of fact.[17] When forensic valuations are undertaken and completed, the report itself is awaited with bated breath, as for many years and in most reported decisions, the court will *at least* take heed of its findings and rarely ignore them.[18] In many instances, it would not be historically unusual for the parties to perceive a forensic evaluation to be subject to the court's instantaneous imprimatur– although there are certainly decisions of more recent vintage to the contrary.[19] The report, and the process of getting there has, despite much academic criticism,[20] been a fulcrum which could on one hand turn a case on its head and, on the other, make a mere "allegation" now essentially one written as fact in stone.

The dilemma in addressing the importance of the forensic report when there is an unrepresented litigant, initially finds voice in the First Department's decision in *Sonbuchner v Sonbuchner*,[21] where the court although finding the pro se father was not deprived of due process by not getting additional time to review the forensic report stated,

> We nonetheless reiterate, as we have previously, that counsel and pro se litigants should be given access to the forensic report under the same conditions (see *Matter of Isidro A.M. v. Mirta A.*, 74 A.D.3d

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> 673, 902 N.Y.S.2d 362 [2010]). Because defendant's attorney had a copy of the report, the court should have given the report to pro se plaintiff, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring that the parties take notes from it while in the courthouse.

The Sonbuchner holding, and the ensuing discussion around it is now some 7 years old. Attorneys and courts have also in the interim, addressed the need for access to the raw data underpinning the report to be available for trial and pre-trial purposes,[22] particularly since depositions of the expert will not occur, and in the downstate departments, neither will pre-trial discovery on the issue of custody in most instances.[23] Having a pro se litigant further complicates matters. On July 10, 2019, and without citation to Sonbuchner, the Second Department in Matter of Raymond v Raymond,[24] rejected the pro se father's argument that he should have had been permitted to retain a copy of the forensic report, holding,

> The Family Court did not improvidently exercise its discretion in denying the request of the father, who proceeded pro se, for a copy of the forensic report prepared by the courtappointed forensic evaluator. The court provided the father with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents (see *Matter of Isidro A.M. v Mirta A.*, 74 AD3d 673; *Matter of Morrissey v Morrissey*, 225 AD2d 779; *Matter of Scuderi-Forzano v Forzano*, 213 AD2d 652). The father has failed to show that his ability to prepare for the hearing was prejudiced by his not having his own physical copy of the report.

While it is argued in some quarters that the self-represented parent has as much right to the report and underlying data as a party with counsel, the manner and extent of access must be different. First, the represented client also has existing limitations. They cannot take the report itself. They cannot make copies. They often cannot actually read the report, but must rely on the attorney's oral summary. Second, lawyers also have limitations. While they can get a copy of the report from the court, often they cannot make further copies. They most often have to make separate notes when reading it. They cannot disseminate it to a consultant without court permission. They cannot quote from the report in court papers. They must return the report back to the court upon conclusion of the case or on substitution of counsel. They are guided and restricted by the order providing the report to them, which they must sign off on– and, with the lack of uniformity in our system, those orders still vary from judge to judge.[25] Even judges have restrictions– although normally self-imposed– such as not reading the report, except on consent or after it is admitted into evidence.

The reason for these restrictions, even on counsel, is basic– the information in the reports and in the underlying data (which at least at the initial release is not in evidence, and thus not challengeable by cross-examination),[26] would be detrimental to the children and also to the parties themselves, if disseminated. How often do we see that a party has "inadvertently" or more likely purposefully, discussed the litigation with the children or actually left a copy of an affidavit on the kitchen table for the children to read, despite admonition of the court or their own attorney? How often do vindictive or emotionally hurt litigants seek to sway the children's view in their favor and by equal measure harm the other parent by word or deed?

The forensic report and underlying data are replete with not only the statements of both parties or at least the evaluator's recitation/summarization of those statements, it contains the evaluator's subjective observations of the parties within and without the presence of the children. It may have the children's statements. It may have proclamations by teachers, grandparents, older siblings and caretakers, therapists, and others germane to the world of custody and designated as appropriate "collateral sources". It may make actual recommendations to the court. It has references to and includes various psychological tests and test results, not always actually performed by the evaluator and has diagnoses presumably made under the DSM-V[27] – opining that one party may have a psychiatric disorder or underlying criteria for tendency towards same. It may or may not have been prepared in compliance with governing professional standards.[28] It may recite assertions of child abuse or domestic violence, alcoholism, drug addiction, or perhaps a party's discussion of a family history of sexual abuse when they were a child. Given the heightened state of emotions in the divorce litigation– never mind the even greater emotionality of *custody* litigation– having this black-and-white ticking time bomb in the hands of an unrepresented litigant, is not just a simple matter of an asserted due process claim, it is a shrapnel-filled explosion waiting to happen– unless that litigant is subject to restrictions to safeguard the information.

Attorneys are "officers of the court".[29] We are subject to ethical obligations which the litigant is not;[30] we are fingerprinted upon admission to the bar; we are issued a "secure pass" by virtue of our status, to bypass the court's metal detectors; we may discuss matters in Chambers without having a court officer present. We possess these privileges because they have been earned through a long process of education, testing, and ethical evaluation. We are subject not only to contempt and sanction for violating court directives, but also to suspension, disbarment, and

other legal processes. There are repercussions to our misbehavior which are not limited to one case or one client and serve as a deterrent against such misbehavior– and, since we are at least presumptively distanced personally from the client's matter, are disinclined to act in a manner which would create personal harm to the litigants or to their children.

The client is not subject to our process and our liabilities for misusing the trust given to us by the court system. The pro se litigant, not having counsel as a barrier to dissuade them from bad behavior, creates the additional danger created by a release of forensic reports to them which mitigates against similarly situating them with the lawyer. They may, of course, be subject to court order. If they violate the order they *may* be held in contempt; they *may* be incarcerated for that contempt, subject to statutory limitations; they *may* lose custody; they *may* find parental restrictions placed on them. While a protective order may be applied for, the clear presumption under the proposals is for release of the report and underlying data. There are, however, no absolutes, and once the bell has rung, it may not be unrung. They may always move a court for modification on a proper change in circumstances.

The legislative "powers that be" should take heed of the dangers posed by what appears to be an over-simplified leveling-up of the forensic playing field under the guise of due process. Self-represented litigant's should not have such relatively unfettered access to the forensic custody reports and raw data. The potential damage to be done by a release of the forensic report and raw data obtained under the guise of self-representation, might not be so easily, if it all, remedied.

Endnotes

1. Although the legislature is currently out of session, the Assembly version of the bill passed that body on June 11, 2019 and was delivered to the Senate. The Senate version was committed to the Rules Committee on June 20, 2019. The Bills remain part of the 2019-2020 Regular Session.
2. *See e.g*. Report of the Matrimonial Practice Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York, January 2019. https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019Matrimonial.pdf
3. *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016); *Troxel v. Graanville*, 530 U.S. 57 (2000).
4. FCA § 262(a)(v); *Hensley v. Demun*, 163 A.D.3d 1100 (3rd Dep't. 2018); *DiBella v. DiBella*, 161 A.D.3d 1239 (3rd Dep't. 2018).
5. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982); *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982).
6. *Hogan v. Hogan*, 159 A.D.3d 679 (2nd Dep't. 2018); *Sajid v. Berrios-Sajid*, 73 A.D.3d 1186 (2nd Dep't. 2010); *Realbuto v. Butta*, 134 A.D.3d 1041 (2nd Dep't. 2015).
7. *Louise E.S. v. W. Stephen S*., 64 N.Y.2d 946 (1985); *Olivieri v. Olivieri*, 170 A.D.3d 849 (2nd Dep't. 2019).
8. *Zafran v. Zafran*, 306 A.D.2d 468 (2nd Dep't. 2003); *Robinson v. Cleveland*, 42 A.D.3d 708 (3rd Dep't. 2007); *Caruso v. Cruz*, 114 A.D.3d 769 (2nd Dep't. 2014).
9. FCA § 249(a) (McKinney 2012); *Plovnick v. Klinger*, 10 A.D.3d 84 (2nd Dep't 2004).
10. *R.K. v. R.G.*, 169 A.D.3d 892 (2nd Dep't. 2019); *Headley v. Headley*, 139 A.D.3d 855 (2nd Dep't. 2016); *Silbowitz v. Silbowitz*, 88 A.D.3d 687 (2nd Dep't. 2011).
11. FCA § 251 (McKinney 2012); *Sanchez v. Alvarez*, 151 A.D.3d 1869 (4th Dep't. 2017); *Palmeri v. Palmeri*, 110 A.D.3d 859 (2nd Dep't. 2013).
12. *Parris v. Wright*, 170 A.D.3d 731 (2nd Dep't. 2019); see *Lane v. Lane*, 68 A.D.3d 995 (2nd Dep't. 2009).
13. *Welch v. Taylor*, 115 A.D.3d 754 (2nd Dep't. 2014).
14. FCA'§ 251; *Catalano v. Catalano*, 66 A.D.3d 1012 (2nd Dep't. 2009); *Salamone-Finchum v. McDevitt*, 28 A.D.3d 670 (2nd Dep't. 2006).
15. *Donald G. v. Hope H*., 160 A.D.3d 1061 (3rd Dep't. 2018); *Montoya v. Davis*, 156 A.D.3d 132 (3rd Dep't. 2017).
16. *See Matter of* Tyrek J., 161 A.D.3d 864 (2nd Dep't. 2018); *C.S. v. A.L.*, 55 Misc.3d 1212(A) (Fam Court Bronx Co. 2017). The court retains discretion as to whether a forensic report is required to render a custody determination. *Keyes v. Watson*, 133 A.D.3d 757 (2nd Dep't. 2015); *James Joseph M. v. Rosana R*., 323 A.D.3d 725 (1st Dep't. 2006); *Sassower-Berlin v. Berlin*, 31 A.D.3d 771 (2nd Dep't. 2006).
17. *Aldrich v. Aldrich*, 263 A.D.2d 579 (3rd Dep't. 1999).
18. *Cunningham v. Brutman*, 150 A.D.3d 815 (2nd Dep't. 2017*); Hutchinson v. Johnson*, 134 A.D.3d 1115 (2nd Dep't. 2015); *Nikolic v. Ingrassia*, 47 A.D.3d 819 (2nd Dep't. 2008).
19. *See Vasman v. Conroy*, 165 A.D.3d 954 (2nd Dep't. 2018); *Imrie v. Lyon*, 156 A.D.3d 1018 (3rd Dep't. 2018); *E.D. v. D.T*., 152 A.D.3d 583 (2nd Dep't. 2017); *Phillips v. Phillips*, 146 A.D.3d 719 (1st Dep't. 2017).
20. *See e.g*. Tippins and DeLuca, *The Custody Evaluator Meets Hearsay: A Star Crossed Romance*, Journal of the American Academy of Matrimonial Lawyers, Vol 30, May 2018.
21. *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566 (1st Det. 2012).
22. *K.C. v. J.C.*, 50 Misc.3d 892 (Sup. Court Westchester Co. 2015); *J.F.D. v. J.D*., 45 Misc.3d 1212(A) (Sup. Court Nassau Co. 2014); *In the Matter of* an Article 6 Proceeding and an Article 8 Proceeding *M.M. v. K.M*., 2019 Slip Op 51071(U) (Fam. Court Rockland Co., June 26, 2019).
23. *Garvin v. Garvin*, 162 A.D.2d 497 (2nd Dep't. 1990); *Torelli v. Torelli*, 50 A.D.3d 1125 (2nd Dep't. 2008); *Zappin v. Comfort*, 49 Misc.3d 1201(A) (Sup. Court N.Y. Co. 2015); *S.R.E.B. v. E.K.E.B*., 48 Misc.3d 1217(A) (Sup. Ct., Kings Co. 2015).
24. *Matter of Raymond v Raymond*, 2019 NY Slip Op. 05546 (2nd Dep't 2019).
25. There is a "form" order of appointment which may be found on the Uniform Court System website. https://www.nycourts.gov/LegacyPDFS/forms/matrimonial/forensicorder.pdf. It does not, however, address what the attorneys' obligations are in obtaining and reviewing the report.
26. *See Strauss v. Strauss*, 136 A.D.3d 419 (1st Dep't. 2016).
27. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).
28. *See e.g*. American Academy of Matrimonial Lawyers, *Child Custody Evaluation Standards*, 25 J. Am. Acad. Matrim. Law 251 (2013); American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings* (Dec. 2010); Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation* (2006).
29. *See e.g*. 22 NYCRR § 700.4(a).
30. New York Rules of Professional Conduct at 22 NYCRR 1200, et seq. Further, lawyers who are also parties to litigation cannot use an affirmation—we must swear in an affidavit. [*Law Offices of Neal D. Frishberg v. Toman*, 105 A.D.3d 712 (2nd Dep't. 2013); *Nazario v. Ciafone*, 65 A.D.3d 1240 (2nd Dep't. 2009); CPLR § 2106]; we are not supposed to use our "secure pass" to enter the courthouse; we do not get to go to into chambers with opposing counsel.

The Hague Convention on International Child Abduction: A Primer (Part 2)

By Robert D. Arenstein

Continuing where Part 1 of this article concluded,[1] Part 2 will address the establishment of habitual residence and the right of custody.

Habitual Residence

The attorney has to prove that the child[ren] was removed from or retained away from the country of "habitual residence"[2] of the child[ren]. Habitual residence was purposely left undefined by the drafters of the Convention in order to leave room for judicial interpretation and flexibility and in order to prevent mechanical application of the term.[3]

Friedrich v. Friedrich,[4] held that a person having valid custody rights to a child under the law of the country of the child's habitual residence cannot fail to "exercise" those custody rights under the Hague Convention short of acts that constitute clear and unequivocal abandonment of the child. Once it determines that the parent exercised custody rights in any manner, the court should stop—completely avoiding whether the parent exercised the custody rights well or badly. In *Sealed Appellant v. Sealed Appellee*,[5] the Fifth Circuit Court of Appeals adopted the reasoning from *Friedrich II* and held that in the absence of a ruling from a court in the child's country of habitual residence, when a parent has custody rights under the laws of that country, even occasional contact with the child constitutes "exercise" of those rights. To show failure to exercise custody rights, the removing parent must show the other parent has abandoned the child. It held that under the law of Australia, the children's country of habitual residence, the father was "exercising" his rights of custody when the mother removed the children. It also held that no custody suit need be pending for the mother's removal to be wrongful under the Convention.

If one parent suspects that the other might abduct the child[ren], that parent may obtain a court order that prevents the other parent from leaving the jurisdiction with the child[ren]. This is known as a *ne exeat* order. This too may give the parent a right of custody as defined by Article 3 and 5 of the Hague Convention and as will be discussed below.[6] In *Croll v. Croll*,[7] Mrs.Croll removed her daughter from Hong Kong to the United States in violation of her custody agreement with Mr.Croll. Mr.Croll filed an ICARA petition seeking her return to Hong Kong. Under their agreement, Mrs.Croll maintained sole "custody, care, and control" of the child, and Mr. Croll had a right of "reasonable access." The agreement also provided that the child "not be removed from Hong Kong until she attains the age of 18 years" without leave of court or consent of the other parent. The district court concluded that this "*ne exeat*"[8] clause created rights of custody under the Convention and granted Mr.Croll's petition. In reversing, the *Croll* majority relied on three main conclusions: (1) that Mr. Croll's *ne exeat* right was not a right to determine the child's place of residence, but only a limitation on Mrs. Croll's right to determine the child's place of residence; (2) that his *ne exeat* right could not be exercised absent removal; and (3) that the history and drafters' intent of the Hague Convention supported the view that a *ne exeat* right was not custodial. The Second Circuit held that a *ne exeat* right is not custodial. In reaching its view that the *ne exeat* right was only a limitation, the Court relied in part on how the particular agreement gave Mrs. Croll the sole "custody, care, and control" of the child, and thus the sole right to determine her place of residence within Hong Kong. Current U.S. Supreme Court Justice Sonya Sotomayor wrote an extensive dissent in this matter and later it was reversed in the recent United States Supreme Court in the case of *Abbott v. Abbott*.[9]

In *Furnes v. Reeves*,[10] the Eleventh Circuit distinguished *Croll* because it involved Norwegian law and Plaintiff Furnes' *ne exeat* right had to be considered in the context of his additional decision-making rights by virtue of his joint "parental responsibility" under Norwegian law. In reaching its view that the *ne exeat* right was only a limitation, the *Croll* majority relied in part on how the particular agreement in *Croll* gave Mrs. Croll the sole "custody, care, and control" of the child, and thus the sole right to determine Christina's place of residence within Hong Kong. The Eleventh Circuit noted that under Norway's "Children Act", parental responsibility is broadly defined to include the right "to make decisions for the child in

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personal matters." Where parents exercise "joint parental responsibility" but the child lives with only one parent, the parent with whom the child resides has decision-making authority "concerning important aspects of the child's care," but not all aspects of the child's care. While the parent with whom the child resides has the authority to determine where the child will live within Norway, the Children Act grants a parent with joint parental responsibility, decision-making authority over whether the child lives outside Norway. Both parents must consent to the child moving abroad. This joint parental responsibility effectively gave the father the right, generally referred to as a "ne exeat " right, to determine whether the child could live outside of Norway with her mother.

"Habitual residence is not defined by a specified period of time; it is more a state of being or a state of mind."

The Eleventh Circuit held that Furnes' rights to his daughter under Norwegian law were the type of rights that entitled him to the return of his child under the express terms of the Hague Convention. The court held that "rights of custody" included "rights relating to the care of the person of the child," and in particular, "the right to determine the child's place of residence." Furnes' *ne exeat* right granted him the substantive right (albeit a joint right) to determine whether the child lives within or without Norway, and thus the right to determine jointly with Reeves the child's place of residence. This *ne exeat* right in the context of Furnes' retained rights, constitutes a "right of custody" as defined in the Convention.

Habitual residence is not defined by a specified period of time; it is more a state of being or a state of mind.[11]In that regard, it differs from the "home state" analysis under the UCCJA and the PKPA[12] which clearly uses six (6) months as a bench mark. Habitual residence can technically be established after only one day.[13] "The leading view is that habitual residence is the permanent physical residence of the child as distinguished from the legal residence or domicile."[14] If a family decides to move, permanently, to another country and thereafter the parents sell the family home, quit their jobs and purchase a residence in another country, the family has effectively changed the habitual residence of the child[ren].[15] Therefore, if one parent then decides the move was not what he or she really wanted, the child[ren] cannot simply and unilaterally be removed from the "new" habitual residence.[16]

To establish a basis for asserting habitual residence, the attorney must carefully gather all relevant data from the client. This may appear to be an obvious instruction, but it can often prove to be a difficult task. Aside from the common difficulties involved in getting unfavorable details from a client, the Hague attorney may confront cultural and lingual differences that hinder the communication process. Oftentimes it is difficult to explain to a client, in his or her second language, that the Hague proceeding is not a custody proceeding at all. The attorney must carefully explain that the Hague hearing will determine only *where* the custody hearing should take place, not *who* will have custody of the child[ren]. The attorney will also find that this rule must be reinforced time and again as the client insists on describing how negligent the other parent can be and has been.

To avoid certain misunderstandings, the attorney should attempt to collect any and all documents regarding the family such as affidavits from teachers and neighbors regarding how "settled" the child[ren] were in the foreign jurisdiction. To accomplish this, it may be necessary for the client to contact his or her foreign lawyer in order to obtain the pertinent documents.[17]

The attorney has other sources of information that he or she may not be aware of. The Central Authority in the child[ren]'s state of habitual residence may have documents on record that will assist the attorney in building his or her case. For instance, the attorney may discover that it is difficult to show that the client had a right of custody of the child[ren] at the time of the removal. Based on information from the government and the American Embassy, the foreign Central Authority may be able to gain access to documents that the attorney and client cannot.

The issue of habitual residence can be a controlling factor as to whether an abduction will apply under the Hague Convention. In one case, *Santiago v. Lopez*[18], the court ruled that children, who lived with their parents on a United States military base in Germany for nine years, were not habitual residents of Germany. In contrast, in a more recent Federal Court of Appeals case, *Friedrich v. Friedrich*,[19] the court ruled that under the case of *Dare v. Secretary of the Air Force*,[20] children living on an army base *were* habitual residents of the country in which the base was located.[19]

Rights of Custody and Rights of Access

A right of custody and/or a right of access "may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."[20] For example, if custody has already been awarded to one parent then that parent has a right of custody. If the other parent has been granted visitation rights, then that parent has a right of access. This right of access, though, is not sufficient in and of itself to qualify as a right of custody sufficient to order a return under the Convention. As referenced above,

in a very controversial case, the Second Circuit, in a 2-1 decision, ruled that a *ne exeat* order did not give a "right of custody" under the treaty.[21] In a stinging dissent, Justice Sotomayor was critical of the majority looking at "right of custody" as a pure custody terminology. The *Croll* decision was distinguished in a First Circuit Case, *Whallon v. Lynn,* [22] where the court discusses that *Croll's ne exeat* clause was one of a negative right and in this case the *ne exeat* was a positive right. The Supreme Court had never taken a case involving the Hague Convention until January 12, 2011 when it heard the arguments in *Abbott v. Abbott*, supra.

The Supreme Court took *Abbott* as well as *Duran v. Beaumont.*[23] Both cases had decided that a *ne exeat* order is not a right of custody. However, in *Abbott* – the first case ever to be heard by the Supreme Court on any issue involving the Hague Convention – Justice Anthony Kennedy, held that father's *ne exeat* right granted by Chilean family court was a "right of custody," under the Hague Convention, abrogating *Croll, Fawcett,* and *Gonzalez*. Both Abbott and Duran were remanded to the Circuit Court for trial only on the issues of the exceptions to the treaty for returning children. The majority opinion in *Furness v. Reeves*, supra, held the day and is the law of the land. Justice Sotomayor, who dissented in *Croll*, was vindicated in this opinion and she was in the majority on *Abbott.*

There are times however when the notion of who has a right of custody becomes clouded.[24] If parents are married and have not begun any divorce or custody proceedings, and thus have joint custody, the United States views them as having an equal right of custody of the child[ren]. However, this may not be true in other countries. In a situation where the child was born out of wedlock, many countries will give a superior right of custody to the mother. Custody rights are defined by the laws of the country of the child's habitual residence,[25] so the attorney may have to do some research into rights of custody and access in the foreign jurisdiction prior to filing the petition.

A parent does not have to have actual physical custody to be exercising rights of custody. Decisions regarding the child's well-being, including the right to determine the place of residence of the child[ren], are considered rights of custody.[26] In *Costa v. Costa*,[27] the court found that, "the right to determine a child's place of residence" is included among the rights of custody to which Article 3 applies.[28] Therefore, if a court or a parent must approve a relocation of a child[ren], that very fact gives rise to a recognizable non-custodial "right of custody" within the meaning of the Convention.[29]

In an Australian case, *C v. C*,[30] the court found that a clause in a custody order stating that "neither the husband or the wife shall remove the child from Australia without the consent of the other..." was sufficient to find that the father had rights of custody.[31] Although the father did not have the right to determine the place of residence within Australia, he did have the right to decide whether the child remained in Australia or lived anywhere outside that country.[32]

In some instances, it may be beneficial to obtain a custody decree prior to applying for return of the child[ren] under the Convention. An order which is based, in part, upon a finding that there was a wrongful removal or retention within the meaning of Article 3 may speed up the process of return.[33] Even if there is a custody decree, the Convention does not require its enforcement or recognition;[34] "it only seeks to restore the factual custody arrangements that existed prior to the wrongful removal or retention."[35]

Custody rights must have actually been exercised by the left-behind parent at the time of the breach by the abducting parent, or would have been exercised but for the breach, in order for the Convention to apply.[36] The burden is on the petitioner to prove that his or her custody rights were or would have been exercised. The burden is on the party opposing return to prove the non-exercise of custody rights.[37] For example, in *Meredith v. Meredith*,[38] Mrs. Meredith brought an action under the Hague Convention, in the United States, claiming that her child was wrongfully removed from England by the child's father. Mrs. Meredith had taken her child to France, on December 7, 1989, with the consent of the child's father. A few weeks later, she telephoned her husband and notified him that she would not be returning to Arizona with their child. Instead, she moved to England without notifying her husband and, with the help of her family, concealed her whereabouts from him.

On April 26, 1990, Mr. Meredith was awarded custody by an Arizona court after Mrs. Meredith had been served with notice, through her parents, and given an opportunity to be heard to which she had not responded. A month later, Mr. Meredith, with the help of an attorney in England, regained physical custody of the child and brought her back to the United States. It was after the child's removal that Mrs. Meredith filed a petition under the Convention.

The Court determined that Mrs. Meredith only had *physical possession* of the child rather than legal rights of custody at the time of the removal, even though prior to the custody order both parents had legal custody and denied her petition.[39]

Article 15 Ruling - Decision of Wrongful Removal or Retention

Under Article 15, the Treaty provides that the judicial or administrative authorities, prior to issuing an order for the return of the child[ren], can request that the authorities of the state of habitual residence of the child[ren] issue a decision stating that the removal or retention was wrongful under their laws.[40] It is very helpful to have the Central Authority or the court of the foreign country issue such a determination prior to bringing the petition for re-

turn, if possible. It can be argued that this determination, though not binding, is certainly persuasive evidence on the issue of wrongful removal. If this has not been done in advance and the judge requests it, this could further unduly delay the return of the child[ren] until such a determination is rendered.

Immigration and the Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction focuses on issues of residency, not citizenship. It is important to note that the Convention does not confer any immigration benefit. Anyone seeking to enter the United States who is not a United States citizen must fulfill the appropriate entry requirements, even if that person was ordered by a court to return to the United States. This applies to children and parents involved in any child abduction case including a Hague Convention case.

When a taking parent in a Hague Abduction Convention case is ineligible to enter the United States under United States immigration laws, the parent *may* be paroled for a limited time into the United States through the use of a Significant Public Benefit Parole in order to participate in custody or other related proceedings in a United States court.

Drafting the Hague Convention Papers

It is important to stress that time is of the essence in a Hague Convention case.[30] The lawyer may and should begin drafting the petitioning papers immediately. The actual Hague Petition generally requires only a small amount of case specific information and therefore may be drafted before meeting with the client in the United States. For these purposes, the information in the Request for Return is often sufficient. The Petitioner usually wishes to come to the United States as soon as possible in order to see the child[ren]. In such a case it is necessary to obtain a stay of any Orders of Restraint or Protection quickly. Note that immediate contact with the abducting parent may not be advisable if the Petitioner believes the abductor may again flee with the child[ren]. The attorney should use his or her best judgment.

Warrant in Lieu of Writ of Habeas Corpus

If the client has an idea of where the abducting parent and child[ren] are, but is concerned that the abductor may flee again, an Order for Issuance of Warrant In Lieu of Writ of Habeas Corpus may be prepared and filed early in the proceeding. Such a Writ, once signed by a judge, permits the proper authorities to take the child[ren] into custody to be presented to the court for the Hague Convention hearing. The document may be modeled after the following:

ORDER FOR ISSUANCE OF WARRANT IN LIEU OF WRIT OF HABEAS CORPUS

The Convention on the Civil Aspects of International Child[ren] Abduction, done at the Hague on 25 Oct 1980 and International Child Abduction Remedies Act, 22 U.S.C. 9001 et. seq.

Upon the reading and filing of the PETITION FOR RETURN OF THE CHILD PURSUANT TO THE CONVENTION and the International Child Abduction Remedies Act and Petitioner's PETITION FOR A WARRANT IN LIEU OF WRIT OF HABEAS CORPUS, it appears that (NAME OF CHILD[REN]) are persons under sixteen (16) years of age, are illegally held in custody, confinement or restraint by (NAME OF ABDUCTING PARENT) (and her family) at (specific location of child[ren]) and from which it appears that a Warrant should issue in lieu of Writ of Habeas Corpus.

ORDERED, that a Warrant of Arrest issues out of and under the Seal of the [name of court] directed to any peace officer within the State of [name of state where they are being held] commanding the peace officer to take into protective custody (NAME OF CHILD[REN]) and release (NAME OF CHILD[REN]) to the Petitioner or his/her agent; and it is further

ORDERED, that this case shall be heard at a hearing scheduled on the __day of ___

, at o'clock in the fore/afternoon of that day at , or as soon thereafter as counsel may be heard; and it is further

ORDERED, that the peace officer serve a copy of the following listed documents on [NAME OF ABDUCTOR] and execute and deliver to Petitioner the appropriate proof of service thereof:

Warrant In Lieu of Writ Habeas Corpus; and

Notice of Petition Under Hague Convention; and

Petition For Return of Child[ren] To Petitioner.

ORDERED, that Petitioner or his agent shall not remove (NAME OF

CHILD[REN]) from the (name of the state) pending further order of this Court, and it is further,

ORDERED, that this Order gives any peace officer within the (name of state] the authority to search [name of place Petitioner believes the child[ren] are being held), or any other place where (NAME OF CHILD[REN]) are reasonably believed to be present, for the purpose of determining whether (NAME OF CHILD[REN]) are present.

J. S. C.

Notice of Petition Under the Hague Convention

The next likely document to be drafted is the Notice of Petition. This document provides the abducting parent with the following: the case caption naming the Petitioner and Respondent; the existence of the Hague Convention[31] and ICARA[32]; the date, place and time of the hearing; notice that Respondent's personal appearance is required at the Hague hearing; and the attorney's address and telephone number.[33] The following is a good model:

NOTICE OF PETITION UNDER HAGUE CONVENTION

The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980 and International Child Abduction Remedies Act, 42 U. S. C. 11601 et. seq.

NOTICE is hereby given to _____, that a PETITION FOR RETURN OF

CHILD[REN] (Copy attached) has been filed with the _____ Court of the State of _____, County of __.

A hearing on this matter will be held at _____ at the Courthouse located at _____ on the _ day of _, 20__ or as soon thereafter as counsel may be heard.

YOU ARE ORDERED TO APPEAR PERSONALLY AT THE HEARING.

Dated:

Attorney, Esq.

TO: Respondent

Petition for the Return of the Child[ren] to Petitioner

Finally, the attorney *must* prepare, file and serve the Petition for Return of the Child[ren] to Petitioner.[34] This document is generally broken down into sections.[35]The "Preamble" informs the court that the Petitioner is moving under the Hague Convention and that the text of the Hague Convention and ICARA are annexed with the papers. The objectives of the Hague Convention, which are to secure a prompt return of the abducted child[ren][36] and to ensure that the rights of the Petitioner in one Contracting State are respected by other Contracting States,[37] should also be clearly stated. The most important thing for a lawyer to keep in mind when drafting papers for a Hague Convention case is that, more often than not, the primary purpose of the papers is to educate both the bench and the bar on the Hague Convention.[38]

Under the heading "Jurisdiction," the attorney should simply state that ICARA gives the U.S. courts jurisdiction over the case.[39]

The third heading is the "Status of Petitioner and Child." Here the attorney sets forth the elements of the cause of action. The Hague Convention applies to cases where a child under the age of sixteen (16) years[40] has been removed from his or her state of habitual residence,[41] in breach of right of custody of Petitioner[42] which the Petitioner had been exercising[43] at the time of the wrongful removal or retention.[44] The attorney should annex a copy of the original [Request for Return] form with the Petition. The section entitled "Removal and/or Retention of Child[ren]" by Respondent sets forth, generally, the approximate date of the alleged abduction and states that the abduction was wrongful under Article 3 of the Hague Convention.[45] This section of the Petition may be written very generally by merely stating the existence of a right of custody, but the issue will become more complicated at the Hague hearing where opposing counsel may defend against the Petition by alleging that the Petitioner never had any right of custody.[59] This will be covered in more depth under the heading "Defenses to the Hague Convention."

Finally, this section should state as specifically as possible where the Petitioner believes the child[ren] are being held in the United States and that the child[ren]'s habitual residence is the foreign jurisdiction.

"Custody Proceedings in [name of country]" should reference (and annex) any papers regarding proceedings in the State of habitual residence, including orders or decrees issued by the courts of that state.[60] Here the attorney should cite Article 16[61] which gives the court entertaining the Hague Petition the authority to stay other proceedings regarding the same parties and the same child[ren]. This may also be done by an Order to Show Cause filed in the same Court and served upon the Respondent.

"Provisional Remedies" refers to requests such as the Warrant in Lieu of Habeas Corpus which is based upon the belief that the abducting parent will again remove and secrete the child[ren]. The section called "Relief Requested" can be drafted like any court order. For instance, the attorney may choose to respectfully request the following: (a) an order directing a prompt return; (b) the issuance of a warrant; (c) the direction of notice; (d) an order staying other proceedings; (e) an order directing Respondent to pay Petitioner's costs and fees; and (f) any other and further relief . . ..

The attorney should, under the heading *Notice of Hearing*, state the law under which notice is being given. For example, "pursuant to 22 U.S.C. 9003(c)[62] the Respondent shall be given notice according to" and then state the appropriate law. The Hague Convention makes a provision for attorney fees.[63] The attorney may want to ask for fees under the heading *Attorney's Fees and Costs [Including Transportation Expenses] Pursuant to Convention Article 26*

and/or 22 U.S.C. 9007) and submit a bill for fees incurred to date in the case.[64] If this strategy is taken, a request should also be made for the court to reserve judgment over any further fees. The above documents can be verified by the client via fax, therefore, the papers may be drafted, filed and served without the client having to be present in the United States.[65]

Choosing a Forum

Any court of competent jurisdiction can entertain a Hague Convention case. Usually cases are brought in state court because most attorneys who practice family law are more familiar with state courts, however, ICARA gives both federal and state courts jurisdiction over Hague Convention cases.[66] Therefore, the attorney should carefully consider where the Petition should be brought. Since the Federal courts do not normally hear custody cases, a federal judge may be better able to look solely at the legal issue of jurisdiction, as required by the Convention, without becoming clouded by the custody issues. "Local law regarding ultimate issues of custody are inappropriate and irrelevant."[67] However, the practitioner may still feel more comfortable in the state courts in which he or she normally practices.

If an attorney chooses to bring the action in state court, he or she should consider different local or state courts that handle family cases. For instance, a local court or judge may be perceived to display bias toward a local abducting parent. In that case it may be wiser to bring the action in federal court. Although a case could be brought in either the Federal or the State Courts, there have been various methods used to try to remove the case from a particular court. A case brought in the State Court may be removed to the Federal Court under the Federal Removal Statute.[68] Further, a case could be denied a hearing in the Federal Court under the *Younger Abstention Doctrine*.[69]

Serving the Respondent

ICARA provides that notice of a Petition under the Hague Convention must be effectuated according to "the applicable law governing notice in interstate child custody proceedings."[70] In the United States, the relevant federal law is the Parental Kidnapping Prevention Act [PKPA][71] which dictates that the Uniform Child Custody Jurisdiction Act [UCCJA][72] governs the issue of notice.[73] The UCCJA requires that "reasonable notice and an opportunity to be heard" be provided to the Respondent.[74] This does not specifically require personal service, but in a Hague Convention case, the Notice of Petition and the Petition for Return should ideally be personally served in order to forestall any notice challenge. Of course, this is not always possible, especially if the Respondent's whereabouts are unknown.

Often times the Respondent is staying with family in the United States and the Petitioner has a good idea of where to begin looking for the Respondent and the child[ren]. In a case like this, service may be simple. Additionally, frequently the abducting party has availed him or herself of the local courts and obtained an *ex parte* order which has been served upon the client. When appearing at any scheduled hearing, with or without your own stay, it is easy to serve the Petition on the Respondent or the Respondent's attorney.

Defenses and Exceptions Under the Hague Convention and Rebutting Those Defenses

Articles 12,[75] 13[76] and 20[77] of the Hague Convention provide the defenses available to the Respondent in a Hague case. Such defenses include alleging that: the Petitioner had no right of custody or access at the time of the removal or retention[78]; the Petitioner was not exercising his or her right of custody[79]; the Petitioner acquiesced to the removal or retention[80]; there is grave risk that a return would expose the child[ren] to harm or an intolerable situation[81]; the child[ren] is of appropriate age and degree of maturity and objects to the return[82]; the child[ren] is settled in the new environment[83]; and/or a return would not be permitted by "the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."[84] These exceptions however, in light of Article 19, are narrowed to prohibit the making of custody decisions at this level.[85] Article 19, therefore, should be kept in mind to rebut issues and testimony that border on issues of custody and parental fitness.

A Return Would Place the Child[ren] in Grave Risk of Danger

Article 13 allows an authority to refuse to return a wrongfully abducted child if there is a grave risk that the child[ren] would be placed in an intolerable situation or exposed to physical or psychological harm by being returned to the State of habitual residence.[86] Read along with Article 19[87], the 13(b) exception has been interpreted to mean protecting the child[ren] from harm that may occur in the State,[88] not at the hands of the Petitioner.[89]

However, there has been a shift in recent years in the U.S. law concerning grave risk of harm and a growing realization that it is inappropriate to order that children be sent back to face domestic violence without a full evaluation of the nature of the prior abuse and of the likelihood that the authorities in the country to which the children are being returned will indeed fully protect them and their abused mother.

The Second Circuit upheld an Article 13(b) defense in *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001), explaining that although The Hague Convention is not designed to resolve underlying custody disputes. (See Hague Convention, art. 19.) this fact, however, does not render irrelevant any countervailing interests the child might have. The

Court cited the Elisa Pérez-Vera, Explanatory Report: Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("the "Explanatory Report" or "Report"), ¶ (an especially useful aid to interpretation of the Convention), to explain further that Article 13(b) "clearly derive[s] from a consideration of the interests of the child…. [T]he interest of the child in not being removed from its habitual residence …. gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report at ¶ 29.Id. at 161 (citation omitted).

The *Blondin* court also cited *Walsh v. Walsh*,[90] to find that spousal abuse may also create a "threshold showing of grave risk of exposure to physical or psychological harm." In *Walsh*, the First Circuit applied the 13(b) exception upon reviewing the risk to the respondent's children caused by their father's violent actions directed at third parties.[91] In order to meet her burden under the grave risk exception, the mother, as respondent, provided evidence that her husband had severely beaten her over the years, and that many of these beatings took place in the presence of her children.[92] This violent behavior demonstrated that the father's "temper and assaults are not in the least lessened by the presence of his two youngest children."[93] Noting that the Hague Convention "does not require that the risk be 'immediate'; only that it be grave,"[94] the *Walsh* court found the abuse of the respondent relevant to Article 13(b) given that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser."[95] Based on the risks to the children caused by their father's behavior, the First Circuit remanded the *Walsh* case with instructions to dismiss the father's petition under the Article 13(b) exception.[96]

Similarly, in *Van de Sande v. Van de Sande*, the Seventh Circuit considered the respondent's evidence of her husband's propensity for violence, including his frequent and serious beatings of his wife, as well as his verbal abuse and name calling.[97] Both the physical and verbal abuse occurred in the presence of their children. Though the father never physically abused the son, he spanked the daughter on several occasions. The court found that it would be "irresponsible to think the risk to the children less than grave" given the father's violent behavior in their presence. The court emphasized that the "gravity of a risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes." Though the children had yet to experience severe physical abuse, the Seventh Circuit concluded that "the probability that [the father] . . . would someday lose control and inflict actual physical injury on the children . . . could not be thought negligible." The burden on the Respondent is to prove by clear and convincing evidence[98] that there is a grave risk that the child[ren] will be subject to harm if returned. The burden of proof on the Petitioner is only a preponderance of the evidence. Therefore, it is clear that the Convention is drafted to encourage return of abducted children.

The Child[ren] Objects to the Return

There is an additional provision of Article 13 (unlettered) which allows for the judicial or administrative authority to consider the child[ren]'s wishes. This, however, depends upon the child[ren]'s age and degree of maturity.[99] In the case of *Sheikh v. Cahill*,[100] the New York Supreme Court ruled that the child, who was nine (9) years old, had not obtained an age and degree of maturity to warrant the court to make the child's views dispositive. The court found that the *in camera* interview revealed that the child preferred to stay in the United States because of being wooed by his father during his summer vacation visitation. The court further found that the child's reaction to his summer vacation was expected given his age and degree of maturity. However, the *Blondin* Court (*Blondin IV*, 238 F.3d at 166) decided that a court may deny the return of a younger child if the respondent can demonstrate by a preponderance of the evidence, that there is a "considered objection to returning by a sufficiently mature child".[101] The Perez Vera Report, in its Explanatory Report to the Convention sheds light on the rationale behind the exception and the framers' intended application:

> [S]uch [a] provision is absolutely necessary given the fact that the Convention applies….to all children under the age of sixteen: the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will.[102]

In short, there is no precise age at which a child will be deemed sufficiently mature under the convention.

The Child[ren] Is Settled in the New Environment (One Year Elapsed)

Article 12 states that even if proceedings had been commenced after the expiration of one year the court *shall* order the return of the child *unless it is demonstrated that the child is now settled in its new environment*.[103] This exception provides a defense to an abducting parent in a case where the proceedings were not started within one year after the abduction. The judge would then have to determine whether the child is settled in his or her new environment. However, if the time elapsed is less than one year, even if the child is settled in this new environment, the court *must* order the return of the child to the state of Habitual Residence, unless the child comes under one of the other exceptions of the Convention.

A Return Conflicts with the Fundamental Freedoms of the Requested State[104]

Another exception, provided under Article 20, allows for the court to refuse to order the return of the child[ren] "if this would not be permitted by the fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms."[105] This article functions as a safety valve for a member country to not return a child[ren] to a country where the rights of freedom have been abridged. In addition, it might dovetail with Article 13(b) with regard to a return in the event of a grave risk of danger to that country. Yugoslavia, which was signatory, could have this problem if the Treaty still applies to its various new states.

The Burden of Proof

The Respondent's burden of proof, in defending against the Petition for Return, is to prove either by clear and convincing evidence[106] that the Article 13(b)[107] or Article 20[108] exceptions apply or by a preponderance of the evidence[109] that any other Article 12[110] or the other Article 13[111] exceptions apply. The Petitioner's burden of proof is always preponderance of the evidence.[112]

Awaiting the Decision

Under the provisions of Article 11 of the Hague Convention,[113] the judge must act expeditiously. If a decision has not been made within six (6) weeks of the date of the commencement of the action, the Petitioner or the United States Central Authority has the right to request a statement from the authority regarding the reason for the delay.[114]

Payment of Costs and Fees

Of major interest to attorneys handling cases under the Hague Convention is Section 22 U.S.C. §9007, which provides for the award of cost and fees under the Convention and ICARA.[115] The Act, in paragraph 2, provides that petitioner may be required to bear the cost of legal counsel or advisors, court costs incurred in connection with their petitions and travel costs for the return of the child involved and any accompanying persons unless a return is ordered or the case is covered by Federal or State legal assistance programs. It should be noted that many countries across the world provide funding for counsel in bringing a case for return of the child in their countries. The United States opted against this part of the Convention. Paragraph 3 states that any court ordering the return of a child pursuant to an action brought under this Act "*must order the respondent to pay necessary expenses incurred by or on behalf of petitioner, including court costs, legal fees, foster home, or other care during the course of the proceeding and transportation costs relating to the return of the child, unless the respondent establishes that such order would be clearly inappropriate*."[116] This inquiry, therefore, is not into the Respondent's ability to pay but into the inappropriateness of requiring the Respondent to pay. It is very clear that when a petition is brought under the Hague Convention and a successful return is accomplished, then the judge *must* award counsel fees to the successful party. This may be very helpful in being able to get an attorney to represent a client. In addition, Courts have ruled that the Foreign Attorney who assisted in the case may also be compensated under the Federal Statute.[117]

Order for Return and the Problems of Return

Once a Request for Return of the child[ren] to the state of that child's habitual residence has been granted, the question then becomes which parent the child[ren] is to return with. In some cases, the court orders that the abducting parent return to the state of habitual residence with the child[ren] in order for a custody proceeding to take place there. In other instances, the court turns the child[ren] over to the parent who petitioned for the return. The outcome depends upon the facts and circumstances of each case.

It is important to remember that this is a civil treaty. Its purpose is to ensure the return of a child[ren] to his or her habitual residence in an orderly, expeditious manner. Criminal actions should not be enforced against the abducting parent once that parent has returned to the country of habitual residence with the child[ren].[118]

Criminal actions can have a detrimental effect on the child[ren], especially when the child[ren] is present to witness the arrest of one of its parents. This is not and was not the intention of this treaty.

Conclusion

It is a good idea to collect as much of the case law around the country and around the world as possible. To be able to argue issues of terminology and theories under the terms of this Convention, the law is now developing in this country. Each new case which is undertaken brings to the forefront a new decision which further construes and helps to write the law in the United States.

Learning and developing arguments which can be used to further reduce child abduction throughout the world is a good by-product of the Convention. Educating judges across the country that just because a party has abducted a child to their courtroom does not give that judge a right to hear the merits of a case thereby allowing an abducting parent to pick their forum is our task. It is important that this convention be given full opportunity to make the world a little bit smaller and protect children by reducing abductions throughout the world.

Endnotes

1. Robert Arenstein, *The Hague Convention on International Child Abduction: A Primer*, 50 Fam. L. Rev. 12 (2018).
2. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, at Article 4 ("Hague Child Abduction Convention") ("The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody of access rights.")
3. Elisa Perez-Vera, Explanatory Report, ¶III B (The Autonomous Nature of the Convention.) (1981); *see also In Re* Bates [1989] Fam. 9 (C.A.); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001); *Levesque v. Levesque*, 816 F.Supp. 662 (D.Kan. 1993) [citing *Meredith v. Meredith*, 759 F. Supp. 1432, 1433 (D.Ariz. 1991)]; *Matter of David B. v. Helen O.*, 164 Misc.2d 566 (Fam. Ct. 1995).
4. *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996).
5. *Sealed Appellant v. Sealed Appellee*, 394 F.3d 338 (5th Cir. 2004).
6. Hague Convention, *supra* note 2, at Art. 3 & 5; *see Costa v. Costa* [1991] Fam. 518/91 (C.A.); but *see Croll v. Croll*, 229 F.3d 133 (2d Cir. 2002).
7. Croll, 229 F.3d at 135.
8. A common law writ restraining a person from leaving the jurisdiction; Latin for "that he not depart."
9. *Abbott v. Abbott*, 560 U.S. 1 (1983); The Fourth and Ninth Circuits had agreed with this conclusion. (*See Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir.2003), cert. denied --- U.S. ----, 124 S.Ct. 805, 157 L.Ed.2d 732 (2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 954 (9th Cir.2002). These cases have now been reversed on the issues of right of custody.
10. *Furnes v. Reeves*, 362 F.3d 702 (11th Cir. 2004).
11. Pérez-Vera, *supra* note 3.
12. 28 U.S.C. § 1738A (2000).
13. *Cohen v. Cohen*, 1993 WL 364578 (N.Y. Sup. Ct. 1993) (Posing, but not answering, the question of, ". . .whether one party may change their mind as to a move to another country and thereby negate an apparent change in the child's habitual residence.")
14. William Hilton, Litigation under the Convention on the Civil Aspects of International Child Abduction, Done at the Hague on Oct. 25, 1980: An Overview (1992) (on file with the author); *See, Mozes*, 239 F.3d 1067.
15. *D'Assignies v. Escalante*, (No. BD 051876, Super. Ct. of Cal. December 9, 1991) (citing *In re Bates*, High Court of Justice, Family Division, United Kingdom; February 23, 1989).
16. Cohen, *supra* note 13; But *see Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001) (where other parent acquiesced to change of residence).
17. If the client does not have an attorney in his or her home country, it may be necessary to have the client obtain foreign counsel in order to make access to necessary documentation quicker and simpler.
18. Index No.71083-91 (S. Ct. of New York, County of Bronx, Aug. 1992); *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir.1993); *Friedrich v. Friedrich* 78 F.3d 1060 (6th Cir, 1996).
19. *Friedrich*, 983 F.2d 1396.
20. *Dare v. Secretary of Air Force*, 608 F. Supp. 1077 (D.Del.1985), *aff'd* no opinion (3d Cir.1986).
19. This is true regardless of the fact that the parents may be citizens of another country or domiciled outside that country. In point of fact, military personnel retain, as their legal residence, their last place of residence prior to entry into service.
20. Hague Convention, *supra* note 2, at Article 3; *see Roy Peter Costa v. Debra Jean Costa*, (U.K. 1991) High Court of Justice, Family Division CA 518/91; *see also In re C.*
21. *Croll,* 229 F3d. 133 (2d Cir. 2000), 122 S.Ct. 340, 151 L.E. 2d 256. cert. denied (10/09/2001).
22. *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000).
23. *Duran v. Beaumont*, 560 U.S. 921 (2010).
24. It, therefore, becomes the job of the attorney to explain to the judge that the right of custody can mean different things.
25. *Meredith v. Meredith*, 759 F.Supp. 1432, 1434 (D.Ariz.1991).
26. Hague Convention, *supra* note 2, at Article 5.
27. Costa, *supra* note 6.
28. *Id*.
29. Costa, *supra* note 6; but *see Croll, supra* Note 23; 1 FLR 403 (1989); 1 WLR 654 (1989).
30. *C v. C*, 1 FLR 403 (1989), 1 WLR 654 (1989).
31. *Id.*
32. *Id.*; 1 Fed. Reg. 10498, 10506.
33. 51 Fed. Red 10498, 10506 (1986).
30. Hague Convention, *supra* note 2, at Article 11 (The Convention requires that Hague cases proceed promptly and expeditiously); Hague Convention, *supra* note 2, at Article 12 (Creates an additional defense if an action is not brought within one year between the abduction and the date of filing the Petition for Return). Also, the more swiftly the attorney acts, the less time there is for the abducting parent to learn of the proceedings and re-abduct or secrete the child[ren].
31. *See generally*, Hague Convention, *supra* note 2.
32. *See generally,* International Child Abduction Remedies Act, 22 U.S.C. § 9001 et seq.; 42 U.S.C. § 11601 (1988).
33. The Notice of Petition can be copied almost directly from a previous Notice. They do not change very much from case to case.
34. The Petition for Return can be copied from a previous Petition. The form need not change from Petition to Petition.
35. Such sections include: Preamble; Jurisdiction; Status of Petitioner and Child[ren]; Removal and/or Retention of Child[ren] By Respondent; Custody Proceedings in [Name of country from which child[ren] were abducted]; Relief Requested; Notice of Hearing; Attorneys' Fees and Costs (Convention Article 26 and/or 22 U.S.C. 9007).
36. Hague Convention, *supra* note 2, at Article 1(a); Perez-Vera, *supra* note 3, at 23, ¶II B (provisional ed. April 1981) (available on BBS electronic bulletin board maintained by the Office of William M. Hilton. The access number is (408) 246-0387) [hereinafter Perez-Vera Report].
37. Hague Convention, *supra* note 2, at Article 1(b); see also *Id.* at ¶II B 16.
38. *See,* Hague Convention, *supra* note 2, at Article 19 (Such an education will involve, among other things, informing the presiding justice and your opposing counsel that the Hague Convention is only to determine what Contracting State has jurisdiction over any and all custody issues. This will become most important when your opposition begins to defend against the Hague Petition. If the judge allows issues of custody to be tried, the purpose of the Hague Convention is defeated. Remember, first and foremost, the Hague is a jurisdictional Convention!)
39. ICARA, *supra* note 32; 43 U.S.C. 11603(a), § 4 ("JURISDICTION OF THE COURTS. The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention").
40. Hague Convention, *supra* note 2, at Article 4.
41. Hague Convention, *supra* note 2, at Article 1.
42. Hague Convention, *supra* note 2, at Articles 3 & 5.
43. Hague Convention, *supra* note 2, at Article 3.
44. Hague Convention, *supra* note 2, at Article 1.

45. Hague Convention, *supra* note 2, at Article 3 (This is the client's cause of action. A removal or retention is considered wrongful where: "(a) it is in breach of rights of custody attributed to a person. . . under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.")

59. Hague Convention, *supra* note 2, at Article 3 ("The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Such rights include: orders of protection and/or restraint issued by the State of habitual residence; orders of custody either temporary or permanent; equal rights of custody attributable to both parents as a matter of law; and rights of visitation).

60. Hague Convention, *supra* note 2, at Article 26.

61. Hague Convention, *supra* note 2, at Article 16 ("After receiving notice of the wrongful removal or retention of a child under Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which the child has retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this convention or unless an application under this Convention is not lodged within a reasonable time following receipt of notice.")

62. ICARA, *supra* note 32, 22 U.S.C. 9003(c) § 4 ("NOTICE: Notice of an action brought under this subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.")

63. ICARA, *supra* note 32, at Article 26.

64. When an Order for Return is granted, the court is required to order the person who removed or retained the child[ren] to pay the necessary expenses incurred by and on behalf of the petitioner "including court costs, legal fees, foster home or other care during the course of the proceedings in the action and transportation costs related to the return of the child unless the respondent establishes that such order would be clearly inappropriate" 22 U.S.C. § 9007(b)(3).

65. For those clients who are unable to read English, remember to alter the verification to say, "The above referenced papers have been *read* to me…."

66. ICARA, *supra* note 45; 22 U.S.C. 9003(a) & (b).

67 Keane v. Courtwright No. 91-DR-40-066 (Family Court for the 5th Judicial Circuit of S.C. April 16, 1991).

68. *In Matter of Makmoud* 1997 WL 43254 (ED NY Dearie, J 1997).

69. *Grieve v. Tamerin*, 269 F.3d 149 (2d Cir. 2001).

70. ICARA, *supra* note 32; 22 U.S.C. 9003(c), § 4.

71. Parental Kidnapping Prevention Act, 28 U.S.C.A § 1738A (hereinafter PKPA).

72. Uniform Custody Jurisdiction Act (hereinafter UCCJA).

73. PKPA, *supra* note 71; 28 U.S.C.A. § 1738A.

74. Domestic Relations Law § 75-e (McKinney 2012).

75. Hague Convention, *supra* note 2, at Article 12.

76. Hague Convention, *supra* note 2, at Article 13.

77. Hague Convention, *supra* note 2, at Article 20.

78. Hague Convention, *supra* note 2, at Article 3.

79. *Id.*

80. Hague Convention, *supra* note 2, at Article 13(a).

81. Hague Convention, *supra* note 2, at Article 13(b); Friedrich, 78 F.3d 1060; Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001).

82. Hague Convention, *supra* note 2, at Article 13.

83. Hague Convention, *supra* note 2, at Article 12.

84. Hague Convention, *supra* note 2, at Article 20.

85. Hague Convention, *supra* note 2, at Article 19 ("A decision under this Convention concerning the return of that child shall not be taken to be a determination on the merits of any custody issue.")

86. Hague Convention, *supra* note 2, at Article 13(b).

87. Hague Convention, *supra* note 2, at Article 19.

88. An example today, in 1993, would be the "grave risk" of returning a child to Bosnia. (Although Bosnia is not a signatory, it is an example of a situation that itself poses a "grave risk" of harm.)

89. *See, Gsponer v. Johnstone*, 12 FamLR 7 (Family Court of Australia); *Zimmerman v. Zimmerman* (Dallas County, Texas, 255th Judicial District) (ordering the return of a child to England and finding that the Respondent did not meet the burden of proof—clear and convincing evidence—to show that the child would be subject to grave risk of harm if returned to the State of habitual residence (England). (If "grave risk" was determined to be the return of the child[ren] to the petitioner, then the case would become a custody case.)

90. *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000); *See, Blondin*, 228 F.3d at 162, 164-165 (finding that spousal abuse may also create a "threshold showing of grave risk of exposure to physical or psychological harm"); *see also, In re Application of Adan*, 437 F.3d 381, 396 (3d Cir. 2006) (recognizing that evidence of the father's abuse of the mother is relevant to whether a child's return would expose him to grave risk of harm).

91. *Walsh*, 221 F.3d at 220-21.

92. *Id*.

93. *Id.* at 220.

94. *Id*. at 218.

95. *Id*. at 220; *See* H.R. Con. Res. 172, 101st Cong. (1990) (enacted) (stating that "the effects of physical abuse of a spouse on children include . . . the potential for future harm" and that "children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent"); see also, Custody of Vaughn, 664 N.E.2d 434, 439 (Mass. 1996) ("There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages"); *Rodriquez v. Rodriquez*, 33 F. Supp. 2d 456, 461 (D. Md. 1999) (finding that "witnessing the abuse of another can be more emotionally traumatic then being the abused" and that returning the children to the habitual residence "even if it did not result in the children's physical abuse at the hands of their father, would result in psychological trauma because of the children's fear of physical harm").

96. *Walsh*, 22 F.3d at 221.

97. *Van de Sande v. Van de Sande*, 431 F.3d 567, 570 (7th Cir. 2005).

98. ICARA, *supra* note 32; 22 U.S.C. § 9003(e)(2), § 4.

99. Hague Convention, *supra* note 2 at Article 13.

100. *Sheikh v. Cahill*, 546 N.Y.S.2d 517, 522 (Sup. Ct. 1989).

101. Blondin IV, 238 F.3d at 166.

102. Perez-Vera Report at 433 Paragraph.

103. Hague Convention, *supra* note 2, at Article 12.

104. Hague Convention, *supra* note 2, at Article 20.

105. *Id.*

106. ICARA, *supra* note 32; 22 U.S.C. § 9003(e)(2), § 4.

107. Hague Convention, *supra* note 2, at Article 13(b) (Even if removal or retention has been determined to have been wrongful, an authority may deny a return if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.")

108. Hague Convention, *supra* note 2, at Article 20 ("The return of the child under the provisions of Article 12 may be refused if this

would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.")

109. ICARA, *supra* note 32; 22 U.S.C. § 9003(e)(2), § 4.

110. Hague Convention, *supra* note 2, at Article 12 (The Hague Convention provides that an authority *may* refuse to return a child[ren] who has been wrongfully removed or retained if: the petitioner waited longer than one year after the wrongful removal or retention to file the **Petition**; the Respondent can demonstrate that the child[ren] is now settled in its new environment.)

111. Hague Convention, *supra* note 2, at Article 13 (excluding 13(b)) (Even if a removal or retention has been determined to have been wrongful, an authority may deny a return if: the Petitioner was not exercising his or her right of custody at the time of the removal; or, depending on the degree of maturity and age of the child[ren], the child[ren] objects to being returned.)

112. *See supra* note 111.

113. Hague Convention, *supra* note 1, at Article 11.

114. *Id.*

115. 22 U.S.C. § 9007(b).

116. 22 U.S.C. § 9007(b)(3).

117. *See Distler v. Distler*, 26 Fed Supp. 2d 723 (D.C. NJ 1998).

118. There was one particular instance where the court ordered that the abducting mother return to Germany with the children. The parents had agreed that no criminal action was to be brought against her, however, once the mother arrived at the airport the police retained her for the initial abduction of the children. Therefore, it is a better idea for the nonabducting spouse to be responsible for the return of the child[ren], *Thonemann v. Thonemann*, Supreme Court of the State of N.Y., Rockland County, Index No. 3438-93, 1993.

Understanding Psychological Dynamics of Children Involved in Separation and Divorce Cases: Guidelines for Court Appointed Attorneys For Children

By Roger Pierangelo and George Giuliani

Introduction

Under the guidelines set forth by the New York State Unified Court System, "attorney for the child" means a law guardian appointed by the family court pursuant to section 249 of the Family Court Act, or by the supreme court or a surrogate's court in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto….. In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances."

One of the most difficult functions facing court appointed attorneys for children (AFCs) is to determine the true motive behind the feelings and expressions of children during separation and divorce cases. For an AFC to fully understand the dynamics behind what children say and their many possible motives, he/she must first explore the psychological dynamics and variables that influence children in dealing with the stressors of separation and divorce, considering the very serious consequences that may result from the AFC's recommendations to the court.

The presenting problem first encountered by an AFC when representing a child may vary from the child's quiet hesitation, to a rigid, non-negotiable stance involving the anger, fear or reluctance in the child's interactions or dealing with one parent. If these behaviors are taken solely at face value by the AFC, then the child may be placed in a compromising position that will aggravate his/her already stressful situation. Therefore, it is imperative that instead of immediately accepting the rationale of the child as fact, an AFC needs to be aware of the variety of underlying motives that may be present in the same fashion.

To the untrained eye, the expression of feelings and beliefs in what children are saying about their parents and experiences with them during separation and divorce cases, may be viewed horizontally – thereby accepting that what the children are saying is a true representation of their actual state of mind. In many cases of separation and divorce, children are in a "survival mode", trying to balance what they believe may be a "conditional love" situation in their relationship with both parents. The fear and stress from trying to maintain this balance directly affects what they say and what they believe they are feeling.

Given the above, the first step in understanding the true motives behind a child's fear, anger or reluctance to a parent, is to recognize the difference between symptoms and problems.

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Drs. Pierangelo and Giuliani are also the Executive Directors of the National Association of Special Education Teachers (NASET) and are the authors of numerous books and articles in the field of education and psychology, including many articles for *NYSBA Family Law Review*.

How Problems Generate into Symptoms

Dynamic or internal problems (e.g., conflicts, fears, insecurities), create tension. The more serious the problem, the greater the level of tension experienced by children. When tension is present, it can only be released one of two ways; verbally or behaviorally. Since children do not always have the labels for their emotions, many emotions come out in behavioral symptoms, e.g. resistance, anger, lying, fabricating etc., and the behavior required to relieve this tension becomes more immediate and observable. As a result, the behaviors exhibited by children may be inappropriate and impulsive rather than well thought out. Therefore, in some cases, a child's reluctance to seeing a parent may be a symptom of a deeper struggle, motive or experience rather than the actual problem itself, and therefore interpreting the symptom as a "true choice" on the part of the child may be a serious mistake.

In many, if not the vast majority of cases, tension is very high for children during a separation or divorce, and therefore it may require a variety of behaviors to relieve the dynamic stress brought on by fears of abandonment, rejection, anger by a parent, and escalating the situation by saying or doing the wrong thing. These behaviors then become symptoms of the seriousness of the problem. That is why the frequency and intensity of the symptomatic behavior of children often reflect the seriousness of the underlying problem(s). As a child becomes more confident or learns to work out his/her problems through therapy or some other verbal outlet, the underlying problems often become smaller. By using verbal skills, being taught the labels for feelings, and working on better tools for dealing with the situation, the child will hopefully generate less tension and exhibit less inappropriate, impulsive or self-destructive behavior patterns.

As previously mentioned, if a child neither recognizes nor has the "label" for a problem, then tension is usually released through some form of behavior. In the case of the tension of children surrounding separation and divorce, there can often be compliance, withdrawal, reluctance, or aggression towards a parent. These behaviors then become the tension reducing behavior. We call these outlets of tension, *behavioral symptoms*. Behavioral symptoms are sometimes misidentified as problems and therefore treated as such. When this occurs, the problem often only gets worse. For example, if one sees a fever as the problem, then treating that alone can exacerbate the real problem which may be a specific virus or infection. Given their importance, these behavioral symptoms should become the first signal noticed and understood by AFCs, as it is very important for these court officials who are making decisions with serious implications to fully understand the difference between symptoms and problems.

Examples of typical symptomatic behaviors by children that may be indicative of more serious concerns include, but are not limited to:

- anxiety
- argumentative attitude
- blames of others for problems
- bullying other children
- controlling
- daydreaming
- defiance of authority
- denial
- destruction of property
- distractibility
- excuses for inappropriate behavior
- fatigues easily
- fearful of authority or adults, criticism or new situations
- forgetfulness
- hyperactivity
- hypoactivity
- impulsivity
- inconsistency
- inflexibility
- intrusive behavior
- irresponsibility
- laziness
- lying
- moodiness
- need for constant reassurance
- overly critical or reactive
- painful shyness
- panic
- poor judgment
- procrastination
- rarely takes chances
- reluctance
- self-criticism
- short attention span
- social withdrawal
- unable to focus on tasks
- verbally hesitant

While many of the above behaviors may indicate the presence of a problem, AFCs also must look at the frequency, intensity and duration of the symptoms to determine the seriousness of the problem/s:

1. ***Frequency of Symptoms***: Consider how often the symptoms occur. The more serious the problem, the greater amount of tension generated. The greater amount of tension, the more frequent will be the need to release this tension. Therefore, the greater the frequency of the symptom, the greater chance that the problem/s are serious.
2. ***Duration of Symptoms***: Consider how long the symptoms last. The more serious the problem, the greater the degree of tension generated. The greater the degree, the longer it will take to release the tension. Therefore, the longer the duration of the symptoms the more serious the problem.
3. ***Intensity of Symptoms***: Consider how serious the reactions are at the time of occurrence. The more serious the problem, the more intense the level of tension coming off the problem will be. This level of tension will require a more intense release which may be shown in a more severe symptom. The more intense the symptom, the more serious the problem.

Anger as an Insulating Emotion

Another factor for AFCs to understand in determining the true motives behind anger, fear and resistance of the children towards a parent, is to view anger as a lead emotion (an emotion that insulates the real emotions i.e. pain, hurt, vulnerability are all insulated by anger) and perhaps not the *real* emotion. Panic, anxiety, vulnerability, fear, guilt, emotional pain and hurt are all emotions that use anger as the lead emotion. That is why there are often such high levels of rage and anger between individuals who go through separation and divorce. Most of these emotions are experienced during this process and become insulated by anger. They lead with anger as an insulation to the real emotion, which the person is unable to label or communicate. To view someone as angry may be missing the real emotion or emotions which lie behind it. Therefore, in the case of the children, it is very important to find the emotions that lie behind the anger and determine why they developed. That eventually allows for repair since the opposite of love is not anger but apathy. Anger assumes hope, and court officials need to see the fact that children may not be able to sort out or label what it is they feel or lack in the relationship with the specific parent they may be struggling with or resistant to seeing.

Five Critical Factors That Need to Be Explored by AFCs Before Making "Recommendations" to the Court

Before any decision by an AFC on the real feelings and motives of children involved in issues with either parent can be made, it is imperative that the AFC ascertain certain answers that may affect the outcome of his or her recommendations to the court.

"Anger assumes hope, and court officials need to see the fact that children may not be able to sort out or label what it is they feel or lack in the relationship with the specific parent they may be struggling with or resistant to seeing."

1. Determine the motive, personality, and expectations of the parent, and the prior history of the parent/child relationship.

AFCs will need to determine a parent's motive for restoring an estranged relationship. It is crucial to determine how genuine this motive is and ensure that the underlying reasons are not connected to revenge, anger, control or potentially a desire to reverse child support.

Along with the parent's motive, will be the need to determine how the parent's personality style and ego strength may impact the child and his/her reactions during the evaluation process by the AFC. The parent will have to be made aware of the difficulty that he/she may have in restoring the relationship. The parent will need to understand the true resistance and work with the AFC or court assigned intervention specialist (i.e. therapist, Parent Coordinator) on a successful outcome. Over-reactive, controlling, or parents with low self-esteem may have to be worked with individually to help them understand and tolerate the process or reengagement with their children.

AFCs need to look at the parent's history of intimacy and involvement with the child prior to the onset of reluc-

tance, anger or fear. A relationship between a parent and a child that has a positive history prior to the separation and divorce has a better prognosis and will be easier to repair. Building a relationship that never was will involve much more work. As a result, the parent's expectations on progress will need to be realistic so that frustration and rejection do not occur.

2. Determine the etiology (cause) of the child's fear or reluctance:

AFCs will need to determine the etiology (actual cause) of the child's fear, anger or reluctance. This is a crucial factor, since the stress of the separation or divorce process on children may make the presented reason for anger, fear and resistance a rationalized motive. Since disturbance in emotional development can create problems in childhood, adolescence, and adult life, it is imperative that any recommendation by a law guardian involving parental relationships be made with the full knowledge of the real motive behind the fear, anger or reluctance.

There are many possible reasons for a child's fear, anger or reluctance in separation and divorce cases. These include:

A. *Divorce related depression and anxiety*: Reluctance towards visitation with a parent may stem from the mental status of the child as a result of the trauma resulting from the damaging experiences of separation and divorce and not necessarily the relationship with a specific parent. If this factor can be determined as the motive behind the fear, anger or reluctance, then it will need to be addressed, and the presenting symptoms should not be considered as unwillingness to be with the other parent, only an avoidance of the total divorce process. Children who are motivated by divorce related depression and anxiety often lack the energy for any involvement and may feel that any interaction will intensify an already hostile environment which the child feels totally unable to cope. Warning signs of divorce related depression or anxiety in children may include:

- *Loss of spontaneity*: Playful children may become moody, agitated, aggressive, anxious etc.
- *Low self-esteem*: Feelings of worthlessness, comments about being stupid or unimportant
- *Poor self-care*: Poor grooming, excessive disorder in a formerly neat child's room
- *Excessive sadness or moodiness*: Prolonged withdrawal from people or moodiness, disinterest in favorite activities
- *Irrational fears or clinginess*: Fear or avoidance of normally safe people, places and things; intense crying and separation anxiety when leaving family members or friends
- *Sleep problems*: Unwillingness to go to bed, difficulty falling asleep, waking up in the middle of the night, nightmares, reoccurring bedwetting, refusal to wake up or go to school
- *Poor concentration*: Chronic forgetfulness, missed homework assignments or decline in grades for an extended period
- *Inappropriate anger*: Excessive frustration, frequent angry outbursts, fights with schoolmates or siblings, yelling at parents
- *Drug or alcohol abuse*: Experimenting with tobacco, medications, household substances, drugs or alcohol
- *Sexual promiscuity*: Engaging in sexual activity that ultimately threatens to damage a child's emotional or physical health
- *Self-injury, cutting*: Finding relief from emotional pain by inflicting physical pain, or taking excessive physical risks that result in injury
- *Suicide*: Talk of killing oneself, making plans to end one's life, suicide attempts.

B. *Not knowing how to bridge the relationship*: Fear, anger or reluctance on the part of children may occur because of a lack of knowledge about how to bridge the relationship with a parent, especially after months or years of non-involvement with the parent. In this case, the child is not unwilling to have a relationship but rather lacks the skills or ego strength to initiate or deign the "road back" to a healthy relationship. While the symptom again is the same, namely rigid resistance, the motive of the child is very different, and the repair is very positive if the AFC has determined this to be the underlying motive. The degree of desire is sometimes measured by the level of anger towards the other parent, since anger assumes hope. The child maintains the anger towards the parent to maintain some connection, and in some manner sends the parent messages, sometimes cryptic, about what needs to be done to win him/her back.

C. *Fear of betrayal to the other parent*: There are times when a child's fear, anger or reluctance to one parent may result from the belief that the other parent will feel betrayed by the relationship with the other parent. While this may not necessarily be communicated or felt by the parent, these feelings of guilt may be generated by the child's experiences with the intense anger and hatred exhibited by the parents towards each other. As a result, any relationship with one parent will be a betrayal of loyalty to the other. This factor increases dramatically if the intense hatred is verbalized or acted out by one parent towards the other or a lack of "permission" is not validated for a relationship with the other parent.

Examples of "subtle non-permission" on the part of one parent may include:

- Not saying a word to the other parent on pickup
- Not saying goodbye to the children
- Turning and walking away when the other parent approaches the door for pickup
- Confronting the parent upon pickup and getting angry
- Frowning, angry or disturbed look on the parent's face at the time of pickup
- Never asking the children how things went at the other parent's house or not wanting to hear anything about the visitation
- Being angry when the children arrive or return from visitation

D. *Discomfort and confusion over the parent's involvement with another person (new boyfriend or girlfriend):* There are times when a child's fear, anger or reluctance with a parent may center around a new relationship in the life of his/her parent. This new romantic relationship by the parent can trigger off a series of emotional reactions, from issues of replacement for a daughter if the father is involved with someone else, a need for protection of the mother by the son if the father is involved with someone else, anger by the daughter over replacing the father if the mother is involved with someone else, or fears of betrayal against a parent, which may occur in having a relationship with this new person in the parent's life. Many times, a spouse will have a very serious reaction resulting from the reality of finality, replacement, etc. when the ex-spouse has someone else enter their lives. A child may be very sensitive to this reaction, forcing a hesitation in visitation with the involved parent.

E. *Resistance as a result of an older sibling's reluctance in having a relationship with the parent:* Sometimes a child's fear, anger or reluctance can result from an older sibling's resistance to seeing or being involved with the parent. The indirect or overt influence of this older sibling can make it almost impossible for the child to visit without repercussions. This fear can become even greater if he/she is the only sibling in the family to want a relationship with the other parent. In this case, the child faces the possibility of alienation of his/her brothers or sisters over the personal decision to have a relationship with the other parent.

F. *Parent alienation:* Fear, anger, or resistance to a relationship with a parent may occur as a result of realistic and valid reasons involving prior or ongoing emotional, physical or sexual abuse, prior neglect or some other tangible pattern of behavior that has caused the child's anger fear or reluctance because of safety issues. This issue is a crucial one to determine, since some parents are very convincing to the court that the reluctance on the part of the child is from the influence of the other parent.

G. *Hostile parent behavior***:** Sometimes a child's reluctance towards a parent results from the hostile behavior of the other parent. There are three states of hostile behavior that greatly affect the psychological well-being of children and mold their opinions and feelings for one of their parents. In order of severity, these are: (1) Subtle Passive State; (2) Hostile Indirect State; and (3) Hostile Direct State.

(1) *Subtle Passive State*: Here, the parent provides subtle messages to the children, such as looking angry or becoming quiet to the children when they are leaving to see the other parent. Nothing overt is said. However, this act of emotional removal creates enormous tension within the children because the loss of approval by the parent is often interpreted as a potential loss of love, one of the most frightening fears of children.

(2) *Hostile Indirect State*: In this case, the parent may argue over the phone with the other parent with the children in proximity. The arguments can become emotionally turbulent, and many hostile words can be said. However, since the conversation has taken place over the phone, the children will only hear one side. The parent will then get off the phone and be nice to the children. Regardless, the confusion over the real feelings of the parent may create anxiety on the part of children.

(3) *Hostile Direct State*: The third state, Hostile Direct, is the most serious type. In this case, the parent doesn't care who is around, and exhibits the most out of control behavior possible (e.g., hitting the ex-spouse or throwing things in front of the children). The messages here are threefold: (1) "No one can stop me"; (2) "I will do anything I want"; and (3) "Do not trust this man or woman." This type of behavior has the most negative effect on children. Not only do such acts constitute a serious issue of emotional instability on the part of the parent, but they indicate a complete disregard for the emotional well-being of the children. In our experience, if Hostile Direct State is occurring, then it is almost certain that the two other levels are also being used.

H. *Hurt in the form of anger and resistance to test the sincerity and dedication of the parent***:** There are times when the child's fear or reluctance to visitation may be a test of the parent's sincerity in the desire to restore or have a relationship with the child. This may occur in instances where the parent has been alienated from the child for a long period of time and does not believe the parent's intentions for reconciliation are genuine. Since anger assumes hope, the-continued anger towards the parent is a test that this time the parent will not give up. The problem here is that in many cases, if this motive is not fully understood by the parent, then the parent does actually

give up, believing the child wants nothing to do with him/her.

I. *Interference with friends and social life*: Sometimes, a child's anger or reluctance may be as simple as not wanting to miss out on a Saturday or Sunday with their friends. While children may not be able to clearly or maturely verbalize this, the need for socialization at this age is crucial and a priority in the child's life. Knowing and working around it through compromise is crucial to maintaining the visitation schedule.

J. *Identification with the aggressor*: This is a concept that can readily be seen in children-during hostile stages in separation and divorce. According to research done in this area of study, when we feel overwhelmed by an inescapable threat, we "identify with the aggressor". Hoping to survive, we sense and "become" precisely what the attacker expects of us—in our behavior, perceptions, emotions, and thoughts. Identification with the aggressor is closely coordinated with other responses to trauma, including dissociation. Over the long run, it can become habitual and can lead to masochism, chronic hypervigilance, and other personality distortions.

But habitual identification with the aggressor also frequently occurs in people who have not suffered severe trauma, which raises the possibility that certain events not generally considered to constitute trauma are often experienced as traumatic. Emotional abandonment or isolation, and being subject to a greater power, are such events. In addition, identification with the aggressor is a tactic typical of people in a weak position. What often happens with children who are in this type of weakened state is that they will side with whom they perceive as the most aggressive and potentially reject the one parent against the other in hopes that the aggressor will not turn on them. The child's behavior in this case will too often be to always make excuses for not wanting visitation, feigning illness, wanting to go home early, creating tension to cause shortened visitation and outright refusal to go.

K. *Parent dependency*: There are times when a parent will not intentionally alienate his or her children from the other parent but will instead create an unhealthy dependency through a series of subtle or emotional reactions. The need for this type of dependency often arises out of the parent's own fears of isolation and abandonment, low self-esteem, a lack of adult anchors or meaningful relationships or sometimes unresolved issues from his/her past.

While not an alienation process, the secondary effects and impact of parent dependency results in an unwillingness of the children to leave the dependent parent. The reactions of the dependent parent give the children the message that the parent is a victim, unhappy without them, in turmoil if they are not with him/her and can only survive if the children stay with him/her. Examples include:

- "It's O.K., I'll find something to do when you are not here."
- "Daddy will miss you so much when you are with Mommy."
- "I get so sad when you leave me."
- "I will be here waiting for you to come home."
- "I will wait for your call all day."

Such guilt makes it very hard, if not impossible, for the children to leave the parent's orbit. The effects of this type of parental dependency can be seen not only in the unwillingness to leave the parent but may also limit the children from venturing out to new social, educational, recreational, and any other experiences that would leave the parent "alone." What inevitably occurs is an extreme limitation of the children's safety zone, the area in which the children feel safe.

L. *Gender and birth order*: Perhaps the most troublesome response of some children to the divorce of their parents is to attempt to fill the role they perceive to be filled in the past by one of their parents. Some parents make this worse by encouraging this kind of behavior as indicating "maturity" on the part of their child. For example, a son may see himself as the protector of the mother, especially if he is the oldest sibling or the only male in the family. Likewise, a daughter may see herself as the replacement for the father's lack of female connection and sees her relationship with her father as "special". In this case, she will potentially protect and take care of him, resulting in reluctance towards visitation with the mother.

3. Determine the level of civility of the parents:

The greater the civility between the parents, the easier it will be for a child to move back and forth between relationships. We call the ability of children to easily move back and forth between parents as *fluid interaction*, and it is a sign of civility and maturity in the parent's behavior. The greater the emotional distance between the parents as a result of anger and rage, the harder it will be for a child to balance his/her relationship with both parents. What normally happens is an alignment with one parent which may result in resistance to being with the other parent.

4. Determine the length of time the parent has been separated from the child:

The greater the separation period between the parent and child, the greater the difficulty in restoring the relationship. While there still may be hope, the question of why the parent allowed this to occur or how this evolved needs to be answered. The parent can still do parental things, i.e. emails, cards, gifts, phone calls, even if the child is resistant. The messages here are positive and

tell the child that the parent is not giving up on him/her no matter what. Pulling away out of hurt, frustration or anger, communicates a very different message, namely "this is over, and you are not worth it." The parent will need to learn that this is a process and may take longer than thought. However, a parent-child relationship is hopefully forever, and any length of time given to restore it in a healthy way should be attempted.

5. Determine the level of apathy towards the parent (sometimes hard to distinguish apathy from suppressed anger)

From our experiences, the most difficult relationship to restore is one in which apathy has occurred. It is these cases, we have found that the chances of success in having a strong parent-child relationship are very poor. The presence of apathy on the part of a child towards a parent will need to be determined and evaluated by the AFC, and if present, the parent may have to accept the fact or come to terms with the reality that the relationship may not happen no matter what is done. In most cases, this factor may be more prevalent during adolescence and early adulthood rather than in early childhood. The teenager, more than a young child, who is apathetic towards a parent is normally not angry, does not scream, attack, or use any energy towards the parent. He/she is apathetic, resolved and has moved on in his /her life. Whether a change in feelings and attitudes towards the parent later in life happens is not known. What is known is that this type of emotional state has little chance of success in reestablishing the relationship.

Conclusion

In our professional opinions, when representing children as an AFC, it is imperative that they be cognizant of the true motives of children, understand symptoms versus problems, have a working knowledge of the critical factors discussed throughout this article, and not take everything simply at face value. A recommendation by an AFC made without a true understanding of what we have addressed, can have long lasting negative effects on the lives of both the children and their parents. The divorce and separation process is hard enough on children and parents on so many levels. All involved deserve the best decisions, directions, and insights available from AFCs with whom so many work with, to help them through this very difficult process.

Endnotes

1. 22 NYCRR § 7.2 While the Court Rule continues to reference "law guardian," the term is disfavored in recent years in favor of "attorney for the child," although it does see ongoing usage.
2. While we are using the word "recommendation," we are speaking of some form of advisement to the court where the issues at hand and the AFC's observations are being conveyed.

Support and the Claim for "Necessaries"

By Donald M. Sukloff

Scenario

The client laments spouse leaving household and, despite requests, refuses to contribute sufficiently to children's and household expenses, insisting that client pay out of client's inheritance, family generosity and/or loans. The client delayed legal action for a year, hoping for reconciliation. Now the client seeks legal advice as to proceeding to a divorce or seeking relief in Family Court.

Bad Advice:

1. Immediately file a Family Court petition for spousal and child support.

2. Commence action for divorce and seek *pendente lite* maintenance and child support.

Good Advice:

1. If Family Court petition was already filed, withdraw without prejudice.

2. Commence Supreme Court matrimonial action, adding as a separate cause of action a demand for reimbursement for necessaries incurred before the commencement.[1]

3. If client has already filed, obtain leave to amend; or consider a separate action.

Law

Support in Family Court is retroactive only to the date of the petition,[2] and in Supreme Court only to date of application for such relief.[3.] But, a common law action for necessaries has no such limitations (except the statute of limitations of six years unless absent from the state.)[4] At common law, a husband was liable for his wife's necessaries. Later, the United States Supreme Court, in *Orr v. Orr*,[5] rendered this obligation gender neutral as did subsequent New York cases. [6]

The question of what constitutes a "reimbursable necessary"[7] is a matter that depends not only on the parties' standard of living, but also must be incurred with an expectation of reimbursement.[8] A denied *pendente lite* relief does not preclude a separate action for prior necessaries; [9] however, a support order and/or a temporary award does. In short, a claim for necessaries is a claim for sums expended by a spouse before the issuance of a *pendente lite* relief order or a Family Court order. It must be based on a spouse's failure to provide funds for necessaries in accordance with their lifestyles.[10]

The burden of proof includes a defined, paid-for necessary with the expectation of reimbursement and a pre-commencement demand.[11] The primary defense to such a claim is the past payment of adequate support[12] or the lack of need based on comparsuch as food, clothing, medicals, utilities, automobile, mortgage, rent, education, counsel fees, etc., a demonstrated high standard of living can include as necessaries such items as servants,[13] furs,[14] etc.

Conclusion

It is surprising how many actions are commenced in a rush to preserve future support while ignoring a legitimate claim for pre-commencement necessaries. Certainly, it is not unusual for there to be numerous expenses for necessaries including reasonable attorney's fees during a period of time prior to the institution of litigation. Before doing so, of course, the prerequisites of proof including expectation of reimbursement and demand should be prepared. The matrimonial action can then be instituted with an added cause of action for pre-commencement necessaries.

Endnotes

1. *Hunelford v. Hunelford*, 95 A.D.2d 664 (1st Dep't 1970); *Schneider v. Schneider*, 156 A.D.2d 439 (2nd Dep't 1990); *Rubin v. Rubin*, 275 A.D.2d 404 (2nd Dep't 2000).
2. N.Y. Fam. Ct. Act § 449 (McKinney 2012).
3. Dom. Rel. Law § 236B(5)(a); *Golin v. Cassese*, 197 A.D.2d 608 (2nd Dep't.1991).
4. *Hefner v. Security Pacific State Bank*, 135 Misc. 942 (Sup Ct. Queens 1987); N.Y. Civil Practice Law and Rules § 207; *Rubin*, *supra* at endnote 1.
5. *Orr v. Orr*, 440 U.S. 268 (1979).
6. *Lourdes Memorial Hospital v. Frey*, 152 A.D.2d 73 (3rd Dep't 1989); *Medical v. Steiner*, 183 A.D.2d 86 (2d Dep't 1992).
7. *Rodgers v. Rodgers*, 98 A.D.2d 386 (2nd Dep't 1983).
8. *Maule v. Kaufman*, 33 N.Y.2d 58 (1973); *Richter v. Richter*, 131 A.D.2d 453 (2nd Dep't 1987).
9. *Elder v. Rosenwasser*, 238 N.Y. 427 (1924).

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10. See *Elder*, *Id.*; *Golin v. Cassese*, 197 A.D.2d 608 (2nd Dep't 1991).
11. *Schneider v. Schneider*, 156 A.D.2d 439 (2nd Dep't 1989); *Zaremba v. Zaremba*, 237 A.D. 2d 351 (2nd Dep't 2009).
12. *Schneider*, 156 A.D.2d 439.
13. *Richter v. Richter, supra* at endnote 8; *Zaremba v. Zaremba, supra* at endnote 8 237 A.D.2d 351 (2nd Dep't 1997); *Schoenfeld v. Schoenfeld*, 168 A.D.2d 674 (2nd Dep't 1990); *Erdheim v. Erdheim*, 119 A.D.2d 623 (2nd Dep't 1986).
14. *Allman Co. v. Durland*, 185 A.D. 114 (1st Dep't 1918).
15. *Altman v. Altman*, 136 Misc.2d 320 (Sup. Ct. Kings Co. 1987); *Rudnick v. Tuckman*, 1 A.D.2d 269 (1st Dep't 1956); *DiBella v. DiBella*, 140 A.D.2d 292 (2nd Dep't 1988).
16. *Sabre v. Sheridan*, 6 A.D2d 953 (3rd Dep't 1958).
17. *Weingreen v. Beckton*, 102 N.Y.S. 520 (Sup. Ct. App. Term 1907).
110. *Schneider*, 156 A.D.2d 439,.
111. *Richter v. Richter*, supra at endnote 8; *Zaremba v. Zaremba*, supra at endnote 8 237 A.D.2d 351 (2nd Dep't. 1997); *Schoenfeld v. Schoenfeld*, 168 A.D.2d 674 (2nd Dept 1990); *Erdheim v. Erdheim*, 119 A.D.2d 623 (2nd Dept 1986).
112. *Allman Co. v. Durland*, 185 A.D. 114 (1st Dept 1918).
113. *Sabre v. Sheridan*, 6 A.D.2d 953 (3rd Dept 1958).
114. *Weingreen v. Beckton*, 102 N.Y.S. 520 (Sup. Ct. App. Term 1907).

Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Publisher's Note: This is the updated, corrected version of Wendy Samuelson's column. The text appearing in the original print version of the publication was included in error. NYSBA apologizes to readers for this oversight.

Recent Legislation

Tax Cuts and Jobs Act

As a reminder, and as more fully reported in my last column, the Tax Cuts and Jobs Act (TCJA) abolished the maintenance payor's ability to deduct maintenance payments from the payor's taxable income, and the recipient spouse is no longer required to pay taxes on the maintenance award. However, New York State still permits the maintenance payor to deduct maintenance from the payor's taxable income. Agreements between divorcing parties executed after December 31, 2018 are impacted by the new federal tax law. If a divorce agreement was executed prior to December 31, 2018, and modified after that date, TCJA will not apply unless the agreement specifically states that it will apply. Therefore, when drafting any modification agreement, it should specifically state whether the TCJA will or will not apply, and whether maintenance will be taxable or not.

The TCJA also includes a new child tax credit, which replaces the old model of taking children as exemptions on tax returns. The new Child Tax Credit is $2,000 per child until age 17, which phases out for income over $200,000 as a single filer, and $400,000 for joint filers. The refundable portion of the credit is limited to $1,400, which amount will be adjusted for inflation after 2018. The new Child Tax Credit is set to expire after December 31, 2025, so it is important to include language regarding both child tax credits and dependency exemptions in settlement agreements.

Be mindful that the person who claims the child as the dependent can also take the child care tax credit of $600 per child until age 13 and the college tuition tax credit of up to $2,500 per child.

NYC Deferred Comp Plan Policy Changes

Effective March 2019, the New York City Deferred Compensation Plan has changed its policy regarding the language acceptable for the division of retirement benefits pursuant to a Domestic Relations Order.

The plan will no longer allow the division between two dates nor the division as of a specific date. The *Majauskas* formula has never been allowed (as with New York State Deferred Compensation Plan). Further, the plan will no longer calculate post-commencement gains and/or losses, nor take into account loans. In July 2011, New York State Deferred Compensation Plan also stopped calculating post-commencement gains and/or losses.

The plan will only accept a fixed-dollar amount or a percentage of the account as of the date the plan establishes an account for the former spouse.

Essentially, the plan will no longer determine the marital share of the plan accounts by allowing the division as of a specific date. In order to accomplish some of the typical methods of division, one particular QDRO

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expert recommends the following.:Obtain a statement for the cutoff date to be used and use the value on this date. If there are any pre-marital account balances, the parties will have to determine the amount. Calculating pre-marital account gains and/or losses has always been the responsibility of the parties. If post-commencement gains and/or losses are to be factored in, there are several methods that can be employed, including the application of a simple interest rate, average rate of return, tracing method and the proportionate method. You should consult with a QDRO expert for more information.

Recent Cases

Maintenance

A Strict Application of the Maintenance Guidelines Is Unjust in Light of the New Tax Law

Wisseman v. Wisseman, 2019 NY Slip Op. 29092[U] (Sup Ct. Dutchess County 2019)

The new federal tax law, The Tax Cuts and Jobs Act, effective January 1, 2019, ended the payor's ability to deduct maintenance payments from his income and the requirement for the recipient to include maintenance as taxable income. The new law is throwing a curve ball to courts, as they decide whether a strict application of the standard maintenance guidelines are still just and appropriate.

The Dutchess County Supreme Court tackled that issue head-on in this case. The couple were married for 13 years and had two children. The wife was a paralegal earning $30,000 per year, and the husband was a highway superintendent earning $70,800 per year. The parties had resolved almost all of their issues, including the duration of maintenance, which they agreed to set at two years, but they failed to resolve the amount of maintenance.

The parties stipulated that, given their annual incomes, a strict application of the statutory guideline (DRL § 236B(6)) would equal $512.54 per month in maintenance. But, the husband argued that due to the new federal tax law, he would now be paying more tax and would have less income at his disposal than originally considered when New York crafted its maintenance guidelines. He claimed that since he was in the 22% tax bracket, his maintenance should be reduced by 22%. The wife argued that the strict application of the statutory formula is mandated, and that a reduction of her award by 22% would result in even less of a net payment to her than would have resulted if she had to claim the maintenance as taxable income, since she was only in the 12% tax bracket.

The trial court declared that, due to the new federal tax law, a "strict application of the maintenance guidelines would be unjust and inappropriate so as to warrant a deviation" and ordered the husband's maintenance payments be set at $451.04 per month, 12% lower than the statutory guidelines amount, which is the amount that the wife would have had to pay in taxes pursuant to the old tax law. The court commented that "(u)ntil this court is guided by a higher authority or legislative change, it finds that such deviation under these circumstances is just and proper."

It is interesting to note that in this case, the court lowered the support award by the recipient's tax bracket based on what she would pay in taxes under the law rather than the payor's tax bracket. It appears that the best approach is still to review the net cash flow of both parties when determining whether to deviate from the formula.

Child Support

A Parent's Voluntary Contributions to Household Expenses Are Imputed as Income and Are Not a Reason to Deviate from the CSSA Formula

Matter of Weissbach v. Weissbach, 169 AD3d 702 (2d Dep't 2019)

The mother petitioned the family court for child support for the parties' three children and an award of educational expenses for the children's private schools.

The father claimed he earned less than $10,000 per year from his auto body shop. The mother earned approximately $27,000 a year as a medical assistant The court imputed approximately $20,000 per year to the father above his claimed income. After determining the child support based on the CSSA, the court determined that it would be unjust or inappropriate for the father to pay the support based on the formula since the father was already paying the mother and children's household expenses, which totaled approximately $70,000 per year, and therefore reduced his support obligation to $25 per week. The court also denied the mother's petition for private school expenses.

The appellate division reversed both rulings. The court should have imputed $70,000 per year above the father's claimed income from his auto body shop, because for the past 10 years, he had contributed that amount to the mother and children's household expenses from sums he inherited and the father had "substantial" assets (although the case does not state how much). In addition, "the father's voluntary contributions to household expenses do not further a basis to depart from the Child Support Standards Act calculations (see Family Ct. Act § 413[1][f]). Such voluntary payments constitute, at most, an unenforceable promise to pay."

Regarding private school expenses, the lower court failed to properly consider that the children were already

enrolled in private school with the father's approval, and the father was capable of supporting himself even after contributing to their private education. Therefore, the father was directed to pay his *pro rata* share of the educational expenses.

The Court May Modify Child Support Absent a Showing of Substantial Change in Circumstances, Where the Parties Did Not Opt Out of FCA 451

***Matter of Calta v. Hoagland*, 167 A.D.3d 598 (2d Dep't 2018)**

The parties' stipulation of settlement, which was incorporated into their divorce judgment, provided for child support and did not opt out of the modification statute of FCA 451 (i.e., the passage of three years or 15% increase or decrease of income). After 3.5 years had past since the agreement was signed, and both parties' incomes had increased more than 15%, the mother petitioned the Family Court for an upward modification of the father's child support obligation, without showing a substantial change in circumstances. The court modified the child support obligation, and the appellate court affirmed.

Child Custody

Former Same-Sex Domestic Partner Has Standing for Custody and Visitation Based on Equitable Estoppel

***Matter of Chimienti v. Perperis*, 2019 Slip Op. 02866[U] (2d Dep't 2019)**

The wide array of reproductive alternatives now available has expanded our options in creating a family. Recently, courts have sought to clarify parental identities via equitable estoppel, solidifying the roles that same-sex partners held at the start of the subject child's life.

In this case, Perperis conceived two children via artificial insemination while the parties were in a domestic partnership. Subsequently, the parties broke up. To clarify their roles and rights, the parties entered into a consent order in which they agreed to share joint custody of the children, with physical custody and final decision-making power to Perperis and a parenting time schedule to Chimienti.

But Perperis' satisfaction with the consent order disintegrated, and she challenged Chimienti's standing to seek custody of and visitation with the children. The family court applied an equitable estoppel analysis, and determined that Chimienti had standing to seek custody and visitation. The Second Department affirmed.

The Second Department held that *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016) expressly left open the issue of whether, in the absence of a preconception agreement, a former same-sex, non-biological, non-adoptive partner of a biological parent could establish standing based upon equitable estoppel. Equitable estoppel is properly applied to protect a child's established relationship with another who has assumed the parental role and to protect the status interest of the child in an already recognized parent-child relationship.

Here, equitable estoppel was appropriate where there was a consent order that granted Chimienti custody and parenting time and because of Chimienti's ongoing parental engagement with the children, from aiding Perperis with prenatal care and staying with her in the hospital after the children's births, to co-parenting the children and being regarded by the older child as "Mommy." To eliminate Chimienti's rights after she solidified that parental bond with the children would be "detrimental to the children's best interests.

Equitable Distribution

Hiring Domestic Help Doesn't Indicate a Failure to Contribute Equally to a Marriage

***Flom v. Flom*, 2019 N.Y. Slip Op. 01643[U] (1st Dep't 2019)**

The parties were married 18 years, had two children, and accumulated tremendous wealth. The husband was a vastly successful breadwinner. The wife was a stay-at-home mother who hired domestic help. There was no evidence that the wife "ever cooked a meal, dusted a table or mopped a floor." The court granted 60% of the marital assets to the husband and 40% to the wife based on the court's perceived inequitable contributions to the marriage.

The wife appealed, and the First Department reversed and awarded each party 50% of the marital assets. The court determined that the wife was an active mother, continuously engaged in familial responsibilities. While the wife hired a cleaning staff and didn't engage in the family's business, she coached the children's sports teams, routinely attended parent-teacher conferences, managed the household, and paid the family's finances from a joint bank account. Simply because the wife hired domestic help does not warrant a lesser award.

The wife had not worked outside of the home in 20 years. The trial court properly awarded her 6 years of maintenance at $26,000 per month based on the parties' lavish lifestyle. It was error to impute $50,000 per year of income to the wife, since the court had no basis to do so. The monthly child support based on an income cap of $141,000 (which was the income cap at the time of trial) was inappropriate given the children's lifestyle, and the appellate court used a cap of $300,000 to satisfy the children's actual needs and luxurious lifestyle.

Stipulations

Anti-Alienation Provision of ERISA Pension Can Be Waived by Stipulation

Schatz v. Feliciano-Schatz, 170 AD3d 766 (2d Dep't 2019)

In 1998, Alysius Schatz divorced his first wife, the plaintiff in this case. Six years later he married the defendant. Two years thereafter, Aloysius retired and began receiving benefits from his retirement plan. He selected a joint and survivor annuity, with the defendant, his new wife, named as the joint annuitant. Soon thereafter, Aloysius and the defendant divorced.

As part of the divorce, Aloysius and the defendant executed a stipulation of settlement. Later, they amended that settlement, providing that both parties waived their rights to each other's retirement plans, and that in the event that either party received payments in contravention of the agreement, the benefits would be turned over to a beneficiary designated by each party or to the deceased party's estate. The defendant remained the only beneficiary named in his retirement plan.

In May 2013, Aloysius remarried his first wife, the plaintiff in this case. Nine days later, he died. Since the defendant was the only named beneficiary, the decedent's retirement was paid out to her. The wife and the administrator of the decedent's estate joined forces and sued the former wife, claiming breach of contract and unjust enrichment for failing to turn over the retirement benefits, and sought summary judgment, based on the clear language of the amended stipulation.

The court denied the plaintiffs' motion, asserting that "once they are paid to the beneficiary, the funds are no longer entitled to protection" *(see Matter of Christie*, 152 A.D.3d at 767).

The Second Department reversed. It clarified that the heart of the matter is not the timing of the disbursement of retirement funds, but rather the voluntary and explicit waiver. At bar, the defendant clearly and voluntarily waived her entitlement to the decedent's retirement benefits, and therefore the plaintiffs' motion for summary judgment should have been granted.

Counsel Fees

Unmarried Parent Is Entitled to Interim Counsel Fee Award in Custody Case Pursuant to DRL 237(b)

Balber v. Zealand, 169 A.D.3d 600 (1st Dep't 2019)

As the petitioner-father and respondent-mother prepared themselves for a custody case, the mother, the lesser-monied spouse, sought to arm herself for the battle with sufficient legal funds. Citing DRL § 237(b) ("Counsel fees and expenses"), she motioned the court for $225,000 in legal fees and was granted $120,000.

The petitioner-father appealed, claiming that the DRL contemplates *pendente lite* counsel fees for a "spouse" in need of legal funds, not for an unmarried parent

The First Department denied the appeal. DRL § 237 contemplates an award of legal fees to a spouse or parent, and there is a significant body of case law in which the court has granted *pendente lite* counsel fees to unmarried parents in custody disputes (*see Matter of Brookelyn M. v. Christopher M.*, 161 A.D.3d 662 [1st Dep't 2018]; *Matter of Renee P.-F. v. Frank G.*, 161 A.D.3d 1163 [2d Dep't 2018]; *Evgeny F. v. Inessa B.*, 127 A.D.3d 617 [1st Dep't 2015]).

As the appellate court noted, the lower court considered the father's arguments that the mother unscrupulously protracted the legal battle and intensified her need for legal funds by serving useless subpoenas that were unlikely to result in relevant discovery, reporting unfounded allegations of mistreatment to the Administration for Children's Services, failing to report her diamond engagement ring as an asset on her net worth statement, and failing to disclose her new job offer to the court. The court took those facts in consideration when only awarding the mother 53% of the legal fees requested.

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