

# Family Law Review



A publication of the Family Law Section  
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## Love and Family Law in the Time of COVID-19

By Lee Rosenberg,  
Editor-in-Chief



## Also in This Issue

- The Need for Mental Health Professionals in Custody/Access Litigation
- Get Me a Divorce: A New Idea Using Orders of Protection to Enforce a 'Get'
- Is a 'Restrained Lifestyle' a Valid Basis for an Equitable Distribution Award?

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# Love and Family Law in the Time of COVID-19<sup>1</sup>

By Lee Rosenberg, Editor-in-Chief

Even good marriages and close families are not normally designed to withstand 24 hours a day/7 days a week togetherness for months at a time. Bad ones, and those on the brink of bad, are certainly not. Relationships infused with domestic violence are already powder kegs with dire consequences, as we are all too often seeing on a daily basis.

Family law is personal. Parents and children, spouses, extended family, and intimate relationships are at odds in varying degrees of opposition and tension. Separating representation of those in turmoil with our own set of emotions, biases, and opinions, is often difficult. During the onset and continuation of varying stages of quarantine (or not) the impact of the coronavirus pandemic has escaped very few, if any. And so, what is personal to those we represent, in many ways is also personal to each of us—sequestering, caring for children, concerns over employment and income, protecting children and elderly parents, sickness and death, divergent views on politics and medicines, remote education and child care,<sup>2</sup> and the effect of all on mental health—as the world’s population stares into the unknown future waiting for a vaccine that some (or many) may decide not to accept.

As New York State gradually entered “Phase 1” and then moved forward to where are standing at the time of this editorial, those who practiced “family law” were, with limited exceptions, incredulously considered “non-essential.” How that was even remotely possible, given the kind of services we perform for families already in crisis, is an absurdity. The bench and bar and their staffs were given short-shrift, and families, except in the most exigent circumstances, could not get their day in court nor even file new actions for a prolonged period of time. Despite the court system requiring special “Matrimonial Rules” for practicing in this field and the talk of the need to protect families, for some reason, it still feels as if other areas of law take precedence. It seems rare that any matrimonial lawyers are even asked to participate and serve on those task forces empowered to offer opinions on over-arching policy matters that affect what we do and those we represent. Clients and self-represented litigants frustrated—as the bench and bar were—with the lack of access to the system, which was finally and miraculously pulled into the age of technology, could not understand how they were in limbo at home as well as in court. Through it all, lawyers, judges, legal assistants, paralegals, court personnel, with a built-in need to serve justice, still had to rightfully worry about themselves and their own families. “Balance,” a repeated mantra for some time now, but rarely found and usually beyond our grasp, is now thrust squarely to the forefront—sometimes as a mandate in our own households.<sup>3</sup>

And so, as we have transitioned to virtual appearances, electronic filing, and with in-person matters at hand—at least to some degree, where do we go from here and how does this *still on-going* experience affect the practice of law and the advice we give?

## Parenting and Access to Children

As was stated above, what is personal in the lives of litigants is now personal in our own lives and in our judges’ lives. In his New York Law Journal Article, *COVID-19 and Future Custody Determinations*,<sup>4</sup> Hon. Jeffrey A. Sunshine—New York Statewide Coordinating Judge for Matrimonial Cases—cautioned about withholding children from parental access during the pandemic. The extent of that access, even in the face of existing court orders, can be affected by real issues and concerns, as well as by feigned assertions, or somewhere in between. What is the view and personal feelings of the judge—whose life experience and opinion will be different from the judge down the hall? One judge may direct the child to be provided to the other parent and the other may think safety requires more time. This is not new, of course, but the circumstances are. What is the ability to get a hearing and how is that to be conducted? How will a forensic evaluation be safely and competently done? How does the attorney for the children gain access to those children? How does the court get to monitor witnesses or conduct an in camera? How does the lawyer conduct a remote cross examination of a difficult witness by Skype? How do all remain comfortable and feel safe?<sup>5</sup>

Many court protocols have been issued to try and guide us through the process and a few interim decisions have been reported since this all started, and may at least provide some views on access to children.

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On September 2, 2020, the *New York Law Journal* reported that Judge Gary Brown of the U.S. District Court for the Eastern District on New York ordered two virtual bench trials due to the pandemic. One trial involves a “former U.S. Securities and Exchange Commission examiner who has pleaded not guilty to disclosing confidential information to the target of an investigation.” That trial will apparently have some participants appear in person. The other trial is “a civil case related to the rights of Latino voters in the town of Islip.” That trial was directed to be held virtually over the objection of the Town Attorney.<sup>6</sup>

On August 28, 2020, the court *In re Kevin M. v. Alexander C.*, scheduled a virtual hearing over objection. A trial had been scheduled on the mother’s support violation petition, but the pandemic intervened. The father then petitioned for downward modification claiming a 100% decrease in earning ability as a result of COVID-19. The father’s attorney sought a virtual hearing and the mother’s counsel objected. The court found no prejudice in the virtual trial, but that a delay would be prejudicial to the children’s best interest. The court cited to UIFSA and other support matters permitting testimony by electronic means even where there is an issue of willfulness and a party’s liberty is at stake. The court referenced “ever-changing Coronavirus information as it relates to symptoms and risks and this Court’s inability to predict when the court system will return to normal in-person operations” as well as to the use of “certain protective procedures.”<sup>7</sup>

In the June 29, 2020 matter, *L.D. v. K.R.*,<sup>8</sup> the court in deciding a custody matter that was tried between July 2019 and February 2020 awarded custody to the father with parenting time to the mother. The mother had a residence in St. Croix. In fashioning time, the court directed “alternate week visitation with the child in New York City” for the Summer of 2020, stating “due to the ongoing COVID-19 pandemic, there remain some restrictions on travel for both New York and Saint Croix. As a result, there shall be no travel to Saint Croix during the summer of 2020.”

Similarly in *S.C.S. v. K.N.M.*,<sup>9</sup> the court on July 2, 2020 confirmed the Referee’s determination to award the parties joint legal custody and the mother physical custody. Such physical custody was conditioned on her return to New York from North Carolina and with the child to live in proximity to the father’s residence in the Bronx. The court further directed,

Due to the ongoing COVID-19 pandemic, there remain some travel and quarantine restrictions between New York and North Carolina. Therefore, the mother’s upcoming July 19, 2020 visit for the child’s birthday, shall be conducted electronically and not in person. The parents should continue to adhere to any travel restrictions and advisories due to the Coronavirus outbreak or any future travel concerns that may arise.

In *S.A. v. R.H.*,<sup>10</sup> issued on June 5, 2020, the court granted the plaintiff-father permission to travel with the child to California on a temporary basis so that the child could visit with his paternal grandparents and observe the Passover holiday.<sup>11</sup> In light of the COVID-19 pandemic and concerns of exposure to the virus and domestic travel, the order directed plaintiff to take certain precautions, including the use of a private airplane, and to return the child to New Jersey on or before April 12, 2020. That time was later extended. Plaintiff then submitted an application to retain the child in California, asserting the dangers of COVID-19 posed by a return to the Tri-State area. The court held a telephonic hearing and granted the application solely to the extent of permitting the child to remain in California until July 8, 2020 at the latest, and with the “express directive that he return the child to his home in New Jersey by that date.” The court did find the father to have been deceptive in his actions, but was constrained to still consider best interests and the prevailing COVID-19 restrictions.

In weighing the risks against the benefits of requiring plaintiff to return with the child to New Jersey, the court must conclude, on this particular set of facts, that protecting the child’s health outweighs any concerns about any possible interference with defendant’s access with the child. Considering that defendant’s minimal, supervised visitation is currently impracticable, with the supervisor being unable to conduct faceto-face parental access sessions, it cannot be said that defendant’s access is being impeded by the child’s continued presence in California. This is especially so inasmuch as defendant is having almost daily virtual parental access while the child remains in California. If the child were to return to New Jersey now, defendant’s access under current circumstances would continue to be virtual.

The good news concerning the COVID-19 health emergency is that situation has improved in the Tristate region to the point that restrictions are now beginning to be lifted. It is, of course, not the place of a court to evaluate the level of danger posed by a virus; that is best done by the executive branch guided by expert medical advice. The court, in turn, will be guided by those executive decisions. The governors of both New York and New Jersey either have or are poised to issue directives that will greatly ease the restrictions placed on travel and activities. The court will therefore assume that by July 8, 2020, which is one full month from the date of this decision, neither New York City nor New Jer-

sey will be subject to the type of restrictive orders that have impacted every aspect of daily life. Under this scenario, the reduction of risk will be sufficiently reduced so as to require plaintiff to return the child to New Jersey and thereby allow defendant to resume inperson supervised access in New York City.

In the June 10, 2020 decision in *Hussain A.R. v. Jennifer J.B.*,<sup>12</sup> the court, looking at a prolonged history of the matter which was also litigated in Texas and which saw the mother violate orders and protocols, inter alia, awarded custody to the father. The court considered the mother's conduct during the pandemic:

After numerous court conferences with the Attorney for the Child's assistance, this Court gradually increased the Mother's parenting access with the Child beginning with unsupervised day visits, then sandwich visits until recently permitting the Mother to have alternate weekends and extended holiday visitation with the Child. Unfortunately, within a short period of time, Mother has progressively reverted to her old behavior of litigiousness and interference with the Father's care and custody of the Child. In fact, during the Coronavirus Pandemic which currently envelops the Country, the Mother has been contacting the Family Court and its Court Attorney on several occasions sometimes more than twice a day—despite this Court's express directives prohibiting the same. Upon the request of the AFC, on April 30, 2020, the Undersigned set up a Skype for Business conference to entertain a proposed Order to Show Cause by Mother requesting sole custody of her Child and a temporary order of protection against the Father, claiming that he has behaved boorishly towards her, hurt the Child and threatened to kill her and the Child during a visitation exchange, thereby requiring NYPD police intervention.

At the Skype conference, the Mother gave her version of the events of April 24, 2020, while the Court was able to observe her cadence and demeanor. The Father explained that it was the Mother who had kept the Child without permission for two additional days, came uninvited to his residence with the police accusing him of domestic abuse, rape and harassment, and instructed the Child via texts to escape the Father's house in the middle of the night

without alerting him, disregarding the Child's safety. After hearing all counsel, the parties and the Attorney for the Child, who denied that anything untoward happened to the Child, this Court, by Order dated April 30, 2020, denied Mother's applications and continued her alternate weekend visitation by implementing more safeguards for the exchanges. In the meantime, Mother's interfering behavior has apparently continued unabated.

In a neglect proceeding, *In re Joziah P.*,<sup>13</sup> where the court on May 26, 2020 directed the return of the young child to the also young mother, the court considered the impact and dangers of COVID-19 in the transition,

At a second Skype Conference to discuss these plans on May 22nd, Shirley made clear that she was not comfortable with having visits with Joziah in a park or public setting nor did she want him brought to the agency because of the risk of COVID exposure and in light of Joziah's allergies and the recent cases of children becoming ill and even dying due to virusrelated illnesses. Unfortunately, the foster mother was not comfortable with the child visiting at Shirley's home and then returning to her because of the number of individuals in that home. Thus, given the health risks, the Court was left with no options for a transition period involving inperson visits that were acceptable to the involved parties. Although this means the transition will be more abrupt than this Court would ideally want, after much careful deliberation and with full knowledge of the facts and history of this case, this Court believes that, given the available options, it is in Joziah's best interests to transition to his mother's home as quickly as possible. It is worth noting that Family Courts are often in the position of ordering the abrupt removal of children from their parents' homes when necessary for their physical and/or emotional wellbeing.

Given the options the Court is faced with during this pandemic, the Court believes that Joziah's emotional health and wellbeing is best promoted by his immediate return to his mother so that there is no further delay in repairing their bond and reintegrating him into his biological family. The fact that Shirley has reiterated her intention to allow the foster mother to visit and have regular ongoing contact with Joziah will help ease this transition.

On July 1, 2020, the New York County Family Court in *A.S. v. N.S.*<sup>14</sup> scheduled a virtual custody trial in a protracted matter over the father's counsel's objection.

While the court is cognizant of the limitations and inherent difficulty involved in conducting virtual hearings, counsels' objection do not set forth a prejudicial basis to further delay the hearing. Given the unpredictable nature of the COVID-19 pandemic it is unknown when court operations will return to normal inperson procedures, particularly given a resurgence is anticipated, if not already occurring, with multiple travel bans and advisories in effect. The court is mindful that compelling inperson attendance, in a courtroom, could subject vulnerable individuals to an increased risk of harm. Virtual technology would remove that risk. Indeed, courts have been utilizing and/or relying on virtual or remote technology in the preCOVID-19 era. *See*, 22 NYCRR 217.1[a]; *Omnamm L. v. Kumar L.*, 177 A.D.3d 973, 97576, 113 N.Y.S.3d 186, 189 (2d Dep't 2019)(court did not err in proceeding to factfinding where interpreter appeared remotely in neglect hearing as father not denied right to meaningfully participate); *In re Olivia G.*, 173 A.D.3d 1688, 99 N.Y.S.3d 919 (4th Dep't 2019) (incarcerated father's contention that his ability to understand the termination of parental rights virtual proceeding was limited by inadequate services of interpreter lacked merit); *Bagot v. McClain*, 148 A.D.3d 882, 883, 49 N.Y.S.3d 175, 176 (2nd Dep't 2017)(father's contention that he was denied due process due to faulty videoconference lacked merit); *46 Downing St. LLC v. Thompson*, 41 Misc. 3d 1018, 102930, 976 N.Y.S.2d 761, 76970 (Civ. Ct., N.Y. Cty. 2013)(videoconferencing of inmates in housing court cases preferred). New York state recently amended Chapter 126, Part D, and Chapter 123 of the Laws of 2020 (effective July 17, 2020 and expiring April 30, 2021) to add a new Criminal Procedure Law § 180.65 that allows virtual preliminary hearings on felony complaints. Neighboring jurisdictions have squarely addressed this issue in light of the pandemic and issued administrative orders directing that most hearings continue even over attorney objections, with exceptions for certain matters including sentencing, termination of parental rights, mental incapacity hearings or matters that involve a reasonable likelihood of a jail

sentence or loss or suspension of license, none of which apply here. (*See*, New Jersey Supreme Court Administrative Order dated April 20, 2020, <https://www.njcourts.gov/notices/2020/n200420a.pdf?c=8vE>)

In May 7, 2020's *S.V. v. A.J.*,<sup>15</sup> the father sought enforcement of a temporary visitation order and make-up time. No custody order had as yet been issued. The mother, citing existing "stay at home" orders issued in New York and New Jersey and concerns over COVID-19 dangers, had withheld the children and suggested only video visits until the pandemic ended. The court determined that the mother's general fears were insufficient to support her position and that she "failed to articulate, submit evidence, or even allege any particularized health concern such that the Court would consider suspension of inperson visits." The court directed an immediate recommencement of the father's in-person parenting time and stated,

This pandemic is not to be used to limit access by a parent or to flout valid orders of the court. Rather, valid orders of the court must be followed during this crisis unless a parent can articulate a specific health or safety risk, and can demonstrate to the Court that suspension of visits is warranted, which may be a heavy burden. In any event, in such a case a parent must then affirmatively move the court for emergency relief in order suspend any visitation order and may not resort to self help by failing to produce children for visits.

Lest it be unclear, and to settle any confusion, it is the opinion of this Court that while our movements and lives may be severely constrained during this time period, it is just as important for the children to see their father as it is for them to see their mother. They have two homes and should spend time in both places. In other words, in times of crisis children need regular contact with both parents more than ever to provide love, comfort, stability and guidance, something that video and virtual connections cannot fully accomplish. Our lives may be "on hold" in many respects, but vital family relationships cannot be placed on hold indefinitely without serious risk of harm. It is also expected that parents make additional efforts in these times to work together for the benefit of their children, and time with the other parent should be viewed as essential for the children and a permissible and important reason to leave the home.

The court also directed that “both parents are directed to follow all social distancing rules, to wear masks in public, and shall make every effort to adhere to the laws, guidelines, and other directives set forth by the City, State, and Federal Government to ensure their safety and the safety of their children.”

In *Jennifer R. v. Lauren B.*,<sup>16</sup> post-divorce proceedings commenced between former same-sex spouses who had settled their matter with a joint legal and residential custody arrangement as to their one child. Several prior unsuccessful custody related modification applications had been filed by Jennifer (deemed the “Mother” – who was also the recipient of child support– by the court for clarity). The Mother then filed for similar relief as before including sole custody and permission to relocate to New Jersey. After her petition was dismissed, she filed again. The court appointed an attorney for the child and ordered a forensic evaluation. The matter was adjourned from February 25, 2020 to May 19, 2020 for a conference and an update on the forensic evaluation, when the pandemic intruded. In the interim, the parties agreed to a temporary modification of the parenting schedule to reduce the child’s transition between parents with a two week-on/ two-week off schedule and with the first transition to require Jennifer to provide the child to Lauren (designated by the court as the “ex-wife”). Instead, however, Jennifer moved for the immediate grant of temporary sole custody and final decision making authority to her with the child to remain in New Jersey, citing the pandemic’s Brooklyn “hot spot” as the basis. Lauren then applied, inter alia, for a writ of habeas corpus. The child’s attorney supported the Mother’s application.

Judge Javier E. Vargas, on April 22, 2020, denied the Mother’s application, citing her history of non-compliance with agreements and orders, multiple applications, and failure to establish a change in circumstances. The court granted the ex-wife’s application for enforcement and the immediate return of the child, holding,

The Mother has failed to cite anything specific which the ExWife has done to place the Child at risk of exposure to Coronavirus or otherwise. To the contrary, the parties were communicating and have developed an appropriate plan for the Child to lower his exposure of contracting the disease by reducing the number of exchanges. The Child is being transported back and forth by car, and it has been the Mother who has had the option of staying in Brooklyn, which is something she usually does when she has parenting time with the Child during week.

Although the Mother makes much of the fact that New York is a “hotspot” of Coronavirus cases, she lives in New Jersey which is second in the Nation in

terms of infections and wherein the New Jersey Governor, only two days before the Governor of New York did, also declared a State of Emergency on March 9, 2020. In any event, the Court trusts the parties’ judgment with respect to the Child, as evidenced by their mature March 2020 emails, and will require that they comply with the government directives in terms of enforcing social distancing, using cloth face coverings and gloves for the Child, avoiding contact with vulnerable populations, and using precautionary sanitizer practices.

...Given the unprecedented times that we are living, the Child may be reflecting a desire for stability and peace in reaction to the Mother’s unrelenting pursue [sic] of his custody by her filing of several, almost consecutive Petitions. The Child may be having a difficult time understanding the current situation and “need(s) all of the adults in their lives to behave in a cooperative, responsible and mature manner” (Tolchinsky, A. & Wertheim E., *Family and Dispute Resolution in Pandemic Times*, NYLJ, April 21, 2020, at 3, col 1). The parents’ behavior during the Pandemic and while the case is pending in court will be relevant to the Referee in her ultimate custody determination (see *Sunshine, J.*, *COVID-19 and Future Custody Determinations*, NYLJ March 27, 2020, at 3, col 1).

Having parents with different views on health issues has been historically resolvable by the court, which has broad discretion in determining “best interests.”<sup>17</sup> This will no doubt perpetuate through Covid when a vaccine is developed. The court has the power to provide for decision-making to one parent even where joint custody has been awarded.<sup>18</sup>

In *Ednie v. Haniquet*,<sup>19</sup> the Second Department modified the trial court’s determination by deleting the provision thereof granting the mother medical decision making authority where the mother refused to vaccinate the child.<sup>20</sup> The court in *Brandon E. v. Kim E.*<sup>21</sup> modified joint custody where the parties “could not agree on many things, leaving important decisions regarding the child in limbo. For instance, the mother refused to consent to the child receiving a flu shot and wanted to contemplate it for months, even after the child’s physician and other medical professionals recommended it.”

Certainly, we would all be well-served by including at least some basic covid-protective language in our stipulations and agreements to ensure that the parties are complying with CDC, State and local guidelines for the safety and well being of all.

## Support Issues

Just as the pandemic has affected parenting, it has most certainly affected economics, although this time it is a worldwide scourge in a global economy. That being said, downturns are not new and courts have been historically reluctant to effectuate modifications even where acknowledging that things are not what they once were. In a non-matrimonial 1908 case, *Germania Life Ins. Co. v. Potter*,<sup>22</sup> the First Department found,

The court can take judicial notice of the fact that during October, 1907, there was great financial depression and disturbance. What might be deemed reasonable at one time might be wholly unreasonable at another time under a different situation.

Matrimonial litigants seeking downward reductions merely citing economic climate changes have not always fared well even in dire times. Coming in the midst of the Great Depression, Justice Schmuck, in *David v. David*,<sup>23</sup> rejected the husband's application for alimony reduction with the following stinging rebuke,

Conceding that the defendant has fallen on evil days and that his financial condition has become deplorable, we may not forget that, before the prevailing economic depression brought its cataclysm of distress, fortune had smiled upon him, and that, if he had been provident as normal individuals usually are, he would have provided for all possible exigencies, including the one from which he now seeks to escape. It is a husband's duty to support and maintain his wife and children. This responsibility demands thought of the future as well as consideration of the present. While single, he may go adventuring without gainsay, but, when married, he must not, through heedlessness, endanger the welfare of those who legally may look to him for support. His application for a reduction of alimony will not be heeded, for the amount he now pays is reasonable. No patience or sympathy is had for those who seek to take advantage of present conditions in order to foil an obvious and indisputable duty.

Coming to trial after the 2008 Great Recession, the court in *G.K. v. L.K.*<sup>24</sup> rejected the husband's account of his finances and notwithstanding his collecting unemployment and the alleged loss of his interest in his construction business, citing his lack of credibility. In a similar vein, no modification was permitted in *Levine-Seidman v. Seidman*,<sup>25</sup>

Here, despite the father's testimony that the current economic downturn severely affected his earnings, and despite the fact that his income as a stock broker fluctu-

ated yearly, depending on stock sales, he did not show a substantial change in average income since the entry of the divorce judgment which established his support obligation. Accordingly, on this record, the father failed to establish a substantial change in circumstances sufficient to entitle him to a downward modification of his support obligation...<sup>26</sup>

The burden is clearly still on the party making the claim.<sup>27</sup> A court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential.<sup>28</sup> Statutorily, support modification is in large part governed by DRL § 236B(9)(b). Courts have repeatedly held that "Where a stipulation of settlement is incorporated but not merged into a judgment of divorce, a court may modify a child support order derived from the stipulation 'upon a showing that there has been an unreasonable and unanticipated change in circumstances justifying the modification.'"<sup>29</sup> That change must be "substantial" and "extreme hardship" is the standard when maintenance is considered unless the parties provided for a lesser standard.<sup>30</sup> Loss of employment may constitute a substantial change in circumstances where the termination occurred through no fault of the party seeking modification and he or she diligently sought reemployment commensurate with his or her earning capacity.<sup>31</sup> As always, facts are key.

In *DavisTaylor v. DavisTaylor*,<sup>32</sup> the court reversed a finding of willful violation of a support order where the father "presented uncontroverted proof that his business failed during the economic downturn of 2008 and that, thereafter, he pursued numerous job possibilities, but was only able to obtain a commission position that had resulted in very low income." The court stated,

His educational background is a high school graduate, and the area in which he had developed an expertise was particularly hard hit during economic decline that commenced in 2008. He looked for jobs both in his field and in other areas. There was no proof that his loss of income was selfimposed in any fashion. He produced documentary proof that, as of September 2009, his household was receiving food stamps and there was a past due payment amount of over \$45,000 on the mortgage on the house where he resided. He owned a 10-year-old vehicle that was inoperable because of needed repairs. There was no evidence that he had other assets or income from any other sources. In light of his fairly lengthy history of consistently making all of his considerable child support payments, which were interrupted at a time when uncontroverted and documentary proof substantiated a signifi-

cant loss of income, we are unpersuaded that this record establishes by clear and convincing evidence the willful nonpayment of his obligation...<sup>33</sup>

In *Parmenter v. Nash*,<sup>34</sup> the court considered the father's relocation to be closer to the children as a potentially valid reason for leaving his employment,

As a general rule, a parent who voluntarily quits a job will not be deemed without fault in losing such employment... Nevertheless, that general rule should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child (see *In re Dupree v. Dupree*, 62 N.Y.2d 1009, 1010-1012, 479 N.Y.S.2d 491, 468 N.E.2d 673 [1984]; *In re Smith v. McCarthy*, 143 A.D.3d 726, 727-728, 38 N.Y.S.3d 588 [2nd Dep't 2016]; see also *Spencer v. Spencer*, 298 A.D.2d 680, 680-681, 748 N.Y.S.2d 809 [3d Dep't 2002]). As one court has explained, a "parent who chooses to leave his [or her] employment rather than [live] hundreds of miles away from his [or her] children is not voluntarily unemployed or underemployed. Instead, he [or she] is a loving parent attempting to do the right thing for his [or her] children. To punish such a parent by requiring higher child support ... is neither good law nor good policy" (*Abouhalkah v. Sharps*, 795 N.E.2d 488, 492 [Ind. Ct. App. 2003]).

Here, it is undisputed that the father quit his job in Virginia and relocated to Onondaga County in order to rehabilitate his relationship with his son, which had suffered since the child was moved to New York. The equities weigh heavily in favor of the father here given that it was the mother who moved the child hundreds of miles away from the father and thereby created the difficulties inherent in longdistance parenting. Thus, under these circumstances, we conclude that the father demonstrated the requisite change in circumstances necessary to reexamine his child support obligation (see *Smith*, 143 A.D.3d at 727-728, 38 N.Y.S.3d 588). We therefore reverse the order, grant the objection, reinstate the petition, and remit the matter to Family Court to determine the appropriate amount of child support, after a further hearing if necessary.

Despite the universal impact of COVID-19 its ongoing financial ramifications with no predictable end— at least pending some tested and approved vaccine— litigants must

still approach these cases as they have in the past, unless and until we have some reported decisions which guide us differently.

### Equitable Distribution and Valuation

There have been various views espoused regarding valuation of assets—particularly businesses and professional practices—during this time.<sup>35</sup> Certainly, in proper circumstances and given the Domestic Relations Law provision that assets may be valued at any time between the date of commencement and the date of trial,<sup>36</sup> the general rule that business are valued as of commencement is not absolute. Discretion in this regard is broadly held by the court,<sup>37</sup> as is its equitable distribution power.<sup>38</sup>

In *Giallo-Uvino v. Uvino*,<sup>39</sup> the court approved the valuation of the husbands' law practice as of the date of trial—and not commencement—where he was disbarred. The court's decision is a reminder of the parties' respective burdens of proof.

Courts have discretion to value "active" assets such as a professional practice on the commencement date [of the action], while "passive" assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial, but such formulations should be treated as helpful guideposts and not immutable rules" (*Daniel v. Friedman*, 22 A.D.3d 707, 708, 803 N.Y.S.2d 129, quoting *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 707, 709 N.Y.S.2d 486, 731 N.E.2d 142; see *McSparron v. McSparron*, 87 N.Y.2d at 288, 639 N.Y.S.2d 265, 662 N.E.2d 745). Under the circumstances of this case, the Supreme Court providently exercised its discretion in valuing the defendant's law practice as of the date of trial, rather than the date of commencement of the action (see *Schachter v. Schachter*, 151 A.D.3d 422, 422-423, 56 N.Y.S.3d 296; *LaBarre v. LaBarre*, 251 A.D.2d 1008, 674 N.Y.S.2d 235; see also *Wegman v. Wegman*, 123 A.D.2d 220, 235-236, 509 N.Y.S.2d 342; cf. *Grunfeld v. Grunfeld*, 94 N.Y.2d at 707-708, 709 N.Y.S.2d 486, 731 N.E.2d 142). Contrary to the plaintiff's contention, she failed to establish that the defendant, who was disbarred during the pendency of this action (see *In re Uvino*, 128 A.D.3d 170, 171, 7 N.Y.S.3d 432), intentionally lost his license in order to devalue his law practice (cf. *Kurtz v. Kurtz*, 1 A.D.3d 214, 215, 767 N.Y.S.2d 104). The plaintiff failed to establish that the defendant's business had any value as of the date of trial.

In *Daniel v. Friedman*, the court, while acknowledging the effect of an economic downturn on the husband's

business, nevertheless valued same as of commencement rather than trial,

Although an economic downturn between the date of commencement of the action and the date of trial had an effect upon the value of the defendant's business, the evidence at trial demonstrated that the business had rebounded significantly and that there were signs of potential positive growth for the future, despite the defendant's contentions to the contrary. Accordingly, the trial court's determination to use the date of commencement of the instant action as the valuation date for the defendant's business was a provident exercise of its discretion.

The court took the same approach in *Rich Wolfe v. Wolfe*,<sup>40</sup>

In this case, the profitability of the parties' businesses had declined after the date of commencement due to deterioration of the broader economy, but defendant did not dispute that the construction industry is a cyclical one that is strongly affected by economic conditions. He also sold one of the businesses and some assets of another for a substantial sum of money in 2008, and provided nothing to indicate that the remaining businesses would not recover as the economy improved. As such, Supreme Court properly selected the date of commencement as the valuation date

Given the case law which has considered past instances of economic calamity, it remains wise to update valuations and make the appropriate arguments for change where the facts bear them out. The unknowns of the pandemic which quarantined the population for months, however, complicate the history since we have not seen the combination of such a global outbreak of disease and economic fall-out in the equitable distribution era.

## Conclusion

To say that we are in uncharted territory is not only stating the obvious, but is an understatement. The future, and even the present, and are still unknowns even as we are living it. That there is even a dispute over the science that is needed to help us recover would be unthinkable a short while ago. When friends and neighbors are at each other's throats—sometimes not just figuratively—what of those families already in turmoil and living in the same household with their children. Fortunately, our efforts and those of our courts have the ability to bring some degree of clarity to the confusion even as the bench and bar also struggle with our own emotions and realities.

What is heartening is that our fellow lawyers and judges have by and large become united in an apprecia-

tion for each other and our respective families. It is rare when a call, Zoom, or Skype is not begun or ended with exchanges of concern or good wishes for each other's and our families' safety and well-being. Concerns as well for staff and court personnel ring out mutually as we hope all are all right. Adjournments are readily agreed upon without posturing. Our judges are respectful of a reluctance to come into a courtroom even if they themselves are there and virtual conferences substituted.

A state of civility that has long been aspired to has been brought about by a reality that was dropped upon us in the most unexpected manner. Let us continue this period of respect though this time and even after it finally ends. Stay safe.

## Endnotes.

1. With due deference to Gabriel Garcia Marquez, *Love in the Time of Cholera*, Orig. Sp. 1985, Editorial Oveja Negra (Columbia); Eng. Transl. 1988, Alfred A. Knopf.
2. For a discussion of the new parenting paradigm, see Eric Wrubel, *Blurred Lines: Balancing Parenting Roles Post Divorce Amid Covid*, NYLJ August 6, 2020.
3. See e.g., Stephen P. Younger, *Shaping Our Profession: A Blueprint for the Future*, N.Y. State Bar Journal, July/August 2010.
4. NYLJ, March 27, 2020.
5. Justice Matthew F. Cooper in *S.C. v. Y.L.*, 67 Misc. 3d 1219(A) (N.Y. County Supreme Court 2020), addresses some of these issues head on.
6. "Virtual Bench Trial Scheduled in Long Island Voter Fraud Case, Amid Freeze on Jury Trials," Jane Wexler, NYLJ, 9/2/20; <https://www.law.com/newyorklawjournal/2020/09/02/virtual-bench-trial-scheduled-in-long-island-voter-case-amid-freeze-on-jury-trials/>.
7. NYLJ 8/28/20 (Family Court Nassau County 2020).
8. 67 Misc. 3d 1242(A) (Bronx County Fam. Court 2020).
9. 67 Misc 3d 1242 (A) (Bronx County Fam. Court 2020).
10. 67 Misc 3d 1227(A) (NY County Supreme Court 2020).
11. The mother had limited supervised parenting time.
12. 67 Misc. 3d 1228(A) (Kings County Fam. Court 2020).
13. 67 Misc. 3d 1226(A) (Kings County Fam. Court 2020).
14. .2020 N.Y. Slip Op. 20161 (N.Y. County Sup. Court 2020).
15. 68 Misc. 3d 330 (Bronx County Fam. Ct. 2020).
16. 68 Misc. 3d 225 (Kings County Fam. Ct. 2020).
17. *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982); *Zaida DD. v. Noel EE.*, 177 A.D.3d 1220 (3d Dep't 2019); *Richmond v. Perez*, 122 A.D.3d 928 (2d Dep't 2014); *Terramiggi v. Tarolli*, 151 A.D.3d 1670 (4th Dep't 2017).
18. *Thorpe v. Homoet*, 116 A.D.3d 962 (2d Dep't 2014); *Cooper v. Williams*, 161 A.D.3d 1235 (3d Dep't 2018).
19. 185 A.D.3d 1029 (2d Dep't 2020).
20. See also, *L.N. v. V.V.*, 67 Misc.3d 1208(A) (Kings County Fam Court 2019). Courts have also addressed instances where refusal to vaccinate are (or are not) based on truly held religious beliefs, but those cases are usually in the nature of abuse and neglect matters and not custody determinations between parents. See, e.g., *In re Freedom R.*, 142 A.D.3d 922 (1st Dep't 2016); *In re Isaac J.*, 75 A.D.3d 506 (2d Dep't 2010); *Nassau Cty. Dep't of Soc. Servs. ex rel. A.Y. v. R.B.*, 23 Misc. 3d 270 (Nassau County Fam. Court 2008); in *F.F. on behalf of Y.F. v. State*, 66 Misc. 3d 467 (Albany County Sup. Court 2019), the court found the elimination of a religious exemption from New York's Public Health Law's mandate that every parent or guardian of a child "shall have administered to such child an adequate dose

or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B” which meet federal and state standards and specifications in order to attend any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school was not unconstitutional.

21. 167 A.D.3d 1293 (3d Dep’t 2018).
22. 124 A.D. 814 (1st Dep’t 1908). Six months later the Appellate Division, parenthetically referencing *David in Gatto v. Gatto*, 237 A.D. 888 (2d Dep’t 1933), was a bit more sympathetic to the husband’s plight in rejecting a contempt finding and suggesting a modification application might be in order.
23. 146 Misc. 444 (NY County Sup. Court 1932).
24. 27 Misc. 3d 1239(A) (Kings County Sup. Court 2010).
25. 88 A.D.3d 883 (2d Dep’t 2011).
26. See also *Taylor v. Taylor*, 83 A.D.3d 815 (2d Dep’t 2011). “The evidence at the hearing showed that, although the economic downturn resulted in the defendant losing his job at Bear Stearns and earning a substantially smaller bonus in 2009 than he had received in previous years at Bear Stearns, the defendant’s base salary and compensation plan at Natixis were similar to his base salary and compensation plan at Bear Stearns. Moreover, the evidence at the hearing showed that the economic downturn did not result in any appreciable change in the defendant’s lifestyle...”
27. *Gharachorloo v. Regeer*, 173 A.D.3d 1025 (2d Dep’t 2019).
28. *Gafycz v. Gafycz*, 148 A.D.3d 679 (2d Dep’t 2017).
29. *Heller v. Heller*, 43 A.D.3d 999 (2d Dep’t 2007), quoting *Terjesen v. Terjesen*, 29 A.D.3d 705 (2d Dep’t 2006).
30. *Glass v. Glass*, 16 A.D.3d 120 (1st Dep’t 2005).
31. *Patscot v. Fisco*, 166 A.D.3d 981 (2d Dep’t 2018); *Berg v. Berg*, 166 A.D.3d 766 (2d Dep’t 2018) citing *In re Smith v. McCarthy*, 143 A.D.3d 726 (2d Dep’t 2016); *Rubenstein v. Rubenstein*, 114 A.D.3d 798 (2d Dep’t 2014); *McAndrew v McAndrew*, 84 A.D.3d 1381 (2d Dep’t 2011).
32. 79 A.D.3d 1312 (3d Dep’t 2010).
33. See, however, *Bushnell v. Bushnell*, 101 A.D.3d 2012 (4th Dep’t 2020). “Respondent claimed that his business failed in the economic downturn, rendering him unable to make the required support payments. After his business deteriorated, however, respondent did not actively pursue other employment options...Thus, respondent failed to meet his burden inasmuch as he failed to introduce “evidence establishing that he made reasonable efforts to obtain gainful employment to meet his ... support obligations” (Christine L.M., 45 A.D.3d at 1452 [internal quotation marks omitted]; see *Hunt*, 30 A.D.3d at 1065, 815 N.Y.S.2d 866). Additionally, we note that respondent did not sell his assets to enable him to make support payments...” See also *Aimee E.H. v. Alexander H.*, 118 A.D.3d 458 (1st Dep’t 2014). “Although respondent asserted that his business had failed due to the economic downturn, he failed to provide evidence of his diminished income or show that he thereafter made reasonable efforts “to obtain employment commensurate with his qualifications and experience...”
34. 166 A.D.3d 1475 (4th Dep’t 2018), *lv. dismissed*, 33 N.Y.3d 996 (2019).
35. See, e.g., Peter J. Galasso, *Equitably Distributing Business Values Post Pandemic*, NYLJ May 4, 2020; Karen Platt, *Valuation Issues in the COVID-19 Economic Crisis - What Should Practitioners Know*, ABA Section of Family Law Marital Property Committee, [https://www.americanbar.org/groups/family\\_law/committees/maritalproperty/valuation\\_issues/](https://www.americanbar.org/groups/family_law/committees/maritalproperty/valuation_issues/).
36. DRL § 236B(4)(b).
37. *McSparron v. McSparron*, 87 N.Y.2d 275 (1995).
38. *Mahoney-Buntzman v Buntzman*, 12 N.Y.3d 415 (2009); *Achuthan v Achuthan*, 179 A.D.3d 751 (2d Dep’t 2020); *Schacter v. Schacter*, 176 A.D.3d 536 (1st Dep’t 2019); *Dechow v. Dechow*, 161 A.D.3d 1584 (4th Dep’t 2018); *Gordon-Medley v. Medley*, 160 A.D.3d 1146 (3d Dep’t 2018).
39. 165 A.D.3d 894 (2d Dep’t 2018).
40. 83 A.D.3d 1359 (3d Dep’t 2011).

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# The Need for Mental Health Professionals in Custody/Access Litigation

By Kieth I. Rieger

In practicing matrimonial and family law for 40 years, I have the advantage of time and perspective to appreciate and be proud of what our chosen profession does well. However, as my professional life has reached its twilight years, I have become increasingly frustrated by what it does not. During my career, our system has changed, stagnated and failed to adopt debated reforms in the area of custody and parental access cases.

Efforts to have custody cases granted preferences, bifurcations, and be tried day-to-day have been subject to discussion, but never materialized. Early “in camera” interviews rarely occur—although, such a “hands on” approach by the court in appropriate cases, could help resolve contested custody cases early and spare families the accompanying emotional turmoil and cost of protracted litigation which so often ensues.

When I first started practicing, “Law Guardians”<sup>1</sup> represented children based on their opinion of what was in that child(ren)’s best interest. The bench and bar considered this problematic as a child(ren)’s preference was not voiced equally to that of their parents.

There is no easy solution, approach or formula to adjudicate custody cases. Our legal system is as imperfect as the litigants who come before it. Although society preaches that the well-being of our children is of the utmost importance, our legal system seldom gives custody cases the priority they deserve. Judicial resources are scarce and, after this pandemic, they will become even scarcer. Although the bench and bar do our best, we can do better, particularly as it relates to the role children play in their own representation.

In 2007, the Rules of the Chief Judge were changed.<sup>2</sup> Law Guardians became “Attorneys for the Child” (AFC). Their role was changed to being charged with zealously advocating the child’s opinion, regardless of whether the AFC believes it to be in the child’s best interests.<sup>3</sup> The child’s “wishes” dictate the AFC’s position with the court.<sup>4</sup> The only two exceptions are (a) when the child lacks the capacity for knowing, voluntary and considered judgment or (b) that following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child.<sup>5</sup> When not representing a child’s wishes based on one of the above exceptions, disclosure of the child’s position is required.<sup>6</sup>

Roughly coinciding with this change in the role of the child’s attorney and the resulting emphasis on the child’s preferences has been the court’s virtual elimination of the role of the mental health professional in custody/access cases. Earlier in my career, mental health professionals were routinely appointed. They provided reports

to the court based on their interviews of parents and children as well as oftentimes family members and “significant others.” They gave opinions on custody, which is now frowned upon as not being generally accepted in the professional community and not scientifically reliable.<sup>7</sup> The result is that today, mental health professionals are rarely appointed. The exception being where it appears that a parent or child has a psychiatric disorder, and then it is limited to that issue.



I submit that the revised role of the AFC is also problematic. Advocating for a child’s wishes pursuant to his or her instructions often does not lead to a just or well-reasoned result. Is it important to know why a seven- or 10-year-old does not want to see a parent or wants limited access without knowing the underlying cause? Is the child being unduly influenced by a parent’s alienation or depression? Is the child influenced by money and all that it can buy? Does one parent set higher expectations or is stricter? Does the child simply think that parent is “annoying”? Should the child’s opinion matter if he or she does not want to do homework, wants to hang out with the wrong crowd or be entitled to stay out late at night? Has a child been too empowered at the expense of the parent? Should a child really get to “drive the bus” and have the AFC act as his or her GPS?

Several years ago, Dr. William Kaplan authored a thought-provoking article regarding the lack of psychiatric maturity in children and adolescents. He questioned their ability to be fully capable of participating in a traditional attorney/client relationship. Dr. Kaplan stated that “[f]rom a neuroscience and child development perspective, there

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are compelling arguments to re-consider the child-directed representation. . . .”<sup>8</sup>

Dr. Kaplan argued that child-directed representation does not “sufficiently reflect our current understanding of child-adolescent development based on recent neuroscience.” His article explained the difference between cognitive and emotional development, with the former possibly being suited for self-directed representation but not the latter. In other words, children’s emotional development lags behind their cognitive development, which impairs their decisions and behavior.

Dr. Kaplan argued that “[i]t is a mistake to assume that an adolescent is qualified cognitively and emotionally to participate as a co-equal in the legal process.”<sup>9</sup>

In *Roper v. Simmons*,<sup>10</sup> the U.S. Supreme Court held it unconstitutional to impose the death penalty to persons who commit capital crimes before turning 18. Justice Kennedy recognized juveniles’ “immature and irresponsible behavior . . . , that juveniles “struggle to define their identity” and therefore have “diminished culpability.”

In *Miller v. Alabama*,<sup>11</sup> the Supreme Court held that a person who commits a crime prior to turning 18 cannot be sentenced to life in prison without parole. Justice Kagan referred to juveniles’ “lack of maturity . . . and underdeveloped sense of responsibility” and failure to “appreciate consequences.” She pointed out that parents normally decide for their children matters of education, recreation, medical care and religious training.

Notwithstanding these considerations, rather than looking to mental health professionals to assist with issues regarding children, the courts give undue influence to the child’s desires as advocated by the AFC. As a result, the AFC, on behalf of the child, has become the most influential and powerful attorney in the courtroom and the child the most important interested participant. Courts invariably defer to the AFC and ask: “What does the child want?” Why should the child’s position as advocated by the AFC matter more than that of the parties (parents) as advocated by their attorneys?

Another key consideration for the utilization of mental health professionals is that our adversarial system is premised upon finding the truth by hearing direct testimony with the ability to cross-examine. Neither the AFC nor the child can testify or be cross-examined. However, a mental health professional can provide such direct testimony which may be tested by cross-examination. The child’s position as advanced by the AFC should not go unchallenged.

Shouldn’t we know if a child’s preference or desire is not in their best interest or if they are exercising improper judgment? Although children are the AFC’s “clients,” they are not “parties” to the litigation, as they do not become adults under the law until they attain the age of 18.<sup>12</sup> The

mental health professional does not have to opine about the ultimate issue of custody, but may opine as to psychological features (if not disorders), motivation and biases of the parents and the child. Isn’t it better for the court to have this professional input, information and perspective presented through direct testimony subject to cross examination to help it decide what is best for the child, rather than be unduly focused by the AFC’s argument of what the child “wants”?

The utilization of mental health professionals can provide a valuable perspective and guidance to the court, parties, as well as the AFC. Mental health professionals, not attorneys, are educated to understand personalities, motivation and psychological features that may affect a child’s wishes and opinion. It is submitted that custody/access cases would resolve far better if the court is presented with a more complete picture of the basis of the child’s view.

It is troubling that matrimonial and family courts regularly obtain professional information, in the form of imperfect and disputed opinions, from CPAs, actuaries and real estate appraisers on financial matters, but not professional information regarding wishes and preferences of children. The insightful contribution that may be provided by mental health professionals can relate to but not be on the “ultimate issue” of custody. Neither attorneys for the parties, AFCs nor judges are sufficiently educated in psychology or sociology. We are not schooled in recognizing our own biases, much less that of children. Those biases might result in unintentionally emphasizing certain information learned from the child and deemphasizing other material. By contrast, true mental health professionals are trained to identify their own biases and have learned to identify and present the projecting of their own experiences onto their subjects. A child’s unbridled preference should not necessarily rule the day. There are many more issues in these cases than just custody, such as access, activities and the ability or lack of ability of parents to work together. I submit that a court will be better able to decide issues relating to children with the benefit of this professional information.

Dr. Kaplan stated, “While courts and attorneys often assume that by the age of 14 most adolescents can be relied upon to participate actively in a custody matter, it is sobering to recognize that adolescence is a period of destabilization with major changes in the brain.”<sup>13</sup> Dr. Kaplan further stated that pre-adolescents are “wired emotionally” to often favor the primary caregiver in his or her effort to maintain a sense of love and security.<sup>14</sup>

Today, our children deal with the fear of mass shootings, terrorism and, now, pandemics. Is it fair to have children of divorce deal with the probable lasting impact of voicing their opinions that favor one parent to the detriment of the other? No matter how much we may try, can we really believe we have insulated children in the divorce proceedings if we involve them in the process any more

than is necessary? Every parent knows that no matter how much we attempt to shield our children from family problems—such as a parent’s serious illness, marital issues, financial stresses and a host of other difficulties and pressures—the children are keenly aware of same. It is likely that their awareness of their exceedingly influential role to their own detriment in affecting the outcome of their parent’s fight over them will have lasting negative effects.

It appears that the pendulum has swung too far, so that we have overly empowered children. Although parties are admonished not to involve their child in the case, this is unrealistic. Not only are parents only human, but they know, if only from their attorneys advising them, how important the child’s and AFC’s opinion is to the outcome of the case. The best antidote for this is to lessen the child’s power and put it back in the hands of adults.

As Dr. Kaplan opined: “[T]hey [children] should know that they are caught in the middle of a mess created by adults and this mess is going to be fixed by adults, including their parents, their own attorney and the judge, in their best interests.”<sup>15</sup>

While financial cost is always an important consideration, the information provided by mental health professionals may reduce the overall cost of litigation by making it easier to settle custody cases. This will reduce the time and accompanying substantial attorneys’ and AFC fees. Is it an effective use of time and money to have advocated what a nine-year-old child “wants” without understanding meaningful insight of what may have influenced that opinion? The reduction in contested custody cases and/or their more expeditious resolutions will also preserve valuable judicial time and resources. Court rules may be formulated to expedite and address cost as well. The most paramount benefit is that the more informed and judicious handling of custody cases will result in greater public confidence in our judicial system.

The complicated, sensitive and critical importance of deciding how to place children in their best position following their already traumatizing experience created by the divorce proceeding must be given the highest priority in our judicial system. It is time to allocate resources and implement rules so we can practice what we preach. Important information and understanding better able to be elicited by mental health professionals must be available to the litigants (parents), their attorneys, the AFC and the court. This information must be presented and tested in accordance with our adversarial system, by direct testimony subject to cross examination. We, as members of the bench and bar, must continue to examine and improve our profession. We must strive to make the most insightful information available to the court in order to allow for the highest system of justice for families.

## Endnotes

1. See FCA § 249.
2. 22 N.Y.C.R.R. § 7.2, added October 17, 2007.
3. 22 N.Y.C.R.R. § 7.2.
4. *In re Jennifer V.V. v. Lawrence W.W.*, 182 A.D.3d 652 (3d Dep’t 2020); *In re Swinson v. Dobson*, 101 A.D. 3d 1686 (4th Dep’t 2012), *lv. denied*, 20 N.Y.3d 286 (2013).
5. *In re Cunningham v. Talbot*, 152 AD3d 886 (3d Dep’t 2017).
6. 22 N.Y.C.R.R. § 7.2(d)(3); see also *In re Mark T. v. Joyanna U.*, 64 A.D.3d 1092 (3d Dep’t 2009).
7. *Frye v. United States*, 293 F 1013 (1923).
8. Kaplan, William H., *Does Client-Directed Representation of Children Make Good Sense Based on Neuroscience and Child Psychology*, Family Law Review, Volume 46, No. 3, (Fall 2014).
9. *Id.* p. 16.
10. *Roper v. Simmons*, 543 U.S. 551 (2005).
11. *Miller v. Alabama*, 567 U.S. 460 (2012).
12. Domestic Relations Law § 2.
13. See endnote 8 at p. 15.
14. *Id.* at p. 14.
15. *Id.* at p. 16.

# Get Me a Divorce: A New Idea Using Orders of Protection to Enforce a 'Get'

By Jennifer Erica Fineman

## Introduction

Rivky Stein, an Orthodox Jewish woman from Brooklyn, tried to get out of her Jewish marriage for six years. Stein was, by account, subjected to “rapes, beatings, intense surveillance of movements, and pseudo-imprisonment in their home” throughout her marriage.<sup>1</sup> Stein eventually managed to escape the home with her two children. She obtained an order of protection against her husband, but she still had to interact with her husband in an attempt to obtain a “get.”<sup>2</sup> A “get,” the Hebrew word meaning a Jewish ceremonial divorce, is only valid under Judaic law if a husband consents.<sup>3</sup> When Stein asked her former husband to grant her a “get,” required under Jewish orthodoxy to remarry in the faith, he refused and used her request as leverage to subject her to repeated harassment and home invasions.<sup>4</sup>

Across the United States, countless are women subjected to domestic violence. Those who escape a violent marriage may have the ability to leave their past behind and remarry. Orthodox Jewish women, like Stein, may not.<sup>5</sup> Observant American Jewish couples’ contract to get married civilly and religiously. People in similar positions to Stein may have to interact with their spouses and face the consequences of continued domestic violence. For observant Jews, the right to obtain a religious divorce is central to the fundamental right to remarry. If a Jewish woman is unable to obtain a “get,” she is considered an “agunah,” a chained woman who cannot get out of her Jewish marriage because of her husband’s unwillingness.<sup>6</sup> She remains unable to remarry under Jewish law until she obtains a “get,” regardless if the couple has obtained a civil divorce.<sup>7</sup> While a “get” is arguably in the best interest for both parties, some men refuse to grant their ex-wives “gets” out of spite because of the financial or emotional results of the civil divorce.<sup>8</sup> In the United States, some jurisdictions have tried to civilly remediate Jewish divorce issues, but several constitutional and legal issues impact states’ ability to enforce the right to a “get.”

Part I will review the fundamental right to marry under the Fourteenth Amendment Equal Protection and Due Process Clauses, the impact of the First Amendment’s Establishment and Free-Exercise Clauses on marriage laws, and the Equal Rights Amendment’s guarantees of access to remarriage.<sup>9</sup> Part I will also provide a background in Jewish divorce law, including the process for receiving a “get,” and will present data on domestic violence in the Orthodox Jewish community. Part II will

review specific state efforts to reduce the barriers to remarriage resulting from the failure to provide religious divorce, without infringing on religious sovereignty, and the limitation of these approaches. Specifically, this section will review New York’s legislative approach, and other state efforts to use common law breach of a contract theories to require a non-party to grant a “get.”<sup>10</sup>

Finally, Part III will propose a two-part solution for reducing the barriers to a religious divorce: first, that more states enact domestic relations legislation similar to New York’s “Get” law, and, second, that states enact legislation permitting clauses that require a restrained party to “refrain from holding any documents over the other party” to be included in protection orders.

## I. The Fundamental Right to Marry and Remarry

Domestic relations issues, including laws related to the civil marriage process, are generally a state matter. States generally have the authority to establish rules and requirements related to the civil marriage process within their jurisdiction. Nevertheless, state laws cannot run afoul of several applicable constitutional provisions – Fourteenth Amendment Equal Protection Clause and the Due Process Clause – fundamental right to marry and First Amendment Freedom of Religion.

### A. Marriage Rights Under the Fourteenth Amendment

The Fourteenth Amendment’s Due Process Clause provides that “no person shall be deprived of life, liberty, or property, without due process of law.”<sup>11</sup> The Fourteenth Amendment’s Equal Protection Clause ensures that the states do not create or support discriminatory laws based on a person’s race, gender or sexual orientation.<sup>12</sup> Both the Due Process and Equal Protection Clauses have been interpreted to implicate a right to marry.<sup>13</sup>

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The United States Supreme Court explicitly upheld the fundamental right to marry in *Loving v. Virginia*.<sup>14</sup> In *Loving*, an interracial married couple, convicted of violating Virginia's miscegenation laws, challenged the statute's constitutionality.<sup>15</sup> The Supreme Court held that the Virginia statute banning interracial marriage violated both the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.<sup>16</sup> In so holding, the Court stated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>17</sup>

Similarly, in *Zablocki v. Redhail* the plaintiff challenged a Wisconsin statute § 245.10(1),(4),(5) (1973), which provided that specific Wisconsin residents could not marry without a court order.<sup>18</sup> The statute defined those Wisconsin residents as people who have custody or support issues outstanding from a prior relationship.<sup>19</sup> The plaintiff in *Zablocki* was denied a marriage license because he had outstanding child support payments.<sup>20</sup> Relying on prior jurisprudence establishing the right to marry is a fundamental right, the Supreme Court evaluated the statute under strict scrutiny and held that § 245.10 violated the Equal Protection Clause which prohibits a state from placing individuals into different classes based on the classification created by the statute.<sup>21</sup>

## **B. Freedom of Religion Under the First Amendment**

States' marriage laws must also not run afoul of the First Amendment, which guarantees a Freedom of Religion. The First Amendment specifies that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>22</sup> The First Amendment's Establishment Clause ensures that Congress and the state government will not pass any law that infringes on religion or favors one religion over the other.<sup>23</sup> Additionally, when a state law imposes a restraint on religion, that action violates the Free Establishment Clause.<sup>24</sup>

In *Lemon v. Kurtzman*, Pennsylvania and Rhode Island adopted statutes that required states to pay for private religious school education.<sup>25</sup> The appellants argued that the statutes violated the separation of church and state mandate in the Establishment Clause of the First Amendment.<sup>26</sup> Writing for the majority, Chief Justice Warren E. Burger laid out a three-part test to evaluate whether governmental action improperly infringed upon religion. To survive a challenge as an improper restraint on the Free Establishment Clause, a state law must: "(1) have a secular purpose; (2) have a primary effect that neither advances or inhibits religion; (3) and avoid excessive entanglement with religion."<sup>27</sup> State legislatures or courts seeking to require parties to provide a "get" in the context of a civil divorce case must be careful not to run afoul of the Establishment Clause.

The First Amendment's Free Exercise Clause prohibits the government from interfering with citizens' free exercise of religion.<sup>28</sup> In *Sherbert v. Verner*, the Supreme Court established a test to determine whether state law infringed on religion under the Free Exercise Clause of the First Amendment.<sup>29</sup> In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was fired from her job when she refused to work on Saturday, the day of Sabbath in her faith.<sup>30</sup> The State of South Carolina denied her request for unemployment benefits, finding that her refusal to work on Saturday constituted a failure without good cause to accept available work.<sup>31</sup> On appeal, the Supreme Court stated that the government infringed on religion when a law "(1) impose[s] a significant burden upon the individual's free exercise of religion and (2) [the state's law is] not...overcome by a compelling interest."<sup>32</sup> In *Sherbert*, the South Carolina government imposed a significant burden on an individual's right to freely exercise religion because the government would not grant the plaintiff unemployment benefits because her refusal to work on Saturdays.<sup>33</sup> The Supreme Court found no compelling state interest that justified the substantial burden on the free exercise of religion imposed by South Carolina in discriminating against only those whose religion prevented them from working on Saturdays.<sup>34</sup> Consistent with these mandates, states cannot pass laws that would improperly infringe on the free exercise of Jewish law, including as it relates to religious marriage and divorce.

## **C. Jewish Law of Divorce**

The Talmud is a collection of Jewish law and traditions that governs modern day Jewish practices, followed by the observant Orthodox Jewish population.<sup>35</sup> Under Talmudic Law, observant Jews must have both civil and religious marriage ceremonies. Similarly, Talmudic Law 24:1 requires a "get": a mutual agreement between the husband and wife, to dissolve their ceremonial Jewish marriages.<sup>36</sup> An observant wife married in a religious ceremony may not receive a "get" on her own, nor can she initiate divorce proceedings without her husband's consent.<sup>37</sup> To obtain a "get," the divorcing couple appears in front of three religious judges called a "Beth Din," or a rabbinic tribunal of three rabbis, who oversee the religious divorce.<sup>38</sup> The "get" allows couples to move past their marriage and exercise their freedom to remarry under religious law.<sup>39</sup>

For highly observant Jewish women, a "get" is a barrier to remarriage.<sup>40</sup> While a Jewish woman has a right to civilly remarry, out of religious principle, she will not remarry because the Jewish community will not accept her marriage.<sup>41</sup> While a woman has the choice to be religious or not, if a woman is heavily involved with her religious community, it is difficult for her to defy her community norms and obtain a non-religious marriage.<sup>42</sup>

Under traditional paternalistic Jewish orthodoxy in particular, if a husband refuses to consent to a Jewish divorce, his former wife is an “*agunah*.” She will have no power to remarry in the religious community.<sup>43</sup> Likewise, if a Jewish woman never receives a “*get*” and has children in a future civil marriage, her children will then be considered illegitimate under Jewish law. Her child will be unable to have a bar mitzvah or be religiously circumcised.<sup>44</sup>

## II. State Law Approaches to “*Get*” Enforcement and Limitations on Enforcement

Some states and localities with proportionately significant orthodox Jewish communities, while aware of the difficulties that arise in cases where one party refuses to grant their former spouse a “*get*,” recognize that laws expressly enforcing the right to obtain a “*get*” are likely to run afoul of the Constitutional freedoms and protections outlined above.<sup>45</sup> Thus, states seeking to assist parties who are unable to obtain a “*get*” have attempted to do so using so-called “neutral principles of law.” These approaches apply “objective, well-established principles of secular law” that make no mention of religion to “*get*” disputes.<sup>46</sup>

### A. New York’s “*Get*” Law

On August 8, 1983, the New York’s state legislature’s “*get*” bill passed and Governor Mario Cuomo signed into law § 253 of the Domestic Relations Law, known as the New York “*Get* Law.”<sup>47</sup> Under § 253:

Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant’s remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.<sup>48</sup>

This language appears in subsection 2 of the statute. Although it is clear from the law’s legislative history, the provision was added to help address “*get*” disputes, the statutory language does not speak specifically to removing barriers to religious remarriage – in fact, it makes no reference to religion at all – and is narrowly tailored to only include voluntary acts. That said, the statute has helped many parties acquire a Jewish divorce.<sup>49</sup> The 1983 “*Get*” Law only required the plaintiff to remove barriers to remarriage.<sup>50</sup> The New York statute requires that Stipulation for Settlement of Divorce documents include a provision that parties have taken or will take any steps to remove any barriers to remarriage.<sup>51</sup>

Nevertheless, the statute must remain neutral on its face so it will not infringe on religious principles.<sup>52</sup> Under the 1983 statute, a recalcitrant spouse, who was the defendant in a civil divorce, did not have the obligation to remove the barriers to remarriage, but in 1992, legislation amended the New York “*Get*” Law to make both the plaintiff and defendant remove the barriers to remarriage.<sup>53</sup>

Although rarely used, the law implicitly gave New York courts some enforcement ability. Swearing to a false statement § 253(8) is punishable under § 210 of the New York Penal Law through fines or imprisonment.<sup>54</sup> Furthermore, the 1992 Amendment allows courts to consider a party’s failure to remove barriers to remarriage as a discretionary “factor” in dividing marital assets under New York’s equitable distribution statute § 236B(5)(d)(1)-(13), (6)(a)(1)-(11).<sup>55</sup> Thus, in dividing marital assets and setting maintenance awards, courts could now consider financial implications to one party’s inability to remarry.<sup>56</sup>

*Schwartz v. Schwartz* codified the 1992 “*get*” law.<sup>57</sup> Under DRL § 236f(2), the formula used by a court to determine post-divorce maintenance and division of asset, is based on discretionary factors that the court evaluates.<sup>58</sup> Courts can now consider whether a party to the divorce made it difficult for the other spouse to receive a “*get*.”<sup>59</sup>

By using facially neutral language to mandate “removal of barriers to remarriage,” New York’s DRL § 253, some in the Jewish orthodox community have raised Equal Protection Clause concerns, contending that the statute places an additional burden on Jewish parties.<sup>60</sup> Specifically, they argue that with a civil remedy available, Jewish litigants will second-guess the “*Beth Din*” process and rulings and be encouraged to turn to civil “*get*” enforcement rather than seeking religious remedies first as religious leaders prefer.<sup>61</sup>

A 2020 New York case illustrates the limitation on enforcing New York’s “*get*” law.” In *A.W. v. I.N.*, a wife commenced an action for divorce.<sup>62</sup> The husband asked the court to stay his obligation to pay the wife \$100,000 under the financial stipulation, until the wife appeared in front of the “*Beth Din*” and accepted a “*get*.”<sup>63</sup> The New York trial court concluded that it could not inquire beyond a party’s sworn statement whether that party actually removed barriers to remarriage under the First Amendment.<sup>64</sup> Rather, according to the court, the enforcement of “*get*” procedures is a religious issue that the “*Beth Din*” is designed to handle.<sup>65</sup> The court thus held it could not apply coercive financial pressures to induce the wife to accept the “*get*,” because it would violate her free exercise of handling the religious divorce. The court directed the couple to the “*Beth Din*” to mediate the religious divorce.<sup>66</sup> DRL § 253(9) states:

[n]othing in this section shall be construed to authorize any court to inquire into or determine any ecclesiastical or religious issue. The truth of any statement submitted pursuant to this section shall not be subject of any judicial inquiry, except as provided in subdivision eight of this section.<sup>67</sup>

Likewise, although some New York State trial and intermediate appellate courts have used their discretion under DRL § 253, to, in effect, penalize spouses who refused to provide a “get” as required by distributing increased assets to the other spouse, some recent cases call into question the ability to use financial penalties to enforce “get” obligation. Specifically, in a 1993 ruling in *Pinto v. Pinto*, New York’s Second Department Appellate Division held that the trial court did not abuse its discretion when the court granted the wife all the property listed on the parties’ statement of net worth because the husband refused to provide his wife a “get.”<sup>68</sup> In two 2019 decisions, however, New York appellate courts have held that imposing certain penalties on a party who refuses to provide a “get,” is coercive and interferes with the free exercise of his religion.<sup>69</sup>

In *Cohen v. Cohen*, the Supreme Court directed the husband to provide his wife a “get” prior to receiving any distribution of marital property.<sup>70</sup> The Appellate Division later held that Domestic Relations Law § 253 does not guarantee a “get” nor does the statute provide that the husband will have financial penalties imposed if he fails to provide a “get.”<sup>71</sup> The penalties towards equitable division of marital property were vacated.<sup>72</sup> *Masri v. Masri* held that courts cannot apply coercive financial pressure to have a party oblige to a Jewish divorce.<sup>73</sup> The court held that a husband cannot be financially sanctioned, in which he pays increased maintenance or child support obligations because he refused to give his wife a “get.”<sup>74</sup> Financial sanctions interfere with the husband’s freedom to exercise his religion and his ability to go through the proper religious channels to acquire a Jewish divorce.<sup>75</sup>

## **B. Breach of Contract Claims for Failure to Provide a “Get”**

Absent legislation, parties in divorce matters have occasionally used common law contract law theories to force noncompliant divorcing parties to abide by divorce settlement obligations and remove barriers to religious divorce. In *re Marriage of Goldman*, a wife in Illinois sued her husband to force him to grant her a “get.”<sup>76</sup> The wife contended that the ketubah, otherwise known as the Jewish marriage contract, should be an enforceable contract.<sup>77</sup> In resolving the issue as to whether the ketubah was intended to be a binding legally enforceable contract, the court used common law contract interpretation, and allowed two Orthodox Jewish rabbis to appear as expert witnesses.<sup>78</sup> The rabbis explained

that the ketubah was a marriage contract and the words “[b]e thou my wife according to the law of Moses and Israel” meant that the marriage was governed by Jewish law and could only terminate when the wife obtains a “get.”<sup>79</sup> On review, the Illinois Appellate Court concluded that the ketubah could be enforced as a contract without imposing an improper restriction on religious freedom because the experts’ testimony clarified that the ketubah was secular in nature and did not require any acts of religion, beyond the contractual terms agreed to in the ketubah.<sup>80</sup> The court thus ordered the husband to obtain and deliver a “get” to his wife.<sup>81</sup>

Illinois also has a state statute called the Illinois Marriage and Dissolution of Marriage Act, which serves to “promote “the amicable settlement of disputes that have arisen between the parties to a marriage;” and to “mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.”<sup>82</sup> By enforcing the “get” proceeding, Illinois also enforces the state’s secular goal of amicably settling marriage disputes.<sup>83</sup>

Delaware courts have likewise used neutral principles of common law contract law to enforce a parties’ right to obtain a “get” under an existing separation agreement. In *Scholl v. Scholl*, a wife sued her estranged husband alleging that he failed to satisfy his contractual duties to provide her a “get” under their divorce settlement stipulation.<sup>84</sup> The couple had settled most matters in their divorce, except for house foreclosure costs, medical bills, wife’s counsel fees and the “get.”<sup>85</sup> As to the “get,” the wife specifically sought the court’s relief because her husband had produced a conservative “get” rather than the agreed to “get” recognized by her orthodox congregation.<sup>86</sup> The *Scholl* court, like the Illinois Appellate Court in *In re Goldman*, relied on expert testimony that the “get” was devoid of religious connotations, but was, rather, a severing of a contractual relationship set forth in the ketubah.<sup>87</sup> The court’s reasoned that requiring the husband to obtain a proper “get” for his wife within 60 days would not impermissibly burden religious freedom, because it did not require the husband to participate in religious worship or perform acts contrary to his religious beliefs.<sup>88</sup>

New Jersey courts have used a combination of neutral principles of law and contract law to enforce commitments to grant a “get.”<sup>89</sup> In *Minkin v. Minkin*, the wife moved, post-judgment of divorce, for an order requiring the husband to obtain and provide her a “get” under the theory that the ketubah could be enforced as a marriage contract.<sup>90</sup> The court relied upon expert testimony from two rabbis that a “get” is a written document that severs the contractual duties in a marriage and a ketubah—a document that makes no reference to God and defines the relationship of two parties.<sup>91</sup> The court described that even though the ketubah was a religious document, the ketubah is still a marriage contract

between Jewish people.<sup>92</sup> As a contract, the ketubah was still an enforceable agreement by both parties, which was not unconscionable or contrary to public policy.

Similarly, in *Odattalla v. Odattalla*, the New Jersey Superior Court considered whether judicial enforcement of a “Mahr” agreement would violate the husband’s First Amendment protections.<sup>93</sup> The wife brought an action for Islamic divorce, which required that the husband pay her \$10,000 when the couple divorced. The court applied both a neutral principles of law approach and principles of contract law to the enforcement of the “Mahr” agreement.<sup>94</sup> The court first determined that the “Mahr” agreement could be resolved using neutral principles of law because the agreement was secular in nature and the neutral principles of law approach does not infringe on the party’s ability to freely exercise their religion.<sup>95</sup> The court then explained that they could use contract law to apply the neutral principles of law approach.<sup>96</sup> The wife brought a videotape into evidence, showing that the husband signed the “Mahr” agreement freely and voluntarily.<sup>97</sup> The video showed how the wife signed the “Mahr” agreement with the same terms, and thus made an acceptance of the offer’s terms.<sup>98</sup> Similarly to “Mahr” agreements, by enforcing “gets” using contract law and not directly mentioning religion, courts have been able to help women achieve their Jewish divorces.

Other courts in New Jersey have held, however, that compelling a husband to provide a “get” would violate his freedom to exercise his religion.<sup>99</sup> In *Aflano v. Aflano*, a wife sought a dissolution of divorce, but refused to settle the divorce, unless her husband provided her with a “get.”<sup>100</sup> When he refused, she sought to compel him under the implied contract theory relied on in *Minkin* based on the ketubah as a contract.<sup>101</sup> The Superior Court declined to compel her husband to provide a “get,” holding that, using “loopholes to get around religion would overstep” on institutions that were designed to be protected under the First Amendment.<sup>102</sup> The court declined to intervene, reasoning it should not supersede and overrule any decision the “Beth Din” (religious panel) would make to resolve the Jewish divorce.<sup>103</sup> New Jersey’s split authority demonstrated that the courts are still concerned about impeding religious freedom by compelling parties to grant a “get.”

At least one Arizona appellate court has declined to compel a party to grant a “get” under an implied contract theory that the ketubah is a binding prenuptial agreement, when the terms do not clearly state an obligation to provide a “get.” In *Victor v. Victor*, a wife attempted to enforce a ketubah as a prenuptial agreement.<sup>104</sup> The Arizona Court of Appeals explained that the language in the ketubah was too vague and non-specific, which made the agreement unclear for the court to determine whether the husband understood that he would have to secure a Jewish divorce.<sup>105</sup> Ketubahs only mention that the husband promises to pay a certain amount of money in the event of divorce.<sup>106</sup> The court

held that ketubahs are not enforceable prenuptial agreements that can be used during divorce proceedings and there is a concern of overstepping on religion.<sup>107</sup>

At least one court in Connecticut has been likewise reluctant to compel a party to grant a “get” under the theory that the ketubah is a binding secular contract. Recently, in *Tilsen v. Benson*, the wife sought to enforce a ketubah as a prenuptial agreement.<sup>108</sup> The Superior Court of Connecticut held that the court could not interpret the ketubah as a prenuptial agreement because, in doing so, the court would be required to choose between competing expert rabbinical authority, in violation of the First Amendment.<sup>109</sup> According to the trial court, the neutral principles of law approach forbids the court from resolving disputes over different interpretations of religious law to find the true meaning of the religious text.<sup>110</sup>

Other courts, in Connecticut and elsewhere, have held, however, that “get” provisions in prenuptial agreements may be enforced as contracts through neutral principles of secular law.<sup>111</sup> In *Light v. Light*, the wife and husband signed a prenuptial agreement agreeing that in the event of divorce, the husband would pay the wife spousal support at \$100 per day until the husband provided the wife with a “get.”<sup>112</sup> The Connecticut Superior Court held that “get” enforcement did not violate the Free Exercise Clause or Establishment Clause of the First Amendment because the court was simply enforcing the prenuptial terms for spousal support payments, and, thus, did not require the court to interpret religious doctrine.<sup>113</sup>

Some Rabbis and Jewish organizations have been working to resolve the “recalcitrant husband” issue while keeping the matter out of court.<sup>114</sup> As “get” refusal has become a widely discussed issue within the Jewish community, rabbis have been taking preventative steps to resolve disputes by encouraging all Jewish couples to get prenuptials.<sup>115</sup> In one example, Rabbi Zalman Bechemia Goldberg provides members of his congregation with a prenuptial agreement containing a binding arbitration agreement in which husband and wife agree to receive a “get” and appear in front of a “Beth Din.”<sup>116</sup> A second contract obligates a noncompliant spouse to pay the other spouse \$100 per day in living expense, even if they are employed, until he or she provides a “get.”<sup>117</sup>

While prenuptials have been an effective measure to prevent new Jewish couples from encountering “get” conflicts, prenups do not resolve the “get” issue for couples who are already married or in the process of settling their divorce. Rabbis thus now also encourage married couples to create postnuptial agreements.<sup>118</sup> A postnuptial agreement can act as a precautionary measure for solving future marital disputes.<sup>119</sup> According to New York DRL § 236(b)(3), prenuptial and postnuptial agreements are valid and enforceable contracts in a mat-

rimonial action, so long as the contracts are in writing by both parties and notarized.<sup>120</sup> Therefore, if a couple chooses to remediate their religious divorce dispute in a civil court, their religious prenuptial or postnuptial will be viewed as an enforceable contract, in which a party can claim damages if the other party does not abide.<sup>121</sup>

Steps within the Jewish community to help parties obtain a religious divorce are certainly a positive step. That said, gaps remain that require better civil enforcement remedies for parties who are otherwise unable to obtain a “get.” In particular, it is essential that states provide an improved civil enforcement mechanism for spouses who seek a religious divorce who are victims of domestic violence.

### C. Domestic Violence Raises the Stakes for Obtaining a “Get” in the Jewish Community

Although some courts have sought to remediate the “get” refusal, particular and heightened concerns exist for religious wives, like Rivky Stein, who are seeking a divorce from a violent partner. Although there is limited statistical reporting on domestic violence among Jews, some statistics show that domestic violence occurs in 15 to 30% of Jewish households.<sup>122</sup> The data on domestic violence may be limited because the Jewish community is fearful of increasing antisemitism that could result from disclosing conduct that could shed a negative light on Jews.

Many in the orthodox community are similarly reluctant to reach out to non-Jewish law enforcement or agencies for an order of protection. Orthodox women are also encouraged by their community to turn to their rabbis for relationship issues, rather than calling the police, a social worker or seeking couples counseling from a therapist.<sup>123</sup> Rabbis rarely suggest that a wife seek resources outside the Jewish community for help by seeing a therapist or getting a restraining order.<sup>124</sup> There is evidence that some rabbis discount the claims of abuse and encourage Jewish women to try to be better wives for the sake of *shalom bayit*.<sup>125</sup>

Holocaust consciousness can also influence abused Jewish women to downplay that abuse.<sup>126</sup> Some battered Jewish women are descendants of Holocaust survivors, who accepted their beatings, and may view domestic violence as nothing in comparison to what was endured during the Holocaust, and pass on that legacy.<sup>127</sup> Research indicates that Jewish women are less likely to report domestic violence to family, friends, social workers, or the court.<sup>128</sup> In fact, the research has shown that while the average time most people stay in violent relationships is between three and five years, Jewish victims report that they stay between seven to 13 years.<sup>129</sup>

Though observant Jews experiencing domestic violence do seek orders of protection in criminal or family court, their effort to obtain a “get” may nevertheless require them to continue to interact with their

violent estranged spouse. Although orders of protection demand that the abuser refrain from committing any family offenses, which may include degrees of coercion, harassment, stalking, and sexual assault, any increased contact with an abuser increases the odds that the order will be violated.<sup>130</sup> Orders of Protection are a filed in local family court or criminal court and are provided to the local police precinct.<sup>131</sup> In New York, if the Respondent violates the Protection Order, the police can immediately respond to the Protective Order and the court can modify the order.<sup>132</sup> Nevertheless, a protected party who feels he or she must interact with an abuser regarding a religious divorce may be less likely to seek enforcement of an order of protection and be more likely to be at risk of further abuse.<sup>133</sup>

### III. A Proposal for a “Get” Stipulation in Restraining Orders

For divorcing spouses who have been victims of domestic violence during their marriage, the stakes are much higher than for others facing “get” refusal. Victims of domestic violence may, as stated above, seek Orders of Protection. Those Orders demand and require that the abuser refrain from committing any family offenses, which may include degrees of coercion, harassment, stalking and sexual assault, among others. Courts and police have enforcement authority upon violation of those Orders.

Under existing law, however, even obtaining a protective order was not enough to enable Rivky Stein to avoid dealing with her abusive husband in attempt to obtain a “get” after a protective order. Courts can provide critical support to spouses in family court matters, who seek a “get” by allowing parties in family court matters to request a targeted “refrain from” clause be included in orders of protection. When Rivky Stein communicated with her former husband about the “get,” he proceeded to invade Stein’s home, causing her to fear for her safety even after she received an order of protection.<sup>134</sup> Although she could pursue enforcement of the order, because she needed her husband’s cooperation to obtain a “get,” she had to remain engaged with him. Had a clause been added to the order of protection, preventing her husband from holding any essential documents, it would have allowed the wife to enforce the order while avoiding the need for contact on the “get” issue.<sup>135</sup>

Presently, to obtain an order of protection in the New York family courts, a petitioner must prove that they experienced a family offense under New York Penal Law, such as rape, harassment, or another of the enumerated offenses.<sup>136</sup> In the order, a petitioner may also request the specific other relief they are seeking from the court, to prevent the harassment or abuse.<sup>137</sup> Orders of protection are enforceable through compliance remedies, such as incarceration and fines, and having

an expanded “refrain from” clause provides courts a mechanism to enforce orders.<sup>138</sup>

Withholding a “get” is a form of harassment, particularly when the party seeking the “get” has faced domestic violence in the marriage. According to Rabbi Jeremy Stern, the executive director of ORA, “Domestic abuse is about control. Abuse is not just about black and blue marks.”<sup>139</sup> Thus, courts should allow parties to obtain an order of protection to include in the order a “refrain from” clause, requiring the respondent to “refrain from holding any papers over the other party, including papers that create a barrier to remarriage.” The “refrain from” clause would apply broadly to documents, encompassing not only a religious “get,” but property ownership, legal guardianship and passports.<sup>140</sup> Similar to New York DRL § 253, while the “refrain from” clause would help to address difficulties in obtaining a religious divorce, the clause would be neutrally applicable without a direct religious impact.<sup>141</sup>

Recent legislation in the context of revenge porn is instructive to address any concerns that refusing to grant a “get” is not a form of abuse that can be addressed in orders of protection. In March 2019, New York passed N.Y. Code § 10-180, the “revenge porn” law and that offense is now listed as a family offense when people seek orders of protection.<sup>142</sup> Under the revenge porn law, it is unlawful for another to disclose intimate images without the depicted individual’s consent.<sup>143</sup> The person sharing the intimate images must also have an intent to cause economic, physical or substantial emotional harm toward the depicted individual.<sup>144</sup> Like the intent required to implicate the revenge porn offense, an intent to hold documents over another would also cause economic, physical or substantial emotional harm.<sup>145</sup> Similar to revenge porn, “get” refusal violates the law, in this case domestic relations law rather than criminal law, and is a form of emotional abuse because the husband prevents the wife from achieving her freedom to remarry and the refusal of a “get” may cause emotional and economic harm.<sup>146</sup>

A clause in an order of protection requiring the subject party to “refrain from holding any documents over the other party” could raise similar questions about its impact on religious freedom that have hampered enforcement under New York DRL § 253. Nevertheless, the compelling need that underlies an order of protection weighs in favor of enforcement even if it imposes a small burden on religious practice.<sup>147</sup>

## Conclusion

Religious spouses who seek a religious divorce, called a “get,” under existing law face a series of legal and practical obstacles. These obstacles are particularly concerning for spouses attempting to leave a violent marriage. Although some states have used a variety of legislative and judicial measures to address this issue,

many provide no civil remedy to help spouses obtain a “get” due to concerns that this interferes with a non-compliant spouse’s right to practice their religion freely. Efforts within the Orthodox community to promote the use of pre- and post-nuptial agreements with “get” provisions are important, but states cannot rely on the religious community to self-regulate and protect spouses. New York’s “get” law is a good first step in requiring parties to remove barriers to remarriage and provides courts the ability to consider refuse to provide a “get” in the distribution of marital assets. Other jurisdictions should follow New York’s lead and enact similar legislation.

That said, many questions remain about enforceability and penalties that courts may appropriately impose for a failure to provide a “get” that do not run afoul of Freedom of Religion rights under the First Amendment. Additional protections and remedies are needed for particularly vulnerable spouses seeking a divorce, who experienced domestic violence in their marriage. Courts should recognize “get” refusal as a form of coercion and permit parties seeking orders of protection to include in the order provisions requiring the subject party to refrain from withholding barriers to remarriage.

## Endnotes

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31. *Id.*
32. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).
33. *Id.* at 405.
34. *Id.*
35. Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 Harv. Women's L.J. 171, 215 (1995).
36. Deuteronomy 24:1. Deuteronomy is fifth book of the Jewish Torah. Deuteronomy 24:1 states: "When a man taketh a wife, and marrieth her, then it cometh to pass, if she find no favour in his eyes, because he hath found some unseemly thing in her, that he writeth her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house." The bill of divorce Deuteronomy refers to is a "get." *Id.*
37. *Id.* See also *Tilsen v. Benson*, No. NNHFA186084187S, 2019 WL 6329065, at \*4 (Conn. Super. Ct. Nov. 7, 2019).
38. *Id.*
39. *Id.*
40. The Agunah - Jewish Divorce: Get, *supra* note 1.
41. *Id.*
42. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 Colum. J.L. & Soc. Probs. 359, 361 (1999).
43. The Agunah - Jewish Divorce: Get, *supra* note 1. ("Agunot" is plural for multiple chained women).
44. Jodi M Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. Rev. 493, 495.
45. *Scholl v. Scholl*, 621 A.2d 808, 810 (Del. Fam. Ct. 1992); *Accord Jones v. Wolf*, 443 U.S. 595, 602 (1979) (neutral clause does not mention anything about religious principles).
46. *Id.*
47. Act of Aug. 8, 1983, ch. 979, [1983] N.Y. Laws 2818, 2819 (codified at N.Y. DOM. REL. LAW § 253 (McKinney 1986 & Supp. 1995)).
48. N.Y. Dom. Rel. Law § 253 (McKinney 2020).
49. *Id.*
50. N.Y. Dom Rel. Law § 236B.
51. *Id.* see also *Avitzur v. Avitzur*, 58 N.Y.2d 108, 112 (1983). *Avitzur* was decided on February 15, 1983, which was before the New York "Get" law was passed on August 8, 1983. The Court of Appeals allowed the wife to enforce their Jewish marriage contract, otherwise known as a ketubah, as a prenuptial agreement. The court explained that the ketubah could be enforced based on neutral principles of contract law, which would not excessively entangle in religion. It did not matter that the marriage contract was entered into during a religious ceremony. Both parties consented to the ketubah. As the ketubah used secular terms, the court could compel the husband to perform his secular obligation to go to the "Beth Din" and secure for his wife a "get." *Id.*
52. *Id.*
53. *Id.*
54. N.Y. Dom. Rel. Law § 253 (McKinney 2020).
55. N.Y. Dom. Rel. Law 236(B)(5)(d)(1)-(13), 6(a)(1)-(11) (McKinney 1986). New York's Equitable Distribution Law includes thirteen factors to consider when dividing marital assets and eleven factors in setting maintenance. These factors include the duration of the marriage, age and health of both parties, the income and property of each party at the time of the marriage and divorce, and present and future earning capacity of each party.
56. Neil Cahn et al., *Unconstitutional to Consider Husband's Refusal to Give Religious Divorce (Get) When Granting Support*, DIVORCE: NEW YORK, (Mar 9, 2020, 5:00 PM), <https://www.divorceny.com/maintenance/masri/>.
57. 583 N.Y.S.2d 716 (Sup. Ct. 1992).
58. Neil Cahn et al., *Unconstitutional to Consider Husband's Refusal to Give Religious Divorce (Get) When Granting Support*, DIVORCE: NEW YORK, (Mar 9, 2020, 5:00 PM), <https://www.divorceny.com/maintenance/masri/>.
59. *Schwartz v. Schwartz*, 583 N.Y.S.2d 716 (Sup. Ct. 1992).
60. Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 PACE L. REV. 703, 737 (1995); *Citing*, Linda S. Kahan, Note, *Jewish Divorce and Secular Courts: The Promise of Avitzur*, 73 GEO. L.J. 193, 198 n.37 (1984).
61. *Id.*
62. *Id.* at 530. See also *Mizrahi-Srouf v. Srouf*, 29 N.Y.S.3d 516 (N.Y. App. Div. 2d Dept. 2016). In *Mizrahi-Srouf v. Srouf*, the wife would be awarded an increased maintenance from \$100 per week for five years to \$200 per week if the husband did not obtain for his wife a "get" in the next 60 days. The *A.W. v. I.N.* court in Nassau County later explains that the wife in *Mizrahi-Srouf v. Srouf* should not have been awarded increased maintenance on the mere fact that the husband did not obtain for his wife a "get." The court cannot impose coercive financial pressures to obtain for one party a "get."
63. *Id.*
64. *Id.* at 530.
65. *Id.* at 531.
66. Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, 15 PACE L. REV. 703, 737 (1995).
67. N.Y. Dom. Rel. Law § 253(9) (McKinney).
68. 260 N.Y.S.2d 701,701 (N.Y. App. Div. 1999); See also Martin E. Friedlander & Nathan Lewin, *Refusal to Remove Barriers to Remarriage: Did the Appellate Division Second Department Eliminate Economic Sanctions* NYSBA, 52 Family L.R. 17, 17-18 (2020).
69. 50 N.Y.S.3d 801, 807 (N.Y. Sup. Ct. 2017).
70. 102 N.Y.S.3d 616, 618 (N.Y. App. Div. 2019).
71. *Id.* 618 (N.Y. App. Div. 2019).
72. *Id.* 618 (N.Y. App. Div. 2019).
73. 50 N.Y.S.3d 801, 807 (N.Y. Sup. Ct. 2017).
74. *Id.* at 492.
75. *Id.* at 492.
76. 196 Ill. App. 3d 785, 789 (Ill. App. Ct. 1990).
77. *Id.*
78. *Id.* at 789.
79. *Id.* at 788.
80. *Id.* at 790.
81. *Id.* at 795.
82. 750 ILL. COMP. STAT. 5/102 (West 1995) (statutory right to remarry).
83. Jodi M Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. Rev. 493, 515 (1996).
84. *Scholl v. Scholl*, 621 A.2d 808, 814 (Del. Fam. Ct., 1992).

85. *Id.* at 811.
86. *Id.* If the wife is Orthodox and does not obtain an orthodox “get,” she would not be free to remarry in the Orthodox community.
87. *Id.*
88. *Id.*
89. *Minkin v. Minkin*, 180 N.J. Super. Ct. Ch. Div. 260, 266 (1981); *See also*, *Burns v. Burns*, 223 N.J. Super. Ct. Div. 219, 224 (1987); *See* 750 ILL. COMP. STAT. 5/102 (West 1995).
90. 180 N.J. Super. Ct. Ch. Div. 260, 266 (1981).
91. *Id.* at 265.
92. *Id.*
93. 355 N.J. Super. Ct. Ch. Div. 305, 306 (2003).
94. *Id.*; *See also* *Seifeddine v. Jaber*, 327 Mich. Ct. App. 514, 517 (2019) (following *Odatalla* and enforcing “Mahr” agreement).
95. *Id.* at 311.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Aflalo v. Aflalo*, 295 N.J. Super. Ct. Ch. Div. 527, 543 (1996).
100. *Id.* at 529.
101. *Id.* at 528.
102. *Id.* at 543 (1996).
103. *Id.* at 530.
104. *Victor v. Victor*, 866 P.2d 899, 900 (Ariz. Ct. App. 1993).
105. *Id.* at 902 (Ct. App. 1993).
106. *Id.*
107. *Id.*
108. *Tilsen v. Benson*, No. NNHFA186084187S, 2019 WL 6329065, at \*1 (Conn. Super. Ct. Nov. 7, 2019).
109. *Id.* at 7.
110. *Id.* at 6.
111. *Light v. Light*, No. NNHFA124051863S, 2012 WL 6743605, at 6-7 (Conn. Super. Ct. 2012).
112. *Id.* at 1.
113. *Id.* at 6. (Contact law and Connecticut’s Premarital Agreement Act could apply to enforce the premarital agreement); *See Peterson v. Sykes-Peterson*, 42 A.3d 390 (Conn. 2012) (“prenuptial agreements are contracts” and “are to be construed according to the principles of construction applicable to contracts generally”).
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117. *Id.*
118. Amelia Hill, *The rise of the post-nuptial agreement: ‘My husband behaved like a rutting stag,’* THE GUARDIAN, (Mar 11, 2020 at 5:30 PM), <https://www.theguardian.com/lifeandstyle/2017/aug/02/post-nuptials-marriage-divorce>.
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120. *Id.* “language”: “en-US”, “note”: “Library Catalog: jdbar.com”, “title”: “DRL 236 B | Equitable Distribution | Maintenance | Divorce Lawyer & Appeals Attorney | Long Island NY”, “URL”: “https://jdbar.com/statutes/drl-236-b/”, “accessed”: {“date-parts”: [“2020”, 3, 11]]}, “schema”: “https://github.com/citation-style-language/schema/raw/master/csl-citation.json”}.
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123. *Id.* at 204; *See also* Rabbi Julie Ringold Spitzer, *When Love is Not Enough: Spousal Abuse in Rabbinic and Contemporary Judaism* 23 (1991).
124. *Id.*
125. *Id.*; *see also* Rachel Biale, *Women & Jewish Law: An Exploration of Women’s Issues In Halakhic Sources*, 293, 10-11 (1984).
126. *Id.*; *see also* Rachel Baile, *Women & Jewish Law: An Exploration of Women’s Issues in Halakhic Sources*, 293, 10-11 (1984).
127. *Id.*
128. *Id.*
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131. *Id.*
132. *Id.* Protective Orders can be filed in family or criminal court. In New York, criminal court has higher jurisdiction than family court. If the Respondent violates the Protective Order, the family court can modify the order, imprison the Respondent, or revoke the Respondent’s license to carry a firearm. If the Protective Order was filed in family court, the Order can be transferred to criminal court, where the Respondent can face a longer prison sentence depending on the severity of the violation to the Protective Order.
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141. *Id.*, *See also* *Hamad v. Rizika*, 984 N.Y.S.2d 605 (Supreme Court App. Div. 2014).
142. N.Y. Code § 10-180 (2019).
143. *Id.*
144. *Id.*
145. Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 Harv. Women’s L.J. 171, 215 (1995).
146. *Id.*
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# The Impossible Existence of the Concept of ‘Matrimonial Regime’ in Common Law Countries, or How to Fit a Square Peg into a Round Hole

By Delphine Eskenazi and Inès Amar

The concept of matrimonial regime is fundamental to French family law, particularly in the event of divorce.

Under European law, the concept of “matrimonial regime” was defined in the *De Cavel I*<sup>1</sup> decision and was also repeated verbatim in the recent European “Matrimonial Property Regimes” Regulation<sup>2</sup> as including “not only property arrangements specifically and exclusively envisaged by certain national legal systems in the case of marriage, but also any property relationships between the spouses and in their relations with third parties, resulting directly from the matrimonial relationship, or the dissolution thereof.”

In principle, there is also a fundamental distinction between matrimonial regime and spousal support. The landmark ECJ decision, *Van den Boogaard*,<sup>3</sup> effectively defines the two concepts according to the objective sought by the decision in question. Thus, if its objective is to provide for the maintenance of a spouse in need or if the needs and resources of each spouse are taken into consideration to determine its amount, then the decision has to do with spousal support. However, if the subject of the decision relates only to the distribution of property between the spouses, then it is a question of matrimonial regime.

Issues in private international law that relate to this distinction between the concept of “matrimonial regime,” on one hand, and “spousal support,” on the other hand, are exacerbated by the entry into force of the “Matrimonial Property Regimes” Regulation of 29 January 2019, which sets strict rules for jurisdiction and applicable law. In divorce cases, this Regulation is applied in France in an overlapping manner with the European Regulation on spousal support, which has been in effect since 18 June 2011. For this reason, practitioners must be able to determine clearly which situations fall under the “Matrimonial Property Regimes” Regulation and, on the contrary, which situations fall under European instruments related to spousal support.<sup>4</sup>

Thus, under French law, if a French judge takes into account factors that center around the needs of the spouses, it is a matter of spousal support obligations, known in France as compensatory allowance (“*prestation compensatoire*”) or alimony (“*pension alimentaire*”) when it is part of the duty of support during divorce proceedings. On the contrary, these criteria are, in principle, absent in France at the stage of liquidating the matrimonial regime.

In common law countries,<sup>5</sup> English and American judges, like French judges, do make a distinction between the payment of spousal support after divorce and the division of property. One notices, however, that, in practice,

while French judges mathematically implement the rules that apply to liquidating matrimonial regimes, it is different for judges in common law countries, who divide property according to more subjective and discretionary criteria.

In light of this reality, the real issue is the fact that the notion of matrimonial regime is a concept that simply does not exist in common law countries.

Indeed, the French practice shows that, very often, the particularities of the rules of common law countries regarding the division of spouses’ property at the time of divorce are disregarded, since, by using a very artificial fiction, attempts are made to equate these rules with those of a similar matrimonial regime in French law.

French practitioners of private international family law thus find themselves confronted with a situation like that of a child who tries desperately to fit a square into a round hole without changing the shapes. It is simply not possible to fit them together and it is illusory to insist on applying the rules of French matrimonial regimes by analogy.

The purpose of this article is to describe, by comparison with French law, the rules of common law countries on the management of property during the marriage and then in the event of divorce (1).

This analysis will show that it is simply impossible to analogize to the rules of the French Civil Code if one truly wants to apply foreign rules (2).

## 1. Rules on management and division of property in common law countries

### 1.1. Rules on management of spouses’ property during the marriage

**French rules**—Under French law, marriage has a direct effect on the spouses’ estate and the management of property accumulated during the marriage. Their married life is, in fact, governed by the default regime of community of acquired assets (*communauté réduite aux acquêts*) if the spouses have not chosen another regime and, conversely, very different rules apply to the management of their property during the marriage if another matrimonial regime applies.

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For example, under the French community property regime, common assets consist of property obtained after the marriage as well as the fruits of separate property, and separate assets consist of property acquired either before the marriage or after the marriage through inheritance, bequest or gift. Liabilities consist of debts incurred during the marriage (except for compensation). Each spouse may manage common property on his or her own; however, neither spouse may dispose of it on his or her own.

**British rules**—Conversely, during the marriage, the British regime more closely resembles a separation of property regime in the sense that marriage is deemed not to have any effect on the spouses' property rights.<sup>6</sup> This lack of interdependence between spouses and of solidarity in relation to creditors does, in fact, remind one of the French separation of property regime.

Thus, marriage is deemed not to have any impact on the spouses' property relations: Each remains the owner of the property he or she acquired prior to the marriage, and property acquired after the marriage belongs to him or her just as if he or she were not married. Consequently, during the marriage, the applicable rules are those of relevant ordinary law depending on the issues involved. For example, spouses' capacity to enter into contracts and related issues, such as one spouse's responsibility for the debts of the other spouse, are governed by contract law.<sup>7</sup> Property and inheritance law (particularly with the system of recording titles) governs other issues which, under French law, would be governed by the matrimonial regime. Regarding the marital home, supposing that it was acquired in the name of both spouses, if it is sold, the spouses will share the price equally, even if one of them paid the entirety or the vast majority of the price, due to a presumption of donation which works in favor of married couples.<sup>8</sup>

**American rules**—Under American law, even though there is no concept of matrimonial regime per se, the idea is even more present than in British law since there is a clear distinction between marital property and separate property.

The majority of states maintain separation of property as the default. Therefore, each spouse may dispose of his or her own property, even though both spouses must consent to alienate or mortgage shared immovable property.<sup>9</sup> Variations do exist, however, depending on the state in question.

Thus, although the majority of states are referred to as "separation of property" states, a minority of states are considered "community property" states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, Wisconsin).<sup>10</sup> These rules are different at the time of divorce, as explained below.

## 1.2. Rules on division of property at the time of divorce

Obviously, it is at the time of divorce that the question of the judge's power to divide spouses' property generally becomes important. It will then be noted that, as a matter of principle, French judges apply rules that are at odds with those implemented by common law countries.

The objectivity and rigor (and sometimes even injustice) of civil law rules on liquidating the French matrimonial regime contrast with the discretionary and very subjective powers that judges in common law countries apply in the interest of fairness.<sup>11</sup>

**French rules**—It will be recalled that, in French law, under the default matrimonial property regime, each spouse takes back his or her own property, and common assets are liquidated, then divided, in order to establish what compensation is due. Under the regime of community of acquired assets, each spouse has the right to share in half the value of the net assets that are found in the other's estate, measured according to the double estimate of the original estate and the final estate. Under the separation of property regime, each spouse takes back his or her own property and joint property is divided. Whether or not a marriage contract exists is obviously a determining factor and French judges strictly apply marriage contracts.

Therefore, under French law, the matrimonial regime is liquidated and divided without taking into account the needs of the spouses, which are largely taken into consideration, however, when calculating the compensatory allowance. Courts, however, constantly recall that the purpose of the compensatory allowance is not to compensate the spouses' matrimonial regime (particularly in the case of separation of property).

**British rules**—Under British law, at the time of divorce, the judge rules on financial effects<sup>12</sup> ("financial provision order" in the form of periodic payments or a flat sum) as well as on property<sup>13</sup> ("property adjustment, lump sum and pension order") and these financial determinations are contained in a single decision ("a financial remedy order").

In the absence of a prenuptial agreement or foreign marriage contract,<sup>14</sup> under British law, judges are first likely to divide property, depending on the circumstances, on the basis of the "yardstick of equal division."<sup>15</sup> The judge starts from the principle that property will be divided equally between the two spouses, and then sometimes adjusts the percentages according to the circumstances, it being specified that the starting point must be equal division (unlike the default regime under French law, the judge does not necessarily distinguish between property acquired prior to the marriage and property acquired during the marriage when making this equal division of property). This principle of equitable division obviously can only be applied in circumstances where the spouses have an estate and assets to be divided.

The judge, therefore, has the power to set aside an equal division depending on the circumstances, particularly with respect to the nature of the property in question,<sup>16</sup> the spouses' respective financial capacities, and their standard of living during the marriage.

Other factors may be taken into account in order to set aside equality: the length (short) of the marriage,<sup>17</sup> (par-

ticularly without children), the fact that the property was received as an inheritance or gift, whether there are more assets than necessary to meet the parties' needs, illiquidity of the existing assets, etc.<sup>18</sup>

However, the fact that only one spouse earned income during the marriage is not enough to set aside an equal division, since British judges consider the contribution of the spouse who took care of the home and raised the children to be very important also<sup>19</sup> (there should be no discrimination between the homemaker and the breadwinner).

Finally, it is important to note that British judges' jurisdictional powers are centered around three concepts: compensation, sharing, and needs. The "sharing" powers of British judges relate to the spouses' rights over the property, for which the initial presumption is that of a division of property, while the concept of "needs" aims to take into account the needs of the spouses, particularly the needs of shelter and basic necessities. The concept of "compensation" is rarely implemented by British judges.<sup>20</sup>

This distinction is very important because it finally allows one, to a certain extent, to distinguish the powers of British judges with respect to "matrimonial regime" from their powers with respect to "spousal support" (as this distinction is made in the *Van den Boogaard* decision cited above).

In light of all these concepts, when ruling on the financial consequences of divorce, a judge will first consider all the assets (including retirement funds and both liquid and illiquid investments, as well as debts) in order to determine which assets the spouses, respectively, will receive. The judge will then equally divide those assets unless, according to the circumstances, there are reasons not to divide them equally.<sup>21</sup> Such a division, as far as possible, should cover each spouse's need for capital, interpreted broadly.<sup>22</sup>

In addition to this division, the judge will look at the present and future revenue and resources of each spouse and may then order additional sums ("periodic payments") which will take into account the "income needs" of each spouse. This assessment considers the couple's lifestyle during the marriage, each spouse's financial potential and capacity to earn income to support this lifestyle, the need to care for minor children, and life expectancy.

This sum will generally be ordered in the form of a life annuity or for a set period. The debtor spouse, however, may propose that this amount be paid in one lump sum (converting the annuity into "capitalized maintenance").<sup>23</sup>

Therefore, one sees that the method British judges follow is, in reality, rather similar to the criteria that French judges use when ruling on compensatory allowances under French law, since French judges, pursuant to Article 271 of the Civil Code, must, in principle, consider "the estimated or foreseeable estate of the spouses, in both capital and revenue, after the matrimonial regime is liquidated."

**American rules**—In the vast majority of American states, at the time of divorce (and also when there is no prenuptial agreement), spouses keep property that is considered "separate property," while property that is considered "marital property" is divided equitably according to the spouses' circumstances ("equitable distribution").

The rule is therefore not equal division, but "equitable" division, according to the circumstances. Therefore, although the concept of matrimonial regime is unknown in American law, an American judge's reasoning is nonetheless similar to that of a French judge insofar as the American judge takes into account the distinction between separate property and communal property and does not create a purely equal division without taking into account each party's property rights.

Among other factors that an American judge takes into account in order to establish equitable distribution are<sup>24</sup> the length of the marriage, the age and health of the parties, their income potential, their respective contributions during the marriage, the liquidity or illiquidity of the marital property, etc.

This brief description makes it possible to draw attention to all the fundamental differences between the French approach and the approach of common law countries. These differences are teleological, intrinsically related to the role that judges have historically played in these countries. The judge's discretionary power must be preserved in order to arrive at a just and equitable result that depends on the circumstances of each case.<sup>25</sup>

How then can a French judge implement these rules without losing their true nature? Is such a reconciliation possible?

## **2. From analogy to distortion: How can the rules of common law countries be preserved in divorce cases?**

### **2.1. The fiction of analogy with a matrimonial regime under French law**

Many practical difficulties arise from the failure of French courts to consider the particularities that result from the lack of a concept of matrimonial regime in common law. In fact, French judges, unaware of these issues, take a simplistic view which is not necessarily in accordance with the foreign law and which often leads to results that may be the opposite of those that would have been obtained in the country where the law applies.

**The fiction that the British regime can be equated with the French separation of property regime, notwithstanding the principle of equal division at the time of divorce**—Thus, French judges generally equate the British "default regime" with a separation of property regime.<sup>26</sup> This analogy is particularly established in doctrine.<sup>27</sup>

Those who equate the British regime with a separation of property regime acknowledge that there are imperfections,

expressed as “exceptions to the principle of separation”<sup>28</sup>: For example, under French law, a spouse under a separation of property regime remains responsible for contributing to the costs of the household to the extent of his or her abilities, or as provided in the marriage contract. However, under British law, there is no law requiring spouses to share household costs equally or even to contribute to them.<sup>29</sup>

Such a simplification is erroneous for two reasons: on one hand, because these systems do not really have a concept of matrimonial regime, and, on the other hand, because equation with a single regime that would apply both at the time of marriage and at the time of its dissolution in the event of separation does not reflect the status of the spouses’ rights at the time of divorce.

British judges have themselves ruled on this issue several times. On one hand, in the *Radmacher* decision<sup>30</sup> (landmark decision on marriage contracts in the United Kingdom), the British judge stated: “It is clear that the exercise under the 1973 Act does not relate to a matrimonial property regime.” On the other hand, in the *Charman* decision,<sup>31</sup> the judge stated that “our jurisdiction does not have matrimonial property and it is scarcely appropriate to classify our jurisdiction as having a marital regime of separation of property.”

Such assimilation was also criticized in doctrine. Thus, in the *International Encyclopedia for Family and Succession Law*:<sup>32</sup> “It is a matter of debate whether England and Wales actually have what could be termed a ‘matrimonial property regime.’ Certainly, there is no statutory code labelled as such, and [...] the concept of ‘matrimonial property regime,’ as understood in Continental Europe, is unknown in England.”

Another author<sup>33</sup> wrote: “As for the so-called separation of property known in Anglo-American countries, it is no more than a legend [...]. [...] [S]eparatist’ systems allow for a redistribution of ‘family property’ when the marriage is dissolved to ensure equality between the spouses. Even if a piece of property is the personal property of a spouse, it may be awarded to the other spouse to compensate for inequalities in the estates.”

In reality, the British regime (the solution under American law is equivalent) is very unlike the matrimonial regime under French law, which requires a great deal of attention to be paid during liquidation and division of the regime to the property rights of each spouse and to what was acquired before or during the marriage, together or separately, in order to establish debts and compensation between the spouses and arrive at a distribution of property that reflects the specificities of the regime to which the spouses agreed when they got married. The situation was summarized by a French notary:<sup>34</sup> “British law simply does not have the legal category of ‘matrimonial regimes.’ Without the concept of matrimonial regime, notaries cannot rely on notions of ‘acquests,’ ‘separate’ or ‘personal property,’ ‘compensation’ or ‘debts between spouses.’ There is no entitlement to property acquired during the marriage, liquidation of the joint estate or matrimonial benefit under British law.”

Thus, if one insisted on fitting the British regime into a French legal category, it would be necessary to equate the rules that apply during the marriage with a separation of property regime, and those that apply at the time of divorce with a universal community property regime,<sup>35</sup> but one which would be divided according to principles of equity. This position is, in fact, the closest to the reasoning of a British judge who, far from going into the details of how the spouses managed their finances during the marriage in order to establish debts and compensation according to the actual contributions and property rights of the spouses, takes an extremely broad view, since the judge divides the spouses’ estate into two equitable portions without distinguishing between property acquired before the marriage and property acquired after the marriage.

**The fiction of equating the American regime with a single matrimonial property regime, notwithstanding the principle of “equitable distribution” at the time of divorce**—The rules that apply during the marriage, depending on the state, are comparable to a separation of property regime or a community of acquired assets regime. However, at the time of divorce, a community of acquired assets regime is more analogous (since nearly all states apply the rule of “equitable distribution” or an equivalent rule at the time of divorce).

We could also compare these rules to a partnership of acquests regime given the duality between marriage and divorce.

The analogy with the partnership of acquests is also partially inaccurate insofar as, in the event of death, the rules that applied during the marriage are maintained (which would not be the case under French law where the liquidation rules are identical regardless of whether the dissolution is due to divorce or death).

Finally, it should be noted that applying the rules of French matrimonial regimes will often lead to the notary taking into account debts or compensation between the spouses, according to the rules of the French Civil Code, even though equivalent rules do not exist in common law countries.

Therefore, it is clear that it is the original reasoning, namely the insistence on equating the rules of common law countries with a specific French matrimonial regime by analogy, is wrongheaded, regardless of the regime chosen for comparison.

The differences between the two systems are, in reality, too fundamental and such an analogy becomes, in fact, a distortion.

## **2.2. How to truly incorporate property division rules from common law countries at the time of divorce**

When forced to apply the British or American legal system, judges sometimes try to apply specific foreign rules while maintaining certain French assumptions. One will note, however, certain judges’ laudable efforts to try to apply more strictly the spirit of judges from common law countries.

Published decisions on these issues are extremely rare and often rather topical.

The reasoning of a Poitiers Court of Appeals decision of 2014 is rather interesting.<sup>36</sup> In this decision, the spouses, who had married under the separation of property regime, had acquired an immovable property and the dispute had to do with the division of this property. Rather than reasoning directly by analogy with the rules of French law, the court, asked by the wife to do so, agreed to apply the criteria of Articles 24 and 25 of the Matrimonial Causes of 1973 to determine the spouses' rights and potential debts.

In a Paris Court of Appeals decision<sup>37</sup> to which British law applied, the French judge had already taken into account the considerable discretionary power that a British judge would have if ruling on the fate of the marital home. Thus, the French judge, seeking to adapt the law, took the attitude that a British judge applying the law would have. He made use of British judges' wide purview and ruled without relying on a French matrimonial regime.

French judges' efforts have sometimes created complete confusion between French law concepts and foreign law concepts, which ended up being conflated. For example, in a 2016 decision, the Agen Court of Appeals<sup>38</sup> acknowledged that British law applied to the issue of liquidating the matrimonial regime. It specified that, under British law, "matrimonial regimes per se do not exist and the parties' relationships are governed by rules similar to separation of property, the liquidation of common interests being tempered by the principle of equity which de facto establishes a presumption of liberality leading to a division in half in certain cases." It rejected the application of any occupation compensation, a concept which is unknown in British law. However, the court established a monetary sum which it ordered the husband to pay the wife. Thus, despite having a certain understanding of the British system, French judges tend to make associations with known concepts of French law, even if such mechanisms are unknown in British law.

Finally, another decision of the Agen Court of Appeals<sup>39</sup> may be cited in which, to oppose the seizure and sale of a car, the debtor invoked the "British legal regime of separation of property," which he claimed the spouses were subject to, against the plaintiff creditor in an attempt to obtain thereby an acknowledgment of the existence of his wife's joint rights over the vehicle (in order to have the seizure nullified). The French judge considered that, in the absence of any indication in the sale contract of joint financing of the vehicle, and the existence of a registration in the husband's name alone, it was the sole property of the husband. A reading of the reasoning of this decision is interesting in that it allows one to see the implicit will of the trial judge to implicitly follow the rules of evidence of the French regime of separation of property to determine whether the vehicle in question was joint property or not according to the British regime, which nonetheless applied, unfortunately, without conducting a real substantial analysis of the rules of British law.

An analysis of these decisions makes one aware of the difficulties judges face in such situations, similar to the difficulties faced by notaries who must perform the same task.

The discretionary power of judges in common law countries also means that, in cases with significant financial stakes, each spouse will produce a certificate of custom on how the rules of the foreign country are implemented; unless a clear consensus emerges, the temptation for the French judge to apply known rules of French law by analogy is great.

However, solutions may exist to mitigate these difficulties while respecting the spirit of common law countries.

Indeed, one could, in the case of a dispute between divorcing spouses, simply ask the French judge to appoint a joint foreign law expert who would make a recommendation on the issue of division of property based on the applicable criteria of the foreign law. This practice of joint expert opinions is, furthermore, extremely widespread in common law countries when it is a matter of applying a foreign law in those countries.

The appointment of a joint expert should, however, be strictly defined by the French judge in order to avoid deviations.

In particular, one might imagine that the joint expert could be tempted to give an opinion on the issue of compensatory allowance and the French judge therefore absolutely must take care to specify the framework of the expert opinion in his or her decision, namely only the issue of the division of property between the spouses, and not that of spousal support after divorce,<sup>40</sup> which takes into account the needs of one of the spouses. In the case of the British system, this means that the joint expert should make a recommendation while considering only the issue of "sharing" while setting aside the determination of the amount related to "needs" or "compensation." In the case of the American system, this means a recommendation to carry out the "equitable distribution" of marital property.

It is essential for courts to strictly define the missions of joint experts they appoint when appropriate, in order to abide by the distinct rules of jurisdiction and of applicable law provided by European Regulations that apply to such questions, since British or American law applies in such scenarios only to the issue of the division of property between the spouses and not to issues of spousal support.

Practitioners of private international family law should review the practice of equating the rules of common law countries with the rules of French matrimonial regimes. Practitioners should not hesitate to advise their clients to use a joint expert, whether in the event of litigation or in the event of voluntary liquidation with a notary.

One should note, finally, that these difficulties exist whenever spouses do not provide in advance for the rules that will apply in the event of a divorce; whereas, these

rules may, by and large, be anticipated today by prenuptial agreements or marriage contracts and, by anticipating them, future disputes may be avoided.

If there is no prenuptial agreement or marriage contract, we must now take into consideration the particularities of the rules of common law countries on the division of property. Otherwise, we will continue to try to fit a square peg into a round hole.

## Endnotes

1. ECJ, 27 March 1979, *De Cavel I*, Case 143/78.
2. Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.
3. ECJ, 27 February 1997, *Mr. A. van den Boogaard v. Ms. P. Laumen*.
4. The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations and Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
5. The common law countries described in this article are essentially the United Kingdom and the United States. It should be noted, however, that most other common law countries in the world follow the rules of one or other of these countries in a relatively similar manner. Thus, the rules in Hong Kong or Singapore are very similar to British rules. Canadian rules (except for the province of Québec) are also very similar to American rules.
6. L. Neville Brown, C.A. Weston, *JurisClasseur Droit Comparé, Grande-Bretagne – Droit anglais – Introduction générale – Les époux – les enfants*, 92.
7. *Id.*
8. *Id.*, provided that no “declaration of trust” is made by either spouse.
9. M. Revillard, *JurisClasseur Notarial Formulaire, Fasc.40: Législation comparée – Amérique, Régimes matrimoniaux et successions*, 22 Jan 2018, updated 26 Mar 2019.
10. M. Revillard, *Droit international privé et communautaire, Défrénois* 2010, p. 235.
11. L. Ferguson, ‘Fairness’ and the Eye of the Beholder: A Comparative Perspective on Financial Remedies upon Relationship Breakdown, available on the website [www.iafl.com](http://www.iafl.com) which cites the British author J. Scherpe: “[f]rom an English point of view it is often argued that [the] certainty of matrimonial property regimes comes at the expense of fairness”
12. *Matrimonial Causes Act 1973*, section 23.
13. *Matrimonial Causes Act 1973*, section 24.
14. If there is a prenuptial agreement or a foreign marriage contract, British courts take a radically different approach and they have fundamentally changed their approach since the famous English *Radmacher v. Granatino* [2009] EWCA Civ 649 (2010) UKSC 42, pt. 107). If there is a marriage contract which is considered valid and which provides rules for separating the spouses’ property at the time of divorce, **the British judge’s “sharing” power is set aside** and the sums the parties are ordered to pay are, in exceptional cases, based solely on the notion of “needs.” Thus, one arrives at a result similar to the result that would be obtained before a French judge who would strictly apply the separation of property contract and order that a sum be paid as compensatory allowance. Cf., for an implementation of these principles by British courts: *Z. Z* (2011), *Luckwell v. Limata* (2014) and *KA v. MA* (2018), although this principle was recently strictly limited in an appeals court decision *Brack v. Brack* (2018).
15. *White v. White* (Conjoined Appeals), UKHL, 23 Oct. 2012.
16. N. Khawam, *AJ Famille*, November 2015, *Divorce dans le monde*, 573.
17. *Miller v. Miller* (2006), UKHL, Dec. 7, 2015.
18. J. Stewart, *Family law*, *European Lawyer Reference*, 2d ed. 2013, p. 171
19. *White v. White* (Conjoined Appeals), UKHL, 23 Oct. 2012.
20. For example, the case of a party who entirely sacrificed his or her own career to follow the other party, but the circumstances must be very specific.
21. The length of the marriage is an important criterion here and the longer the marriage, the more the principle of equal division will be strictly applied while considering each spouse’s needs.
22. It will be a matter, in particular, of verifying that each spouse can obtain suitable housing, which is generally referred to as “housing needs.”
23. The British regime promotes a clean break regarding both the division of assets and determination of the annuity (which may then be capitalized). According to this principle, the monetary relationship between the spouses, as far as possible, must end after the divorce.
24. *Domestic Relations Law* § 236-B-5 and 6.
25. J. Scherpe, cited above by L. Ferguson: “[w]hile [the English discretionary approach] acknowledges that each marriage is different and that therefore fairness might require tailor-made court orders, such an approach very deliberately sacrifices the legal certainty that matrimonial property regimes can provide to achieve the overarching aim of a ‘fair’ outcome.”
26. For example, *CA Limoges*, 25 June 2009, No. 08/00106, *CA Agen*, 27 November 2008, No. 08/00162.
27. For example, M. Revillard, *Droit international privé et communautaire, Défrénois* 2010, p. 235 and M. Souleau-Bertrand, *Le conflit mobile* Dalloz, Nouvelle Bibliothèque de Thèses, March 2005, pp. 223 to 225.
28. L. Neville Brown, C.A. Weston, *JurisClasseur Droit Comparé, Grande-Bretagne – Droit anglais – Introduction générale – Les époux – les enfants*, 92.
29. *International Encyclopedia for Family and Succession Law*, National Monographs/England and Wales, Suppl. 92 (2018), 423: “There is no requirement that spouses share the household expenses equally, or even that each should make a fair contribution.”
30. *Radmacher v. Granatino* cited above.
31. *Charman v. Charman* [2007] EWCA Civ 503 (24 May 2007), pt 124.
32. *National Monographs/England and Wales*, Suppl. 92 (2018), 422.
33. G. Droz, *L’activité notariale internationale*, *Collected Courses of The Hague Academy of International Law*, Vol. 280 (1999) p. 69.
34. R. Canales, *Les prenuptial agreement et les contrats de mariage: perspective franco-anglaise. Point de vue du notaire français, Droit de la famille – monthly review LexisNexis Jurisclasseur*, June 2015.
35. In fact, under the universal community property regime under French law, the estate comprises, by definition, all the spouses’ property, both assets and liabilities, including property the spouses owned at the time of their marriage or on the date they adopted the regime. Upon dissolution of the marriage, each spouse takes back the property that was not part of the communal property, which is rare in terms of universal community property (referring to property provided for in Article 1404 of the Civil Code).
36. *CA Poitiers*, 9 July 2014, No. 13/00686.
37. *CA Paris*, 31 October 1991 (JDI 1993,373, note L. Idot).
38. *CA Agen*, 12 May 2016, No. 14/01072.
39. *CA Agen* 18 November 2015, No. 14/01588.
40. Except, of course, where spousal support obligations themselves are subject to the same foreign law.

# Spousal Maintenance and the 2017 Tax Cuts and Jobs Act

## Understanding and Neutralizing TCJA's Impact with a Focus on New York

By Cheri R. Mazza

**This article is based on the author's presentation for the May 20, 2019 Brooklyn Bar Association Panel Discussion entitled, *Financial Impact in New York Divorces: Federal Tax Cuts and Jobs Act 2017 (TCJA) Impact on Spousal Maintenance and More*, and moderated by Hon. Jeffrey S. Sunshine.**

The 2017 Tax Cuts and Jobs Act (TCJA) created an urgency for matrimonial attorneys and their clients to finalize divorce separation agreements by the end of 2018 in order to maintain the status quo associated with taxable and deductible post-divorce maintenance payments. Almost a year has passed since the flurry of activity, and beginning with agreements entered into as of January 1, 2019, attorneys and judges have faced the task of whether and how to allocate the additional tax burden between the payee and the payor. While the maintenance provision is by far the most significant consideration for post-2018 separation agreements, other important TCJA changes include reduced tax rates, increased standard deductions, the elimination of exemption deductions, reduced itemized deductions, enhancements to child tax credits and earned income credits. Furthermore, although the alimony provision is permanent other individual tax changes are set to phase out in 2025.

The interplay of the various TCJA changes pose a challenge for attorneys and judges as they find ways to grapple with the impact on post-2018 separation agreements. In New York, although the formula approach allows for income tax adjustments, it certainly didn't anticipate a complete federal income "tax axe" for post-divorce maintenance payments. Now that all parties are forced to accept that, beginning with 2019 separation agreements, maintenance is no longer taxable nor deductible, it's imperative to consider the individual TCJA provisions that can be used to neutralize the tax impact on the post-divorce estate.

This article presents a comprehensive overview of individual 2017 TCJA provisions that impact divorcing individuals and the post-divorce estate. The overview is followed by a series of examples comparing taxable/deductible maintenance (pre-TCJA) to nontaxable/nondeductible maintenance (post-TCJA) to illustrate how provisions such as the child tax credit, earned income credit and the allocation of dependents and head-of-household filing status can be used to cushion the blow for nondeductible/nontaxable alimony. The examples focus on New York, which distinguished itself from other states by preserving the taxability/deductibility of alimony at the state income tax level. However, the federal provisions and the framework for assessing the impact of TCJA are applicable to divorces in all states. Additionally, the examples are useful in assessing modifications to pre-2019 separation agreements as well as in determining potential changes to existing pre- and post-nuptial agreements.

### Overview of Significant 2017 TCJA Changes

#### Loss of Federal Post-Divorce Maintenance Deduction—A Game Changer in Divorce

For nearly 80 years, those who paid post-divorce maintenance, generally referred to as alimony, benefited from the ability to deduct amounts paid from their gross income when filing federal income tax returns.<sup>1</sup> Thanks to changes introduced with the 2017 TCJA, for agreements entered into after December 31, 2018, those days are over. Adding salt to the wound is the fact that, while other individual tax provisions expire in 2025, the alimony provision does not.

#### ***The Change: Post-Divorce Maintenance Is No Longer Deductible or Taxable on Federal Returns***

The elimination of the taxability/deductibility of post-divorce maintenance applies to all divorce or separation agreements entered into on or after January 1, 2019. In fact, beginning with 2019 tax returns, the

IRS added a line to Form 1040, Schedule 1 requiring taxpayers to report the date of their divorce or separation agreement. If that date is on or before December 31, 2018, pre-TCJA rules apply, allowing payors to deduct and payees to report alimony on their federal income tax returns.

### ***The Impact***

The changes related to post-divorce maintenance create a windfall for the federal government on several levels. First, by placing the tax burden with the payor, who is generally in a higher tax bracket than the payee, alimony is effectively taxed at a higher marginal rate. Second, the TCJA eliminates the under-reporting or lack of reporting by payees as well as the over-reporting of deductions by payors. Furthermore, if maintenance is a payee's primary or only source of income, tax benefits associated with the payee's use of the standard deduction plus itemized deductions in excess of the standard deduction, are forever lost. Additionally, benefits related to child tax credits and/or earned income credits can be reduced or lost if allocation of dependents aren't carefully evaluated in light of the nontaxability of alimony and other changes in the tax code.

Consideration and understanding of the above tax considerations can be used to minimize the government's windfall and maximize the wealth maintained by the post-divorce estate. For New York divorces, that translates into adjustments resulting from amounts derived from application of the New York post-divorce maintenance formula and potentially revisions at the New York legislative level to the formula itself.

Attorneys and other professionals delivering guidance in these matters should be aware that any revisions made to pre-2019 separation agreements must now specify whether or not post-divorce maintenance payments remain taxable/deductible. In addition, they must also consider implications of TCJA and whether there is a need to modify existing pre- and post-nuptial agreements.

### **N.Y. Decouples from Federal—Post-Divorce Maintenance Taxable/Deductible on N.Y. State Returns**

For New York State (NYS) and New York City (NYC) income tax returns, payors who are New York residents or who have New York sourced income even though they are non-residents may continue to deduct post-divorce maintenance payments from their gross income regardless of when the separation agreement was executed. Such payments will be reported on New York Schedule IT-225 as subtractions from federal adjusted gross income. Payees who are New York residents continue to claim post-divorce maintenance payments as income by reporting them on New York Schedule IT-225 as additions to federal adjusted gross income.

The decoupling of New York from federal creates disconnections in tax filings and opportunities for divorce negotiations. For example, consider a payee whose only source of income is post-divorce maintenance. If the payee is a New York resident, a state income tax return reporting amounts received from post-divorce maintenance is required, which implies that New York payees below federal filing thresholds must nonetheless file federal returns.<sup>2</sup> Also, consider various residency scenarios. If both the payor and the payee are New York residents, alimony is deductible and taxable at the New York level. However, if the payor is a New York resident and the payee is or becomes a New York nonresident, it's a win-win for the post-divorce estate, because the payor benefits from deducting post-divorce maintenance at the New York level, while the payee benefits by not reporting it as income. Furthermore, if the payor is a New York non-resident with New York-sourced income, the post-divorce maintenance can be deducted by the payor on a New York non-resident return. Current and potential scenarios regarding New York tax returns and residency status should be considered in adjusting post-divorce maintenance under the New York formula approach.

### ***The Impact***

The benefits associated with post-divorce maintenance payments that are deductible by a payor and taxable for a payee combine to produce a net savings for the post-divorce estate when the payor is in a higher tax bracket than the payee, likely to be the case in many divorces. Now that maintenance is no longer taxable nor deductible at the federal level for post-2018 agreements, this provides an important opportunity for matrimonial practitioners to present alternative scenarios so that the parties can choose whether to share the new tax burden or assign it to either the payor or the payee.

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### Itemized Deductions Limited, Standard Deductions Increased and Tax Rates Reduced

The TCJA limited certain itemized deductions that were traditionally relied upon to produce significant tax savings. Of particular note is the \$10,000 limitation on state and local tax (SALT) deductions (e.g., property and income) and the establishment of a \$750,000 principal limitation on qualified residential mortgage debt acquired after December 15, 2017 which effectively reduces the coveted mortgage interest deduction.<sup>3</sup> Additionally, interest on home equity loans and lines of credit are limited to \$100,000 loans, the proceeds of which must be used for capital improvements on the residence.

To offset the limitations in itemized deductions and simplify the tax code, the TCJA increased standard deduction amounts as follows:

Standard Deductions Pre- and Post-TCJA			
Filing Status			
	Single and Married Filing Separately	Head-of-Household	Married Filing Jointly
Pre-TCJA 2017	\$6,350	\$9,350	\$12,700
Post-TCJA:			
2018	\$12,000	\$18,000	\$24,000
2019	\$12,200	\$18,350	\$24,400
2020	\$12,400	\$18,650	\$24,800

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Additionally, the tax code reduced tax rates with the top marginal rate going from 39.6 pre-TCJA to 37.0%. The post-TCJA tax tables with calculations by bracket for Single and Head-of-Household (HOH) filing status are displayed below.

TAX BRACKETS AND CALCULATIONS FOR SINGLE FILING STATUS									
Single	Tax Brackets			Tax Calculation			Maximum Tax For Bracket	Sum of First Three Brackets	
\$0 - \$9,525	Zero	to	\$ 9,525	10% x Income			\$ 953		
\$9,526 - \$38,700	\$ 9,526	to	\$ 38,700	\$ 953	+12% over	\$ 9,525	\$ 3,501		
\$38,701 - \$82,500	\$ 38,701	to	\$ 82,500	\$ 4,454	+22% over	\$ 38,700	\$ 9,636	\$ 14,090	
\$82,501 - \$157,500	\$ 82,501	to	\$157,500	\$ 14,090	+24% over	\$ 82,500	\$ 18,000		
\$157,501 - \$200,000	\$ 32,090	to	\$200,000	\$ 32,090	+32% over	\$ 157,500	\$ 13,600		
\$200,001 - \$500,000	\$ 200,001	to	\$500,000	\$ 45,690	+35% over	\$ 200,000	\$ 105,000		
\$500,000 +	\$ 500,000			\$ 150,690	+37% over	\$ 500,000			
TAX BRACKETS AND CALCULATIONS FOR HEAD-OF-HOUSEHOLD FILING STATUS									
Head-of-Household	Tax Brackets			Tax Calculation			Maximum Tax For Bracket	Sum of First Three Brackets	
\$0 - \$13,600	Zero	to	\$ 13,600	10% x Income			\$ 1,360		
\$13,601 - \$51,800	\$ 13,601	to	\$ 51,800	\$ 1,360	+12% over	\$ 13,601	\$ 4,584		
\$51,801 - \$82,500	\$ 51,801	to	\$ 82,500	\$ 5,944	+22% over	\$ 51,800	\$ 6,754	\$ 12,698	
\$82,501 - \$157,500	\$ 82,501	to	\$157,500	\$ 12,698	+24% over	\$ 82,500	\$ 18,000		
\$157,501 - \$200,000	\$ 32,090	to	\$200,000	\$ 30,698	+32% over	\$ 157,500	\$ 13,600		
\$200,001 - \$500,000	\$ 200,001	to	\$500,000	\$ 44,298	+35% over	\$ 200,000	\$ 105,000		
\$500,000 +	\$ 500,000			\$ 149,298	+37% over	\$ 500,000			
								First Three Bracket Difference Single Vs. HOH	\$ 1,392

Note that the Single and HOH tax tables converge at \$82,500 of taxable income. Furthermore, with taxable income above \$82,500 the preference for HOH over Single filing status equates to \$1,392 in tax savings. When assessing allocation of dependents and filing status, the tax savings of HOH, along with child tax and earned income credits (both discussed below) should be considered. However, the filing status is a moving target in the sense that children leave the parents' home and divorced individuals re-marry, resulting in the filing options of Married Filing Jointly or Married Filing Separately.

The tax benefit associated with HOH vs. Single filing status can be quantified. As displayed above, at taxable income levels of at least \$82,500 the tax savings for HOH compared to Single are \$1,392. In addition, the \$6,250 difference in the 2019 standard deduction for HOH (\$18,650) versus Single (\$12,400) multiplied by the marginal tax rate equates to additional tax savings. For example, if a taxpayer is in a 32% tax bracket the standard deduction for HOH versus Single yields additional tax savings of \$2,000 (\$6,250 x 32%).

### The Impact

In divorces in which the payee's only source of income is post-divorce maintenance, the TCJA results in the loss of benefits associated with the standard deduction plus any itemized deductions in excess of the standard deduction. Thus, for the 2019 tax year the lost deduction is \$12,200 (Single) or \$18,350 (HOH) plus any itemized deductions above those amounts such as SALT, mortgage interest and charitable contributions. The measurable impact is equal to the lost deduction multiplied by what would have been the payee's marginal tax rate if maintenance had remained taxable. For example, if the payee's

marginal federal tax rate is 22%, the loss of the standard deduction equates to an annual cost to the post-divorce estate of \$2,684 (Single) or \$4,037 (HOH). If the payee has mortgage interest, property taxes, and contributes to charities the loss to the post-divorce estate is higher.

**Illustration:** Assume that \$75,000 post-divorce maintenance is the payee's only source of income and that the post-divorce filing status for both the payee and the payor is Single because there are no qualifying children. The payee has itemized deduction of \$25,000 associated with a mortgage, property tax and contributions. The payor's marginal tax rate is 37%.

For the payee, if post-divorce maintenance was taxable, the federal tax on \$50,000 of taxable income would be \$6,858. The comparison for pre- and post-TCJA for the payee is as follows:

<b>Payee</b>		
<b>Post-Divorce Maintenance and Itemized Deductions</b>		
<b>Pre- vs. Post-TCJA</b>		
<b>Tax Year 2019</b>		
<i>Filing Status: Single</i>	Post-Divorce Maintenance	
<i>Dependents: 0</i>	Pre-TCJA	Post-TCJA
<i>Marginal Tax Bracket: 22%</i>	Taxable	Non-Taxable
Post-Divorce Maintenance	\$75,000	\$75,000
Itemized Deductions	25,000	
Taxable Income	\$50,000	\$ 0
Federal Income Tax	\$ 6,858	\$ 0
Effective Tax Rate on Maintenance	9.14%	
Net-of Tax Maintenance (Annual)	\$68,142	\$75,000
Net-of-Tax Maintenance (Monthly)	\$ 5,678	\$ 6,250

For the payor, deductible post-divorce maintenance would result in a tax benefit of \$27,750, calculated as \$75,000 multiplied by the payor's marginal rate of 37%. Thus, the pre-TCJA net-of-tax cost of post-divorce maintenance to the payor is \$47,250. In this scenario, what is the cost of the non-deductibility of maintenance to the post-divorce estate and who should pick up the tab?

<b>Post-Divorce Estate</b>		
<b>Cost of Nondeductible and Nontaxable Maintenance</b>		
<b>2019 Tax Year</b>		
<i>Filing Status: Single</i>		
<i>Dependents: None</i>		
<i>Payee/Payor: 22% / 37% marginal rates</i>	Payee	Payor
Net-of-Tax Post-Divorce Maintenance:		
Post-TCJA Income (Cost)	\$75,000	\$(75,000)
Pre-TCJA Net-of-Tax Income (Cost)	68,142	(47,250)
Benefit (Cost) of TCJA	\$ 6,858	\$(27,750)
Payor (Cost) of TCJA	(27,750)	
TCJA Cost to Post-Divorce Estate	<u>\$(20,892)</u>	
Effective tax rate on loss of post-divorce maintenance deduction (\$20,892/\$75,000)	27.86%	

On a monthly basis, the post-divorce maintenance is \$6,250 with a post-TCJA cost to the couple of \$1,741 (\$20,892/12). Should this cost be divided, resulting in \$870 less per month to the payee? Or, should the payor bear the entire cost without reducing the \$6,250? Should the payee's discretion over whether to have a mortgage, property taxes and contributions be considered in determining the division of cost?

### **The Deduction for Personal and Dependency Exemptions Eliminated**

Prior to the 2017 TCJA, taxpayers received deductions from adjusted gross income for personal exemptions plus any qualified dependents claimed on their tax return. For 2017, the amount was equal to \$4,050 per exemption, with the total amount of the deduction phased out based on adjusted gross income (AGI) limitations. For couples with qualifying children, the divorce and separation agreements typically specified which spouse could use the child exemptions in any given tax year.

Although the 2017 TCJA eliminated exemption deductions, it didn't eliminate the need to determine dependency status of children because, as discussed below, both the child tax credit and the earned income credit are based on the number of qualifying children claimed as dependents. In a divorce, an understanding of qualifying child, custodial versus noncustodial parent and what is required to claim HOH status, child tax credits and earned income credits is imperative. Additionally, with the nontaxability of maintenance resulting in lower or zero tax liability for many payees, the role of tax liability and earned income in assessing child tax and earned income credits should be understood.

### **What Is a Qualifying Child?**

The definition and determination of "qualifying child" is important for both HOH filing status and dependency purposes.

1. For HOH filing status purposes, a qualifying child is defined as a son, daughter, stepchild, or grandchild who lived with you for more than half the year. The child must be single and is a qualifying child even if you can't claim him or her as a dependent.
2. For dependency purposes, a qualifying child is a son, daughter, stepchild, brother, or sister that is under the age of 19 at the end of the year and younger than you; under the age of 24 if a student; or any age if permanently disabled. The person must have lived with you for more than half the year.
3. As discussed below, in a divorce the custodial parent can sign away his or her right to a child that otherwise qualifies as a dependent.
4. Only one person can claim a qualifying child for HOH and/or dependency purposes.

### **How Is Custodial vs. Noncustodial Parent Determined in Divorce?**

In a divorce the determination of custodial versus noncustodial parent is determined according to the number of nights the child spent with each parent. If the child spent an equal number of nights with each parent in any given year (e.g. 50/50 custody), the parent with the higher adjusted gross income is considered to be the custodial parent.

### **Can a Non-Custodial Parent Claim a Child as a Dependent?**

Yes. Typically, the custodial parent claims the child as a dependent. However, a non-custodial parent can claim a child if the custodial parent gives up the right by filing IRS Form 8832, making a written declaration to release the claim for the dependent.

### **Can a Taxpayer File Head-of-Household Without Claiming a Dependent?**

Yes. For HOH filing status, it is not necessary for the taxpayer to claim a dependent. However, the home of the taxpayer needs to be the main home of the qualifying child for more than half the year even if the non-custodial parent is claiming the dependent because you gave it up by filing Form 8832. For example, it is possible for one parent to use the benefits of HOH filing status, while the other parent claims a child as a dependent for other purposes such as the child tax and earned income tax credits. With nontaxable alimony, this concept creates a unique opportunity for one party to receive refundable tax credits, while the other party receives the benefit of HOH status resulting in lower federal tax.

### ***Can a Taxpayer Claim a Child Tax Credit (Discussed Below) Without Claiming a Dependent?***

No. In order to claim a child tax credit, the taxpayer must claim at least one dependent. As indicated above, a non-custodial parent can claim a child as a dependent as long as the custodial parent officially gave up the right.

### ***Can a Taxpayer Claim an Earned Income Credit (Discussed Below) Without Claiming a Dependent?***

Yes. If you don't claim a child that qualifies you for earned income tax credit (EITC), you are eligible without a qualifying child if (1) you meet all the EITC basic rules and (2) you cannot be claimed as a dependent or qualifying child on anyone else's return and (3) you are at least 25 but under 65 years old on December 31, the end of the tax year.

### **Child Tax Credit**

The TCJA expanded the amount, duration and availability of federal child tax credits resulting in a greater benefit available to more taxpayers. Divorce agreements should carefully consider which spouse benefits most, if at all, from the increased and potentially refundable child tax credits. To claim the refundable portion of the credit a taxpayer must have earned income.<sup>4</sup>

### ***The Change: A Doubled Credit for Those Who Claim Dependents and Incur a Tax Liability***

For taxpayers who claim a qualifying child as a dependent, the child tax credit has doubled to a maximum of \$2,000 per child 16 or younger at the end of the calendar year. The TCJA allows taxpayers to receive a refundable credit for as much as \$1,400 per child, which means that even if the tax liability is zero, the taxpayer may be eligible for a refund. The refundable credit is available to taxpayers with an "earned income" threshold of \$2,500 and is capped at 15% of earned income in excess of that amount up to \$1,400 per child. For qualifying children between the ages of 17 and 24, the child tax credit has been increased to \$500 per child, limited to the amount of tax liability (i.e., it is not refundable).

Applicable through 2025, the child tax credits phase out with adjusted gross income (AGI) of \$200,000 for Single or HOH filers. With AGI of up to \$200,000, a higher limit makes it available to more divorced taxpayers.

### ***The Impact***

At twice its previous level, the child tax credit is attractive to both the payor and payee, particularly as the number of children involved increases. However, due to the nontaxability of post-divorce maintenance for 2019 agreements and beyond, the tax credits and allocation of dependents must be considered carefully.

For example, if nontaxable post-divorce maintenance is a payee's only source of income, the payee is not eligible for either of the child tax credits (\$2,000 or \$500), because there is no federal tax liability. Additionally, the payee is not eligible for the \$1,400 refundable portion of the credit, due to the lack of earned income.

However, if a payee has a tax liability resulting from other taxable income (including pre-2019 taxable post-divorce maintenance), they are eligible for child tax credits up to the amount of tax liability. Absent use of the \$2,000 credit based on tax liability, a payee with earned income above \$2,500 is eligible for the \$1,400 refundable credit for each qualifying child under the age of 17, which could equate to a bonus of \$117 per month per child. Allocation of dependents and taxable income and earned income of the payee should be considered in conjunction with whether or not the payor can receive the full benefit of \$2,000 per child. If the payor benefits fully, the post-divorce estate could lose \$600 per child if the dependency exemptions are not carefully considered.

In considering the tax impact on the New York post-divorce maintenance formula, the child tax credits can be used to provide a bonus to the payee or considered as a mitigating factor to the payor for the non-deductibility of post-divorce maintenance. Either way, to avoid allowing more of a windfall to the government, it is important to preserve as much of the credits as possible by carefully weighing the facts and circumstances, including the age of the children and the projected taxable income and earned income of both parties. Also, dependency exemptions and child tax credits must be considered in conjunction with filing status.

In divorces in which alimony is the payee's only source of income, with one child under the age of 17, allocating the dependent to the payee could cost the post-divorce estate \$2,000 per year. However, before jumping to conclusions about allocation of dependents based on the child tax credits make sure to also consider the earned income credit.

### The Earned Income Credit

If the child tax credit and the case for the allocation of dependents isn't confusing enough, consider the earned income credit (EIC) and the different criteria for income and "qualifying" dependents. In order to qualify for the EIC, the taxpayer must have some type of earned income, such as wages or self-employment income. Even if post-divorce maintenance is taxable and considered as part of adjusted gross income, it is not considered earned income. Thus, a payee with taxable or non-taxable post-divorce maintenance and no earned income will not qualify for the earned income credit. Furthermore, taxpayers with investment income (e.g., dividends, interest, capital gains) in excess of \$3,600 do not qualify for the EIC.

For the child tax credit, qualifying children fall into one of two categories: 16 or younger or between 17 and 24. For the EIC for a child to qualify, at the end of the year he or she must be younger than 19 or, if a full-time student, the age limitation is relaxed to younger than 24.

As shown in the following table, the maximum earned income credit is based on the number of qualifying children. The credit phases out with earned income and is limited to adjusted gross income as follows for Single or HOH:

<b>Earned Income Credit</b>			
<b>Tax Year 2019</b>			
<b>Maximum Credit, Phaseout Range, and AGI Limit</b>			
Number of Qualifying Children	Maximum Credit	Earned Income Phaseout Amounts	AGI Limit for Single or HOH
0	\$ 529	\$ 8,650 to \$15,570	\$15,570
1	\$3,526	\$19,030 to \$41,094	\$41,094
2	\$5,828	\$19,030 to \$46,073	\$46,073
3 or more	\$6,557	\$19,030 to \$50,162	\$50,162

The earned income credit is fully refundable. Therefore, if a taxpayer qualifies, even if the tax liability is zero, the credit will provide a bonus upon the filing of a federal return. If a payee has earned income and qualifies for the maximum credit, on a monthly basis the credit equates to a bonus of \$294 for one child, \$487 for two children and \$546 for three or more children. This tax bonus can be considered in applying the New York post-divorce maintenance formula. However, as with the child tax credit, the age and education status of the children must be carefully considered into future years. Also, the credit won't arrive automatically and, thus, the payee must be diligent about filing a return to receive the payment.

### The Impact

The EIC may be even more valuable to the post-divorce estate than the child tax credits. With the maximum earned income phaseout amounts of \$50,162, in most divorces it's unlikely that the payor will benefit from the EIC. However, a payee with post-divorce maintenance as a primary source of income and earned income below or within the phase-out-range, can incrementally benefit with each child up to three. Therefore, it may be advisable to consider the allocation of dependents in terms of the EIC before considering the allocation for purposes of the child tax credit.

Prior to TCJA when alimony was taxable/deductible, the dependency exemptions were valuable simply because they provided a reduction against taxable income of \$4,050 per dependent. With the non-taxability of alimony and the elimination of the deduction, it's nonetheless important to determine which divorcing spouse benefits the most from claiming the children. In doing so, the interplay of filing status and standard deductions combined with an assessment of benefits resulting from earned income credits

and child tax credits should be analyzed and considered in applying the New York post-divorce maintenance formula.

The full impact of nontaxable/nondeductible alimony and the other TCJA changes is best understood by comparing tax-effected maintenance awards pre-TCJA to post-TCJA. The impact to the post-divorce estate can then be evaluated to determine potential adjustments to maintenance awards both within and outside of the New York formula.

### **Examples—Taxable Versus Nontaxable Post-Divorce Maintenance**

The following sections provide examples illustrating the impact of the 2017 TCJA on post-divorce estates using the 2019 tax year. The examples are useful in assessing post-2019 maintenance awards as well as modifications to separation, prenuptial and postnuptial agreements in existence prior to 2019.

The examples vary according to filing status, number of qualifying dependents and whether or not the payee has earned income in addition to post-divorce maintenance. Income tax at both the Federal and New York State level are considered, with an assumption that the payor and payee reside within New York City and thus pay taxes as New York City and New York State residents.

Examples 1 through 3 focus on maintenance awards that fall within the New York formula while Examples 4 and 5 focus on higher-net worth situations in which awards fall outside of the New York formula. The taxable/deductible calculations represent maintenance awards prior to 2019 (pre-TCJA) and the nontaxable/nondeductible calculations represent maintenance awards in 2019 and beyond (post-TCJA). Additional TCJA changes including tax rate, standard deductions, and child and earned income credits are used in both the pre- and post-TCJA scenarios. The QBI deduction, is considered in Example 1.

### **Examples Within the New York Formula**

Examples 1-3, illustrate scenarios that fall within the New York maintenance formula criteria by assuming that the payor earns the maximum income of \$184,000. In Example 1 there are no qualifying children and thus, both the payor and the payee file Single. Examples 2 and 3 assume that there are two children under the age of 17 that each qualify for the maximum \$2,000 child tax credit. In Examples 2 and 3, under the New York formula approach child support is calculated and considered in determining post-divorce maintenance. Examples 2A vs. 2B and 3A vs. 3B differ according to whether the payee or the payor file HOH or Single. In the "A" Examples, the payor files HOH with 2 dependents (HOH/2) and the payee files Single with 0 dependents (Single/0). In the B Examples, the payor files Single/0 and the payee files HOH/2. Finally, in Examples 1 and 2 the payee's only source of income is post-divorce maintenance. In Example 3, the payee has earned income, resulting in lower child support and lower post-divorce maintenance, relative to Example 2.

**Example 1: No Dependents, Filing Status Single**

Example 1 illustrates the least complicated scenario, in that both parties will use the filing status of Single because there are qualifying children and thus, no dependency exemptions that need to be allocated. Assuming no income for the payee and \$184,000 for the payor, using the New York formula approach, the annual post-divorce maintenance is \$49,919 (\$4,160 per month). The pre-vs. post-TCJA effects are displayed in the following table.

EXAMPLE 1							
Example 1: Pre-TCJA				Example 1: Post-TCJA			
	Payor Single/0	Payee Single/0	Total		Payor Single/0	Payee Single/0	Total
Earned Income	\$ 184,000	-		Earned Income	\$ 184,000	-	
Post-Divorce Maintenance	(49,919)	49,919		Post-Divorce Maintenance		-	
Adjusted Gross Income	\$ 134,081	\$ 49,919		Adjusted Gross Income	\$ 184,000	-	
Less: Standard Deduction	12,200	12,200		Less: Standard Deduction	12,200	-	
Federal Taxable Income	\$ 121,881	\$ 37,719		Federal Taxable Income	\$ 171,800	\$ -	
Federal Income Tax	\$ 23,541	\$ 4,337	\$ 27,878	Federal Income Tax	\$ 36,666	\$ -	\$ 36,666
New York State Tax	8,045	2,341	10,386	New York State Tax	8,045	2,341	10,386
NY City Tax	4,762	1,504	6,266	NY City Tax	4,762	1,504	6,266
NY City School Credit	(344)	(152)	(496)	NY City School Credit	(344)	(152)	(496)
Net NY Tax	\$ 12,463	\$ 3,693	\$ 16,156	Net NY Tax	\$ 12,463	\$ 3,693	\$ 16,156
Total Income Tax	\$ 36,004	\$ 8,030	\$ 44,034	Total Income Tax	\$ 49,129	\$ 3,693	\$ 52,822

Post-TCJA, the payor loses a tax benefit of \$13,125 while the payee gains a tax benefit of \$4,337, resulting in an \$8,788 loss to the post-divorce estate. From the payor's perspective, the formula-based monthly maintenance payment of \$4,160 is effectively increased by \$1,094 (\$13,125/12). From the payee's perspective, the tax savings result in a monthly increase of \$361 (\$4,337/12). Thus, the monthly maintenance payment of \$4,160, adjusted for tax, ranges from \$4,521 (payee's perspective) to \$5,254 (payor's perspective), the difference of \$733 being monthly windfall to the government (\$8,788/12). The challenge to attorneys and judges is determining how to allocate the government windfall between the divorcing spouses.

Example 1			
Total Tax Comparison			
Pre- Vs. Post-TCJA			
	Pre-	Post	Difference
Payor	\$ 36,004	\$ 49,129	\$ 13,125
Payee	8,030	3,693	(4,337)
Post-Divorce Estate	\$ 44,034	\$ 52,822	\$ 8,788

### Example 2A and 2B

In Examples 2A and 2B, there are two qualifying children and post-divorce maintenance is the payee's sole source of income. Using the payor's income of \$184,000 and the New York formula, child support is \$27,167 and maintenance is \$33,279. The pre- vs. post-TCJA effects when the Payor files HOH/2 and the payee files Single/0 are displayed in the following table:

EXAMPLE 2A							
Example 2A: Pre-TCJA				Example 2A: Post-TCJA			
	Payor HOH/2	Payee Single/0	Total		Payor HOH/2	Payee Single/0	Total
Earned Income	\$ 184,000	\$ -		Earned Income	\$ 184,000	\$ -	
Post-Divorce Maintenance	(33,279)	33,279		Post-Divorce Maintenance		-	
Adjusted Gross Income	\$ 150,721	\$ 33,279		Adjusted Gross Income	\$ 184,000	\$ -	
Less: Standard Deduction	18,350	12,200		Less: Standard Deduction	18,350	-	
Federal Taxable Income	\$ 132,371	\$ 21,079		Federal Taxable Income	165,650	-	
Federal Income Tax	24,667	2,339	27,006	Federal Income Tax	\$ 33,306	\$ -	\$ 33,306
Child Tax Credits	(4,000)		(4,000)	Child Tax Credits	(4,000)		(4,000)
Net Federal Tax	\$ 20,667	\$ 2,339	\$ 23,006	Net Federal Tax	\$ 29,306	\$ -	\$ 29,306
New York State Tax	\$ 8,934	\$ 1,287	\$ 10,221	New York State Tax	\$ 8,934	\$ 1,287	\$ 10,221
NY City Tax	5,181	869	6,050	NY City Tax	5,181	869	6,050
NY Child Tax Credit			-	NY Child Tax Credit	-		-
NY City School Credit	(369)	(114)	(483)	NY City School Credit	(369)	(114)	(483)
Net NY Tax	\$ 13,746	\$ 2,042	\$ 15,788	Net NY Tax	\$ 13,746	\$ 2,042	\$ 15,788
Total Income Tax	\$ 34,413	\$ 4,381	\$ 38,794	Total Income Tax	\$ 43,052	\$ 2,042	\$ 45,094

Note that pre- and post-TCJA, the payor receives the full \$4,000 benefit from the child tax credits and also receives a benefit from the higher standard deduction using HOH filing status. If the dependents and HOH filing status were allocated to the payee, the post-divorce estate would have lost \$4,000 in child tax credits as well as the \$6,150 increase in the standard deduction due to the fact that the payee has no taxable income.

In this scenario, pre-TCJA compared to post-TCJA the payor's tax benefit is reduced by \$8,639 and the payee's tax benefit is increased by \$2,339, resulting in a \$6,300 loss to the post-divorce estate. On a monthly basis, the payor's post-divorce maintenance is effectively increased by \$720 (\$8,639/12)), but the payee only receives an additional \$195 (\$2,339/12), providing the Federal government with a monthly windfall of \$525.

Example 2A			
Total Tax Comparison			
Pre- and Post-TCJA			
	Pre	Post	Difference
Payor (HOH/2)	\$ 34,413	\$ 43,052	\$ 8,639
Payee (SINGLE/0)	4,381	2,042	(2,339)
Post-Divorce Estate	\$ 38,794	\$ 45,094	\$ 6,300

The pre-vs. post-TCJA effects when the Payor files Single/0 and the payee files HOH/2 are displayed in the following table for Example 2B:

EXAMPLE 2B							
Example 2B: Pre-TCJA				Example 2B: Post-TCJA			
	Payor Single/0	Payee HOH/2	Total		Payor Single/0	Payee HOH/2	Total
Earned Income	\$ 184,000	\$ -		Earned Income	\$ 184,000	\$ -	
Post-Divorce Maintenance	(33,279)	33,279		Post-Divorce Maintenance			
Adjusted Gross Income	150,721	33,279		Adjusted Gross Income	184,000		
Less: Standard Deduction	12,200	18,350		Less: Standard Deduction	12,200		
Federal Taxable Income	\$ 138,521	\$ 14,929		Federal Taxable Income	\$ 171,800	\$ -	
Federal Income Tax	\$ 27,535	\$ 1,519	\$ 29,054	Federal Income Tax	\$ 36,666	\$ -	\$ 36,666
Child Tax Credits	-	(1,519)	(1,519)	Child Tax Credits			-
Net Federal Tax	\$ 27,535	\$ -	\$ 27,535	Net Federal Tax	\$ 36,666	\$ -	\$ 36,666
New York State Tax	\$ 9,307	\$ 857	\$ 10,164	New York State Tax	\$ 9,307	\$ 857	\$ 10,164
NY City Tax	5,407	656	6,063	NY City Tax	5,407	656	6,063
NY Child Tax Credit		(502)	(502)	NY Child Tax Credit	-	(502)	(502)
NY City School Credit	(382)	(101)	(483)	NY City School Credit	(382)	(101)	(483)
Net NY Tax	\$ 14,332	\$ 910	\$ 15,725	Net NY Tax	\$ 14,332	\$ 910	\$ 15,725
Total Income Tax	\$ 41,867	\$ 910	\$ 43,760	Total Income Tax	\$ 50,998	\$ 910	\$ 52,391

Compared to Example 2A, notice that both pre-TCJA and post-TCJA the benefit of the \$4,000 child tax credit is no longer available. Pre-TCJA, when the payee files HOH and uses the dependents, the child tax credit is limited to the tax liability of \$1,519. Post-TCJA, because there is no tax liability for the payee, the entire \$4,000 child tax credit is lost. Furthermore, the payor loses the benefit of the higher standard deduction, while the payee receives no benefit from the standard deduction, whether filing Single or HOH.

Example 2B			
Total Tax Comparison			
Pre- and Post-TCJA			
	Pre	Post	Difference
Payor (Single/0)	\$ 41,867	\$ 50,998	\$ 9,131
Payee (HOH/2)	910	910	-
Post Divorce Estate	\$ 42,777	\$ 51,908	\$ 9,131

In Example 2B, when the payee uses HOH/2 versus Single/0, the pre and post-TCJA results are identical due to the fact that pre-TCJA, the child tax credit completely offsets the tax liability of \$1,519. However, when the payor uses HOH/2 vs. Single/0, the tax liability pre- vs. post-TCJA is increase from \$8,639 to \$9,131 due to the loss of the \$4,000 child tax credit and the increase in the standard deduction.

Examples 2A and 2B illustrate that careful consideration of filing status combined with allocation of dependents can be used to save tax dollars for the post-divorce estate. For the payor, HOH/2 results in a \$7,946 lower tax liability. Alternatively, for the payee HOH/2 only results in a \$1,132 lower tax liability. Thus, allocating HOH status and two dependents to the payor, rather than the payee who had no taxable income at the federal level, saved the post-divorce estate \$6,814 in tax dollars as shown in the following table.

Summary Comparison of Example 2A and 2B				
Post-TCJA				
Head-of-Household With Dependents vs. Single				
	HOH/2	Single/0	Difference	
Payor Total Income Tax	\$ 43,052	\$ 50,998	\$ (7,946)	
Payee Total Income Tax	\$ 910	\$ 2,042	(1,132)	
Difference in Favor of HOH/2 for Payor			\$ (6,814)	

The following table provides a detailed analysis of the \$6,814 difference in favor of the payor using HOH/2:

POST-TCJA COMPARISON OF EXAMPLE 2A TO 2B							
	Payor HOH v Single			Payee HOH v Single			Comparison of Difference When Payor Uses HOH/2 and Payee Uses Single/0
	2A-Payor HOH/2	2B-Payor Single/0	Difference	2B Payee HOH/2	2A Payee Single/0	Difference	
Adjusted Gross Income	\$ 184,000	\$ 184,000	\$ -	\$ -	\$ -	\$ -	\$ -
Less: Standard Deduction	18,150	12,200	6,150				6,150 Standard Deduction Higher
Federal Taxable Income	\$ 165,850	\$ 171,800	\$ (6,150)	\$ -	\$ -	\$ -	\$ (6,150) Taxable Income Lower
Federal Income Tax	\$ 33,306	\$ 36,666	\$ (3,360)	\$ -	\$ -	\$ -	\$ (3,360) Federal Tax Lower
Child Tax Credits	(4,000)		(4,000)				(4,000) Child Tax Credit Higher
Net Federal Tax	\$ 29,306	\$ 36,666	\$ (7,360)	\$ -	\$ -	\$ -	\$ (7,360) Net Federal Tax Liability Lower
New York State Tax	\$ 8,934	\$ 9,307	\$ (373)	\$ 857	\$ 1,287	\$ (430)	\$ 57 State Tax Higher
NY City Tax	5,183	5,407	(226)	656	869	(213)	(13) City Tax Lower
NY Child Tax Credit	-	-	-	(502)		(502)	502 Loss of Child Tax Credit
NY City School Credit	(369)	(382)	13	(107)	(114)	13	
Net NY Tax	\$ 13,796	\$ 14,332	\$ (536)	\$ 910	\$ 2,042	\$ (1,132)	\$ 546 Net State Tax Liability Higher
Total Income Tax	\$ 43,052	\$ 50,998	\$ (7,946)	\$ 910	\$ 2,042	\$ (1,132)	\$ (6,814) Total Income Tax Liability Lower

The higher standard deduction at the payor level provides a \$6,150 decrease to taxable income for a \$3,360 tax saving. Also, the payor benefits from the \$4,000 in child tax credits because they are less than the total tax liability. Although the New York income tax is \$546 higher when the payor claims the dependents, it doesn't exceed the tax savings of \$7,360 at the federal level.

**Example 3A and 3B**

In Examples 3A and 3B, there are two qualifying children and in addition to post-divorce maintenance, the payee has earned income. Using the payor's income of \$184,000, the payee's income of \$55,200 and the New York formula, child support is \$23,254 and maintenance is \$20,961.

The pre-vs. post-TCJA effects when the Payor files HOH/2 and the payee files Single/0 are displayed in the following table:

EXAMPLE 3A							
Example 3A: Pre-TCJA				Example 3A: Post-TCJA			
	Payor HOH/2	Payee Single/0	Total		Payor HOH/2	Payee Single/0	Total
Earned Income	\$ 184,000	\$ 55,200		Earned Income	\$ 184,000	\$ 55,200	
Post-Divorce Maintenance	(20,961)	20,961		Post-Divorce Maintenance		-	
Adjusted Gross Income	\$ 163,039	\$ 76,161		Adjusted Gross Income	\$ 184,000	\$ 55,200	
Less: Standard Deduction	18,350	12,200		Less: Standard Deduction	18,350	12,200	
Federal Taxable Income	\$ 144,689	\$ 63,961		Federal Taxable Income	\$ 165,650	\$ 43,000	
Federal Income Tax	\$ 27,623	\$ 10,014	\$ 37,637	Federal Income Tax	\$ 33,306	\$ 5,405	\$ 38,711
Child Tax Credits	(4,000)		(4,000)	Child Tax Credits	(4,000)		(4,000)
Net Federal Tax	\$ 23,623	\$ 10,014	\$ 33,637	Net Federal Tax	\$ 29,306	\$ 5,405	\$ 34,711
New York State Tax	\$ 9,844	\$ 4,002	\$ 13,846	New York State Tax	\$ 9,844	\$ 4,002	\$ 13,846
NY City Tax	5,658	2,517	8,175	NY City Tax	5,658	2,517	8,175
NY Child Tax Credit	-	-	-	NY Child Tax Credit	-	-	-
NY City School Credit	(397)	(212)	(609)	NY City School Credit	(397)	(212)	(609)
Net NY Tax	\$ 15,105	\$ 6,307	\$ 21,412	Net NY Tax	\$ 15,105	\$ 6,307	\$ 21,412
Total Income Tax	\$ 38,728	\$ 16,321	\$ 55,049	Total Income Tax	\$ 44,411	\$ 11,712	\$ 56,123

Note that pre- and post-TCJA, the payor receives the full \$4,000 benefit from the child tax credits and also receives a benefit from the higher standard deduction using HOH filing status.

In this scenario, pre-TCJA compared to post-TCJA the payor's tax benefit is reduced by \$5,683 and the payee's tax benefit is increased by \$4,609, resulting in a \$1,074 loss to the post-divorce estate. On a monthly basis, the payor's post-divorce maintenance payment is effectively increased by \$474 (\$5,683/12), but the payee only receives an additional \$384 (\$4,609/12), providing the Federal government with a monthly windfall of \$90.

Example 3A			
Total Tax Comparison			
Pre- and Post-TCJA			
	Pre	Post	Difference
Payor	38,728	44,411	5,683
Payee	16,321	11,712	(4,609)
Post-Divorce Estate Increase in	55,049	56,123	1,074

The pre-vs. post-TCJA effects when the Payor files Single/0 and the payee files HOH/2 are displayed in the following table:

EXAMPLE 3B							
Example 3B: Pre TCJA				Example 3B: Post TCJA			
	Payor Single/0	Payee HOH/2	Total		Payor Single/0	Payee HOH/2	Total
Earned Income	184,000	55,200		Earned Income	184,000	55,200	
Post-Divorce Maintenance	(20,961)	20,961		Post-Divorce Maintenance		-	
Adjusted Gross Income	163,039	76,161		Adjusted Gross Income	184,000	55,200	
Less: Standard Deduction	12,200	18,350		Less: Standard Deduction	12,200	18,350	
Federal Taxable Income	150,839	57,811		Federal Taxable Income	171,800	36,850	
Federal Income Tax	30,491	7,270	37,761	Federal Income Tax	36,666	4,153	40,819
Child Tax Credits	-	(4,000)	(4,000)	Child Tax Credits		(4,000)	(4,000)
Net Federal Tax	30,491	3,270	33,761	Net Federal Tax	36,666	153	36,819
New York State Tax	10,186	3,516	13,702	New York State Tax	10,186	3,516	13,702
NY City Tax	5,884	2,291	8,175	NY City Tax	5,884	2,291	8,175
NY Child Tax Credit		(627)	(627)	NY Child Tax Credit		(660)	(660)
NY City School Credit	(410)	(199)	(609)	NY City School Credit	(410)	(199)	(609)
Net NY Tax	15,660	4,981	20,641	Net NY Tax	15,660	4,948	20,608
Total Income Tax	46,151	8,251	54,402	Total Income Tax	52,326	5,101	57,427

Compared to Example 3A, note that pre- and post-TCJA, because the payee has income in addition to post-divorce maintenance, the payee also receives the full \$4,000 benefit from the child tax credits as well as the benefit from the higher standard deduction using HOH filing status. In the post-TCJA scenario, the child tax credits almost reduce the payee's tax liability to zero.

In this scenario, pre-TCJA compared to post-TCJA the payor's tax benefit is reduced by \$6,175 and the payee's tax benefit is increased by \$3,150, resulting in a \$3,025 loss to the post-divorce estate. Compared to Example 3A, where the payor claimed the dependents and used the HOH filing status, the wind-fall to the government is higher mostly because the payor is in a higher marginal tax bracket and thus receives more benefit from the higher standard deduction.

Example 3B			
Total Tax Comparison			
Pre- and Post-TCJA			
	Pre	Post	Difference
Payor	\$ 46,151	\$ 52,326	\$ 6,175
Payee	8,251	5,101	(3,150)
Post-Divorce Estate	\$ 54,402	\$ 57,427	\$ 3,025

The following table compares Post-TCJA tax differences for the payee and payor when one or the other uses HOH/2 vs. Single/0. HOH vs. Single combined with claiming two dependents results in a \$7,915 lower tax liability for the payor and a \$6,611 lower tax liability for the payee. In this scenario, the benefit to the post-divorce estate for the payor claiming the dependents and using HOH filing status is only \$1,304.

Summary Comparison of Examples 3A and 3B				
Post-TCJA				
Head-of-Household With Dependents vs. Single				
	HOH/2	Single/0	Difference	
Payor Total Income Tax	\$ 44,411	\$ 52,326	\$ (7,915)	
Payee Total Income Tax	5,101	11,712	(6,611)	
Difference in favor of HOH/2 for Payor			\$ (1,304)	

The following table provides a detailed analysis of the (\$1,304) difference in favor of the payor using HOH/2:

POST-TCJA COMPARISON OF EXAMPLE 3A TO 3B								
	Payor HOH v Single			Payee HOH v Single			Comparison of Differences When Payor Uses HOH/2 and Payee Uses Single/0	
	3A Payor HOH/2	3B Payor Single/0	Difference	3B Payee HOH/2	3A Payee Single/0	Difference		
Adjusted Gross Income	\$ 184,000	\$ 184,000	\$ -	\$ 55,200	\$ 55,200	\$ -	\$ -	
Less: Standard Deduction	18,050	17,200	6,150	18,050	17,200	6,150	-	Standard Deduction Same
Federal Taxable Income	\$ 365,650	\$ 171,800	\$ (6,150)	\$ 36,850	\$ 43,000	\$ (6,150)	\$ -	Taxable Income Same
Federal Income Tax	\$ 33,306	\$ 36,666	\$ (3,360)	\$ 4,153	\$ 5,405	\$ (1,252)	\$ (2,108)	Federal Tax Lower
Child Tax Credits	(4,000)	-	(4,000)	(4,000)	-	(4,000)	-	Child Tax Credit Same
Net Federal Tax	\$ 29,306	\$ 36,666	\$ (7,360)	\$ 153	\$ 5,405	\$ (5,252)	\$ (2,108)	Net Federal Tax Liability Lower
New York State Tax	\$ 9,844	\$ 10,286	\$ (442)	\$ 3,516	\$ 4,007	\$ (491)	\$ 144	State Tax Higher
NY City Tax	5,628	5,884	(256)	2,291	2,517	(226)	-	City Tax Lower
NY Child Tax Credit	-	-	-	(640)	-	(640)	640	Loss of Child Tax Credit
NY City School Credit	(337)	(410)	13	(199)	(212)	13	-	School Tax Credit Same
Net NY Tax	\$ 15,105	\$ 15,660	\$ (555)	\$ 4,948	\$ 6,307	\$ (1,359)	\$ 804	Net State Tax Liability Higher
Total Income Tax	\$ 44,411	\$ 52,326	\$ (7,915)	\$ 5,101	\$ 11,712	\$ (6,611)	\$ (1,304)	Total Income Tax Liability Lower

In Example 3B, the payor and payee each benefit from the higher standard deduction for HOH, because the payee has income in addition to maintenance. Additionally, the payor and payee equally benefit from the \$4,000 child tax credits. However, when the payor uses HOH, the tax liability for the post-divorce estate is lower by \$2,108 because the payor benefits fully from the \$1,392 tax savings for HOH and there is less income above the \$82,500 HOH vs. Single threshold that is taxed at higher marginal rates. Although the New York income tax is \$804 higher when the payor claims the dependents, it doesn't exceed the \$2,108 tax savings at the federal level.

### Examples Outside the New York Formula

Examples 4 and 5 illustrate the impact of the 2017 TCJA on post-divorce estates using maintenance awards that fall outside the New York formula (i.e., high net-worth divorce). For maintenance purposes, payor/payee income is assumed to be \$500,000/\$40,000 in Examples 4A and 4B and \$5,000,000/\$200,000 in Examples 5A and 5B. As in the previous examples, there are two children under the age of 17 that each qualify for the maximum \$2,000 child tax credit. In the "A" Examples, the payor files HOH with 2 dependents (HOH/2) and the payee files Single with 0 dependents (Single/0). In the "B" Examples, the payor files Single/0 and the payee files HOH/2. The examples assume that both the payor and payee have itemized deductions in excess of the standard deductions for HOH and/or Single. Specifically, total itemized deductions for the payor and payee are \$38,500, consisting of \$10,000 for state, local and property tax (maximum allowed under the TCJA) and \$28,500 of mortgage interest based on the maximum allowable post-TCJA mortgage acquisition debt of \$750,000 at an assumed rate of 3.8%. Contributions are not considered, but would decrease federal taxable income for both parties.

**Example 4A and 4B**

Example 4A and 4B illustrate taxable versus non-taxable post-divorce maintenance of \$50,000 assuming payor income of \$500,000, payee additional earned income of \$40,000, and itemized deductions of \$38,500 for both the payor and the payee. Although child support does not impact the analysis, it was assumed to be \$90,000 in arriving at the post-divorce maintenance amount.

**Example 4A**

The pre-vs. post-TCJA effects when the Payor files HOH/2 and the payee files Single/0 are displayed in the following table:

EXAMPLE 4A							
Example 4A: Pre-TCJA				Example 4A: Post-TCJA			
	Payor HOH/2	Payee Single/0	Total		Payor HOH/2	Payee Single/0	Total
Earned Income	\$ 500,000	\$ 40,000		Income	\$ 500,000	\$ 40,000	
Post-Divorce Maintenance	(50,000)	50,000		Post-Divorce Maintenance			
Adjusted Gross Income	\$ 450,000	\$ 90,000		Adjusted Gross Income	\$ 500,000	\$ 40,000	
Itemized Deductions	38,500	38,500		Itemized Deductions	38,500	38,500	
Federal Taxable Income	\$ 411,500	\$ 51,500		Federal Taxable Income	\$ 461,500	\$ 1,500	
Federal Income Tax	\$ 121,023	\$ 7,275	\$ 128,298	Federal Income Tax	\$ 138,523	\$ 151	\$ 138,674
Child Tax Credit	-	-	-	Child Tax Credit	-	-	-
Net Federal Tax	\$ 121,023	\$ 7,275	\$ 128,298	Net Federal Tax	\$ 138,523	\$ 151	\$ 138,674
New York State Tax	\$ 29,921	\$ 4,882	\$ 34,803	New York State Tax	\$ 29,921	\$ 4,882	\$ 34,803
NY City Tax	16,781	3,053	19,834	NY City Tax	16,781	3,053	19,834
NY City School Credit	(988)	(244)	(1,232)	NY City School Credit	(988)	(244)	(1,232)
NY Child Tax Credit	-	-	-	NY Child Tax Credit	-	-	-
Net NY Tax	\$ 45,714	\$ 7,691	\$ 53,405	Net NY Tax	\$ 45,714	\$ 7,691	\$ 53,405
Total Income Tax	\$ 166,737	\$ 14,966	\$ 181,703	Total Income Tax	\$ 184,237	\$ 7,842	\$ 192,079

In Example 4A, pre-and post-TCJA, the payor's adjusted gross income is above the limit in which the child tax credits can be utilized. Thus, the payor does not benefit from claiming the children as dependents. Furthermore, because both the payor and the payee have itemized deductions that are well in excess of the standard deductions for HOH (\$18,350) or Single (\$12,200), there is no benefit to either for the additional increased standard deduction available for HOH. However, in both scenarios, because the payee's income is below the \$82,500 tax table convergence point for Single vs. HOH, from a tax rate perspective, the payor realizes the full tax savings of \$1,392 by using HOH, while the payee would only receive partial benefit because taxable income is below \$82,500.

Example 4A			
Total Tax Comparison			
Pre- Vs. Post-TCJA			
	Pre	Post	Difference
Payor	\$ 166,737	\$ 184,237	\$ 17,500
Payee	14,966	7,842	(7,124)
Post-Divorce Estate Tax Increase	\$ 181,703	\$ 192,079	\$ 10,376

In Example 4A, pre-TCJA compared to post-TCJA, the payor's tax benefit is reduced by \$17,500, which is \$50,000 multiplied by the payor's marginal tax rate of 35%. Because the payee is in a much lower tax bracket, the payee's tax benefit from non-taxable maintenance is only increased by \$7,124. The loss to the post-divorce estate resulting from nontaxable/nondeductible maintenance is \$10,370. On a monthly basis, the payor's post-divorce maintenance cost is increased by \$1,458 (\$17,500/12), but the payee only receives an additional \$594 (\$7,124/12), providing the Federal government with a monthly windfall of \$865.

**Example 4B**

The pre-vs. post-TCJA effects when the payor files Single/0 and the payee files HOH/2 are displayed in the following table:

EXAMPLE 4B							
Example 4B: Pre TCJA				Example 4B: Post TCJA			
	Payor Single/0	Payee HOH/2	Total		Payor Single/0	Payee HOH/2	Total
Earned Income	\$ 500,000	\$ 40,000		Income	\$ 500,000	\$ 40,000	
Post-Divorce Maintenance	(50,000)	50,000		Post-Divorce Maintenance			
Adjusted Gross Income	450,000	90,000		Adjusted Gross Income	500,000	40,000	
Standard Deduction	38,500	38,500		Itemized Deductions	38,500	38,500	
Federal Taxable Income	\$ 411,500	\$ 51,500		Federal Taxable Income	\$ 461,500	\$ 1,500	
Federal Income Tax	\$ 122,415	\$ 5,911	\$ 128,326	Federal Income Tax	\$ 139,915	\$ 151	\$ 140,066
Child Tax Credit		(4,000)	(4,000)	Child Tax Credit		(151)	(151)
Earned Income Credit			-	Earned Income Credit		(1,217)	(1,217)
Additional Child Tax Credit			-	Additional Child Tax Credit		(2,800)	(2,800)
Net Federal Tax	\$ 122,415	\$ 1,911	\$ 124,326	Net Federal Tax	\$ 139,915	\$ (4,017)	\$ 135,898
New York State Tax	\$ 30,277	\$ 4,391	\$ 34,668	New York State Tax	\$ 30,277	\$ 4,391	\$ 34,668
NY City Tax	17,007	2,827	19,834	NY City Tax	17,007	2,827	19,834
NY City School Credit	(1,001)	(230)	(1,231)	NY City School Credit	(1,001)	(230)	(1,231)
NY Child Tax Credit		(413)	(413)	NY Child Tax Credit		(413)	(413)
Net NY Tax	\$ 46,283	\$ 6,575	\$ 52,858	Net NY Tax	\$ 46,283	\$ 6,575	\$ 52,858
Total Income Tax	\$ 168,698	\$ 12,486	\$ 181,184	Total Income Tax	\$ 186,198	\$ 2,558	\$ 188,756

In Example 4B the payee receives benefit from claiming the dependents both pre- and post-TCJA. Specifically, with taxable maintenance, the tax liability of \$5,911 results in the payee receiving full benefit from the \$4,000 child tax credits. With nontaxable maintenance, the payee only receives a \$151 benefit from the \$600 per child portion of the nonrefundable child tax credit. However, because of the earned income, the payee benefits entirely from the \$1,400 per child (\$2,800 total) nonrefundable portion of the child tax credit. Also, when post-divorce maintenance is nontaxable, the payee receives an earned income credit of \$1,217 because AGI is below the limit of \$46,073. With two dependents the maximum EIC is \$5,828. However, the maximum is phased out within the earned income range of \$19,030 to \$46,073.

Example 4B			
Total Tax Comparison			
Pre- Vs. Post-TCJA			
	Pre	Post	Difference
Payor	\$ 168,698	\$ 186,198	\$ 17,500
Payee	12,486	2,558	(9,928)
Post-Divorce Estate Increase in Tax	\$ 181,184	\$ 188,756	\$ 7,572

Pre- and post-TCJA the payor receives no benefit from claiming the dependents and in both scenarios (4A or 4B) whether filing HOH/2 or Single/0, the additional cost of non-deductible maintenance to the payor is \$17,500. For the payee, pre-vs. post-TCJA, the benefit of nontaxable maintenance is \$9,928 using HOH/2 compared to \$7,124 using Single/0. Thus, pre-vs. post TCJA there is an additional benefit of \$2,804 to the payee by using HOH filing status and claiming the children as dependents.

Comparing Example 4A to 4B, there is a \$3,323 benefit to the post-divorce estate when the payee uses HOH and claims the dependents. The payor's additional cost of HOH/2 vs. Single/0 when maintenance is non-deductible is \$1,961 but the payee's gain is \$5,284.

Comparison of Examples 4A and 4B			
Post-TCJA			
Head-of-Household With Dependents vs. Single			
	HOH/2	Single/0	Difference
Payor	\$ 184,237	\$ 186,198	\$ (1,961)
Payee	2,558	7,842	(5,284)
Difference in Favor of HOH/2 for Payee			\$ 3,323

The following table provides a detailed analysis of the \$3,323 difference in favor of the payee using HOH/2:

POST-TCJA COMPARISON OF EXAMPLE 4A TO 4B							
	Payor HOH v Single			Payee HOH v Single			Comparison of Differences When Payor Uses HOH/2 and Payee Uses Single/1
	HOH/2	Single/0	Difference	HOH/2	Single/0	Difference	
Adjusted Gross Income	\$ 500,000	\$ 500,000	\$ -	\$ 40,000	\$ 40,000	\$ -	\$ -
Less: Divorced Deductions	18,500	18,500		18,500	18,500		Divorced Deductions Same
Federal Taxable Income	\$ 461,500	\$ 461,500	\$ -	\$ 1,500	\$ 1,500	\$ -	Taxable Income Same
Federal Income Tax	\$ 138,573	\$ 139,915	\$ (1,392)	\$ 151	\$ 151	\$ -	\$ (1,392) Federal Tax Lower (Full benefit of HOH)
Child Tax Credits				(151)		(151)	151 Child Tax Credit Lower
Earned Income Credit				(1,217)		(1,217)	1,217 Earned Income Credit Lower
Additional Child Tax Credits				(2,800)		(2,800)	2,800 Additional Child Tax Credit Lower
Net Federal Tax (Refund)	\$ 138,573	\$ 139,915	\$ (1,392)	\$ (4,017)	\$ 151	\$ (4,168)	\$ 2,776 Net Federal Tax Liability Higher
New York State Tax	\$ 29,021	\$ 30,277	\$ (1,256)	\$ 4,361	\$ 4,882	\$ (491)	\$ 135 State Tax Higher
NY City Tax	16,783	17,007	(226)	2,827	3,053	(226)	- City Tax Same
NY City School Credit	(988)	(1,001)	13	(238)	(244)	14	(1) City School Credit Higher
NY City Child Tax Credit	-	-	-	(413)	-	(413)	413 City Child Credit Lower
Net NY Tax	\$ 45,714	\$ 46,283	\$ (569)	\$ 6,575	\$ 7,651	\$ (1,116)	\$ 547 Net State Tax Liability Higher
Total Income Tax	\$ 184,237	\$ 186,198	\$ (1,961)	\$ 2,558	\$ 7,842	\$ (5,284)	\$ 3,323 Total Income Tax Liability Higher

The detailed analysis shows that when using HOH status, the payor's federal income tax is lower by \$1,392 because the taxable income exceeds the \$82,500 tax table convergence threshold for HOH vs. Single. However, the payor's income is above the \$200,000 AGI limit for child tax credits and way beyond any limits for EIC. Interestingly, in this higher net worth scenario, earned income qualifies the payee for the additional child tax credits as well as the EIC.

### Example 5A and 5B

Example 5A and 5B illustrate taxable versus non-taxable post-divorce maintenance of \$500,000 assuming payor income of \$5,000,000, payee additional earned income of \$200,000, and itemized deductions of \$38,500 for both the payor and the payee. Although child support does not impact the analysis, it was assumed to be \$60,000 in arriving at the post-divorce maintenance amount.

### Example 5A

The pre-vs. post-TCJA effects when the Payor files HOH/2 and the payee files Single/0 are displayed in the following table:

EXAMPLE 5A							
Example 5A: Pre TCJA				Example 5A: Post TCJA			
	Payor HOH/2	Payee Single/0	Total		Payor HOH/2	Payee Single/0	Total
Income	\$ 3,000,000	\$ 200,000		Income	\$ 3,000,000	\$ 200,000	
Post-Divorce Maintenance	(500,000)	500,000		Post-Divorce Maintenance			
Adjusted Gross Income	\$ 2,500,000	\$ 700,000		Adjusted Gross Income	\$ 3,000,000	\$ 200,000	
Itemized Deductions	38,500	38,500		Itemized Deductions	38,500	38,500	
Federal Taxable Income	\$ 2,461,500	\$ 661,500		Federal Taxable Income	\$ 2,961,500	\$ 161,500	
Federal Income Tax	\$ 900,253	\$ 210,445	\$ 1,110,698	Federal Income Tax*	\$ 1,085,253	\$ 33,727	\$ 1,118,975
Child Tax Credit	-	-	-	Child Tax Credit	-	-	-
Net Federal Tax	\$ 900,253	\$ 210,445	\$ 1,110,698	Net Federal Tax	\$ 1,085,253	\$ 33,727	\$ 1,118,975
New York State Tax	\$ 219,336	\$ 47,402	\$ 266,738	New York State Tax	\$ 219,336	\$ 47,402	\$ 266,738
NY City Tax	96,239	26,697	122,936	NY City Tax	96,239	26,697	122,936
NY City School Credit	-	-	-	NY City School Credit	-	-	-
Net NY Tax	\$ 315,575	\$ 74,099	\$ 389,674	Net NY Tax	\$ 315,575	\$ 74,099	\$ 389,674
Total Income Tax	\$ 1,215,828	\$ 284,544	\$ 1,500,372	Total Income Tax	\$ 1,400,828	\$ 107,821	\$ 1,508,649

In Example 5A, pre-and post-TCJA, the adjusted gross income of both the payor and the payee are above the limit in which the child tax credits can be utilized. Thus, neither benefits from claiming the children as dependents. Furthermore, because the payor and the payee each have itemized deductions that are well in excess of the standard deductions for HOH (\$18,350) or Single (\$12,200), there is no benefit to either for the additional increased standard deduction available for HOH. Finally, because the taxable income of the payor and the payee are above the \$82,500 tax table convergence point for Single vs. HOH, from a tax rate perspective, both would realize the full tax savings of \$1,392 by using HOH.

Example 5A			
Total Tax Comparison			
Pre- Vs. Post-TCJA			
	Pre	Post	Difference
Payor	\$ 1,215,828	\$ 1,400,828	\$ 185,000
Payee	284,544	107,821	(176,723)
Post-Divorce Estate	\$ 1,500,372	\$ 1,508,649	\$ 8,277

In Example 5A, pre-TCJA compared to post-TCJA, the payor's tax benefit is reduced by \$185,000 which is the post-divorce maintenance of \$500,000 multiplied by the payor's marginal tax rate of 37%.

The payee's tax benefit from non-taxable maintenance is \$176,723 because post-TCJA when maintenance is nontaxable, the payee is in a lower tax bracket and the tax savings average 35.3% rather than 37%. The loss to the post-divorce estate resulting from nontaxable/nondeductible maintenance is \$8,277. On a monthly basis, the payor's post-divorce maintenance cost is increased by \$15,416 (\$185,000/12)), and the payee effectively receives an additional \$14,727 (\$175,723/12), providing the Federal government with a monthly windfall of \$670.

**Example 5B**

The pre-vs. post-TCJA effects when the payor files Single/0 and the payee files HOH/2 are displayed in the following table:

EXAMPLE 5B							
Example 5B: Pre TCJA				Example 5B: Post TCJA			
	Payor Single/0	Payee HOH/2	Total		Payor Single/0	Payee HOH/2	Total
Income	\$ 3,000,000	\$ 200,000		Income	\$ 3,000,000	\$ 200,000	
Post-Divorce Maintenance	(500,000)	500,000		Post-Divorce Maintenance			
Adjusted Gross Income	\$ 2,500,000	\$ 700,000		Adjusted Gross Income	\$ 3,000,000	\$ 200,000	
Itemized Deductions	18,500	18,500		Itemized Deductions	18,500	18,500	
Federal Taxable Income	\$ 2,461,500	\$ 661,500		Federal Taxable Income	\$ 2,961,500	\$ 161,500	
Federal Income Tax	\$ 901,645	\$ 209,053	\$ 1,110,698	Federal Income Tax	\$ 1,086,645	\$ 33,722	\$ 1,120,367
Child Tax Credit	-	-	-	Child Tax Credit	-	(4,000)	(4,000)
Net Federal Tax	\$ 901,645	\$ 209,053	\$ 1,110,698	Net Federal Tax	\$ 1,086,645	\$ 29,722	\$ 1,116,367
New York State Tax	\$ 219,794	\$ 47,046	\$ 266,840	New York State Tax	\$ 219,794	\$ 47,046	\$ 266,840
NY City Tax	96,465	26,471	122,936	NY City Tax	96,465	26,471	122,936
NY City School Credit	-	-	-	NY City School Credit	-	-	-
Net NY Tax	\$ 316,259	\$ 73,517	\$ 389,776	Net NY Tax	\$ 316,259	\$ 73,517	\$ 389,776
Total Income Tax	\$ 1,217,904	\$ 282,570	\$ 1,500,474	Total Income Tax	\$ 1,402,904	\$ 103,239	\$ 1,506,143

In Example 5B when maintenance is nontaxable, the payee's adjusted gross income (based on earned income) equates to the cutoff for receiving the full benefit of the child tax credits. Thus, the payee and the post-divorce estate benefit when the payee uses HOH and claims both children as dependents. With non-taxable maintenance, the payee's tax liability of \$33,722 resulting from taxable earned income results in the full benefit from the \$2,000 per child tax credit. There is no earned income credit for the payee because AGI/earned income are well above the \$46,073 AGI limit as well as the \$19,030 to \$45,073 earned income range.

Example 5B			
Total Tax Comparison			
Pre- Vs. Post-TCJA			
	Pre	Post	Difference
Payor	\$ 1,217,904	\$ 1,402,904	\$ 185,000
Payee	282,570	103,239	(179,331)
Post-Divorce Increase in Tax	\$ 1,500,474	\$ 1,506,143	\$ 5,669

Pre- and post-TCJA the payor receives no benefit from claiming the dependents and in both scenarios (5A or 5B) whether filing HOH/2 or Single/0, the additional cost of non-deductible maintenance to the

payor is \$185,000. For the payee, pre- vs. post-TCJA, the benefit of nontaxable maintenance is \$179,331 using HOH/2 compared to \$176,723 using Single/0. Thus, pre-vs. post TCJA there is an additional benefit of \$2,608 to the payee by using HOH filing status and claiming the children as dependents.

Comparing Example 5A to 5B, there is a \$2,506 benefit to the post-divorce estate when the payee uses HOH and claims the dependents. The payor's additional cost of HOH/2 vs. Single/0 when maintenance is non-deductible is \$2,076 but the payee's gain is \$4,582.

Summary Comparison of Examples 5A and 5B			
Post-TCJA			
Head-of-Household With Dependents vs. Single			
	HOH/2	Single/0	Difference
Payor	\$ 1,400,828	\$ 1,402,904	\$ (2,076)
Payee	\$ 103,239	\$ 107,821	\$ (4,582)
Difference in Favor of HOH/2 for Payee			\$ 2,506

The following table provides a detailed analysis of the \$2,506 difference in favor of the payee using HOH/2:

POST-TCJA COMPARISON OF EXAMPLE 5A TO 5B								
	Payor HOH v Single			Payee HOH v Single			Comparison of Differences When Payor Uses HOH/2 and Payee Uses Single/0	
	HOH/2	Single/0	Difference	HOH/2	Single/0	Difference		
Adjusted Gross Income	\$ 3,000,000	\$ 3,000,000	\$ -	\$ 200,000	\$ 200,000	\$ -	\$ -	
Less: Itemized Deductions	82,500	82,500		82,500	82,500			Itemized Deductions Same
Federal Taxable Income	\$ 2,961,500	\$ 2,961,500	\$ -	\$ 161,500	\$ 161,500	\$ -	\$ -	Taxable Income Same
Federal Income Tax	\$ 1,085,253	\$ 1,086,645	\$ (1,392)	\$ 33,722	\$ 33,722	\$ -	\$ (1,392)	Federal Tax Lower
Child Tax Credits				(4,000)		(4,000)	4,000	Loss of Child Tax Credit
Net Federal Tax	\$ 1,085,253	\$ 1,086,645	\$ (1,392)	\$ 29,722	\$ 33,722	\$ (4,000)	\$ 2,608	Net Federal Tax Liability Higher
New York State Tax	\$ 219,336	\$ 219,794	\$ (458)	\$ 47,046	\$ 47,402	\$ (356)	\$ (102)	State Tax Lower
NY City Tax	96,239	96,465	(226)	26,473	26,697	(226)		City Tax Same for Payor and Payee
NY City School Credit								
Net NY Tax	\$ 315,575	\$ 316,259	\$ (684)	\$ 73,519	\$ 74,099	\$ (580)	\$ (102)	Net State Tax Liability Lower
Total Income Tax	\$ 1,400,828	\$ 1,402,904	\$ (2,076)	\$ 103,239	\$ 107,821	\$ (4,582)	\$ 2,506	Total Income Tax Liability Higher

The analysis for the payor in Example 5A is the same as in Example 4A. Specifically, when using HOH status, the payor's federal income tax is lower by \$1,392 because taxable income exceeds the \$82,500 tax table convergence threshold for HOH vs. Single. Additionally, as was in Example 4A, the payor's income is above the \$200,000 AGI limit for child tax credits and way beyond any limits for EIC. For the payee, in this high net worth scenario, the tax liability on the earned income qualifies for the full \$4,000 in child tax credits. However, the earned income of \$200,000 is above the limits for EIC.

### Summary and Conclusions

The examples illustrate how the careful consideration of filing status and allocation of dependents can limit the windfall to the government for the change in the taxability and deductibility of post-divorce maintenance. In fact, when payor AGI is greater than \$200,000 and/or post-divorce maintenance falls outside of the New York formula approach (i.e., payor income more than \$184,000), in order to preserve child tax credits, which phase out at \$200,000 AGI, it is usually more beneficial to allocate the dependents to the payee. When maintenance falls within the New York formula, the most tax effective allocation of

dependents and filing status may depend on whether the payee has earned income in addition to post-divorce maintenance. Also, when there are two or more dependents, consideration should be given to dividing the dependents if both the payor and the payee receive equal tax benefit from HOH filing status and are both eligible for child tax credits. Although there are no hard and fast rules, the framework provided by the examples in this paper can be used to develop models for analyzing and adjusting maintenance awards both within and outside of the New York formula approach. Ultimately, complicated and ever-changing financial scenarios along with a misunderstanding of new and old tax regulations can result in costly mistakes for divorcing couples and their attorneys. With the changes brought on by the 2017 TCJA, perhaps more now than ever, it is wise for attorneys and clients to consider retaining a financial professional that specializes in both matrimonial litigation and income tax preparation and planning.

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- 1 The terms alimony, post-divorce maintenance and maintenance are used interchangeably. Internal Revenue Code Section 71, which was stricken by the 2017 TCJA, used the term *alimony or separate maintenance* and defined it as "any payment in cash if (a) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument, (b) the divorce or separation instrument does not designate such payment as being not includible in gross income and not allowable as a deduction, (c) in the case of spouses legally separated under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and (d) there is no liability to make any such payment after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse."
- 2 Post-TCJA, with the elimination of dependency exemptions, the filing threshold equates to the standard deduction, which for 2019 is \$12,200 (Single), \$18,350 (Head-of-Household) and \$24,200 (Married Filing Jointly). Depending on filing status, if your income exceeds the amount of the standard deduction, you are required to file a federal return.
- 3 Acquisition debt acquired before 12-15-17 is subject to a \$1,000,000 principal limitation.
- 4 Generally speaking, earned income includes wages, salaries, tips and other employee pay and net earnings from self-employment.

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# REQUEST FOR ARTICLES



# A New Factor in the New York Equitable Distribution Law: Domestic Violence

By Alexandra Weaderhorn

A recent law passed in New York adding a new factor to the Domestic Relations Law as it relates the equitable distribution.<sup>1</sup> The new law will explicitly provide a legal basis and obligation for courts to consider domestic violence when deciding the outcome of equitable distribution in divorce cases.

Previous to the amendment, (and applicable to prior commenced actions), Domestic Relations Law Section 236 (B) (5)(d), provides,

In determining an equitable disposition of property under paragraph c, the court shall consider:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) the loss of health insurance benefits upon dissolution of the marriage;
- (6) any award of maintenance under subdivision six of this part;
- (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;
- (8) the liquid or non-liquid character of all marital property;
- (9) the probable future financial circumstances of each party;
- (10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of

retaining such asset or interest intact and free from any claim or interference by the other party;

- (11) the tax consequences to each party;
- (12) the wasteful dissipation of assets by either spouse;
- (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (14) any other factor which the court shall expressly find to be just and proper.<sup>2</sup>

In issuing decisions regarding equitable distribution, courts are required to enumerate in their decisions, the factors applied in coming to their decision. Thus, courts in New York are not given unfettered discretion to the division of property, but are guided by these factors. They do, however, have the final catchall factor in the law, which the courts have invoked for certain compelling public policy reasons.

The new 15th factor (re-numbered 14),<sup>3</sup> which became effective May 3, 2020, requires the Court to consider "whether either party has committed an act or acts of domestic violence, as ascribed in subdivision 1 section 459-a of Social Services Law, against the other party and the nature, extent, duration and impact of such act or acts." <https://www.nysenate.gov/legislation/laws/DOM/236>.

Section 459-a, subdivision 1 of the Social Services Act states,

"Victim of domestic violence" means any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and

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- (i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and
- (ii) such act or acts are or are alleged to have been committed by a family or household member.

Before this amendment, equitable distribution was applied in many cases without consideration of marital fault and grievances between the parties during the marriage. Notwithstanding, litigants could assert in their case that equitable distribution be affected by a party's conduct (or misconduct) when one party's conduct was found to constitute "egregious" behavior and "shock the conscience." This standard was set in the seminal case, *O'Brien v. O'Brien*,<sup>4</sup> where the New York Court of Appeals found that in the parties' divorce action, "there is no occasion to consider defendant wife's marital fault on the question of equitable distribution because there is no suggestion that she was guilty of fault sufficient to shock the conscience." The Court relied on the (then 10th) factor of the Equitable Distribution Law which allowed a court to consider such "other" factor as the court deemed just and proper.

Since the *O'Brien* decision, the case law has set a very high bar for such conduct and, unless that high threshold was reached, marital/divorce fault was not factored into the economic distribution of assets.

In *Alice M. v. Terrance T.*,<sup>5</sup> a case involving domestic violence, the defendant-husband was imprisoned for the rape of the plaintiff-wife, who alleged acts of domestic violence throughout the marriage including punching, breaking her glasses, and almost breaking her back. The Supreme Court, Kings County, went into a detailed analysis of the basis for affecting equitable distribution based on conduct of one party against the other. In determining the outcome of the division of the assets there, the court referred to *Blickstein v. Blickstein*,<sup>6</sup> where the Appellate Division, Second Department held that it is only "in rare cases where the Court found that one spouse had engaged in 'egregious' conduct against the other spouse that it may be a factor the Court could consider in making an equitable distribution award." The Appellate Division in *Blickstein* went on to explain the egregious conduct as involving situations "in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship — misconduct that 'shocks the conscience' of the court there by compelling it to invoke its equitable power to do justice between the parties." In *Alice M. v. Terrance T.*, Justice Jeffrey S. Sunshine went into a detailed analysis of what this means and what it has meant in the past and ultimately determined that the facts outlined in the case were sufficiently egregious, under the caselaw, that "it would be unjust to ignore plaintiff's behavior."

In *McCann v. McCann*,<sup>7</sup> the record reflected that the husband falsely and deceitfully induced the wife into marriage, promising her that he would have children with her

but later refusing, causing the wife to pass the age of child-bearing with no children. The Supreme Court stated, "A judge, therefore, in determining whether particular conduct amounts to egregious marital fault, must decide whether the social interest compromised by the offending spouse's conduct is so fundamental that the court is compelled to punish the offending spouse by affecting the equitable distribution of the marital assets." The court also referenced other trial court determinations, stating that the rationale behind other trial courts decisions holding that rape, kidnapping, and a long history of severe physical abuse constituted egregious conduct was that "such conduct callously imperils the value our society places on human life and the integrity of the human body." The court in *McCann* ultimately did not find that the husband's misconduct, in knowingly lying outright when he declared his intentions to his fiancée, violated the type of value set forth in the prior caselaw in order to be considered "egregious."

In *Havell v. Islam*,<sup>8</sup> the Appellate Division, First Department references the *McCann* Standard and analysis and narrowed the definition of egregious conduct explaining that an uneven distribution of assets is warranted based on a violation of the value of "preservation of human life and the integrity of the human body." The court in *Havell* was assessing a lower court's determination that the husband was entitled to 4.5% of the marital assets based on the record which established physical and verbal abuse by the husband against his wife and six children throughout the 21 year marriage (including beating the wife with a barbell) and the husband being indicted for attempted murder of the wife and the husband serving an 8 ¼ years prison sentence.

In 2007, the Appellate Division, Second Department, affirmed a determination that a wife was entitled to 100% of the marital estate in *Levi v. Levi*,<sup>9</sup> finding egregious conduct existed when a husband conspired to bribe a Justice of the Supreme Court in an attempt to gain an advantage in the pending divorce. This seemed to be a departure from the previous high standard that seemed to require the action by one violated the public policy of preservation of life and body.

The New York Court of Appeals, in *Howard S. v. Lilian S.*,<sup>10</sup> addressed the issue of adultery and whether same would fall under the "egregious conduct" standard and ultimately affirmed a lower court decision which held that adultery did not constitute egregious conduct. The Court of Appeals set out clearly that, "While adultery, and many of its unintended consequences, will undoubtedly cause a great deal of anguish and distress for the other spouse, it does not fit within the legal concept of egregious conduct required for an equitable distribution of property." The Appellate Division, First Department in that case had previously stated, "while defendant's alleged misconduct cannot be condoned and is clearly violative of the marital relationship, it does not rise to the level of egregious fault, since defendant neither endangered the lives or physical well-being of family members, nor deliberately embarked on a course designed to inflict extreme emotional or physical abuse upon them" and, therefore, her conduct was not egregious.<sup>11</sup>

In *Kellerman v. Kellerman*,<sup>12</sup> the Appellate Division, Third Department, reversed a lower court determination that the husband's conduct rose to a level that would justify a deviation in the distribution of the assets. There, the ex-husband's conduct consisted of verbal harassment, threats, and several acts of "minor" domestic violence. The Appellate Division reversed the lower court's determination which concluded that the conduct there rose to such a level of egregiousness as to warrant a consideration of his fault in apportioning the marital property. In so holding, the Appellate Division found that "Defendant's conduct, which consisted predominantly of verbal harassment, threats and several acts of minor domestic violence, is in our view not so outrageous or extreme as to shock the conscience of the court and to justify his divestiture of certain of the parties' marital property."

In *Orofino v. Orofino*,<sup>13</sup> the Appellate Division upheld a lower court decision which found that the allegations against the defendant husband did not constitute egregious conduct that would warrant affecting the distribution of assets. The allegations to be considered there were as follows: "Supreme Court found, that defendant, inter alia, had consumed extraordinary amounts of alcohol; was verbally abusive to plaintiff on a biweekly basis; was physically abusive and threw an ashtray at plaintiff causing a laceration to her scalp; threatened to commit arson; and placed the muzzle of a rifle to plaintiff's head and threatened to kill her." The court concluded that this conduct was a sufficient basis for the grounds of cruel and inhuman treatment but when addressing the issue of whether such treatment/fault should be considered as a factor in determining the equitable distribution, the court stated that, "Although defendant's actions were determined to be the cause of the marital discord, we conclude that they did not rise to the level of that rare occasion where marital fault should be considered."

In *Galvin v. Francis*,<sup>14</sup> the plaintiff testified about incidents of abusive conduct by the defendant extending over a period of 8 years during the marriage. The lower court determined that the actions by the defendant were sufficient grounds for divorce under DRL § 170(1)—"cruel and inhuman treatment"—which requires the conduct that "so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant." However, the lower court did not find that the conduct rose to the level of egregious conduct which would affect equitable distribution. On appeal, the Appellate Division, Third Department, affirmed the lower court's determination that such conduct was not sufficient to affect the equitable distribution as to the marital home.

While the above cases and their analysis will remain important and likely still need to be analyzed by courts in determining equitable distribution, there are some cases, which would otherwise be harder to determine, and fell into more of a gray area before the new law, which may now turn out differently.

Cases such as *Kellerman*, *Orofino*, *Galvin*, and the many cases which were decided in reliance thereof may now be decided differently with different outcomes since the new

factor incorporated into the DRL explicitly permits courts to consider domestic violence—present in those cases, yet found not to meet the previous higher standard of "egregious" conduct that "shocks the conscience."

Domestic violence introduces complications in all aspects of a divorce action. Most often cases with a history of domestic violence are the most contentious and hardest to resolve without a trial. In fact, according to a 2004 American Academy of Matrimonial Lawyers article relating to domestic violence, while mediation is widely an accepted method of resolving divorce disputes, it should generally be avoided in cases where there has been domestic violence as the fear that results from domestic violence taints the negotiation process.<sup>15</sup>

Victims of domestic violence enter into the divorce situation on an uneven playing field and at an immediate disadvantage. With regard to equitable distribution specifically, many victims are also victims of financial abuse and are not privy to the marital assets. Until now, since domestic violence was not a factor in equitable distribution, it could only have been a consideration under the old catchall factor 14—"such other factor as the court deems just and proper"—and the case law largely did not support this, except in the scenarios where there was a record so shocking that the victim's life was proven to be at risk. With this new equitable distribution factor, judges now have more leeway than before to consider less life-threatening acts of domestic violence when issuing its decisions relating to equitable distribution. This is in line with public policy which supports deterring perpetrators of domestic violence from their abhorrent, cruel and abusive conduct, which has no place in this society, let alone within a marriage.

## Endnotes

1. 2020 NY Senate-Assembly Bill S-7505-B, A-9505-B signed by Governor Andrew Cuomo on April 3, 2020, effective 30 days thereafter and applicable to matrimonial actions commenced on or after such effective date.
2. There is another important factor in equitable distribution under paragraph (h) of D.R.L. 236(B)(5), which authorizes the court to consider the effect of the refusal to eliminate a barrier to remarriage on the factors enumerated in paragraph (d) above.
3. Factor 15 is now "any other factor which the court shall expressly find to be just and proper."
4. 66 N.Y.2d 576 (1985).
5. 50 Misc. 3d 1204(A) (Sup Court Kings County 2015).
6. 62 N.Y.2d 802 (1984).
7. 156 Misc. 2d 540 (Sup Court NY County 1993).
8. 301 A.D.2d 339 (1st Dep't 2002).
9. 46 A.D.3d 520 (2d Dep't 2007).
10. 14 N.Y.3d 431 (2010).
11. 62 A.D.3d 187 (1st Dep't 2009).
12. 187 A.D.2d 906 (3d Dep't 1992).
13. 215 A.D.2d 997 (3d Dep't 1995).
14. 20 A.D.3d 550 (3d Dep't 2005).
15. [https://cdn.ymaws.com/aaml.org/resource/collection/CAAD926A-6089-4B24-8945-E052009325E0/Journal\\_vol\\_19-1-3\\_Domestic\\_Violence\\_10\\_yrs\\_later.pdf](https://cdn.ymaws.com/aaml.org/resource/collection/CAAD926A-6089-4B24-8945-E052009325E0/Journal_vol_19-1-3_Domestic_Violence_10_yrs_later.pdf).

# Is a 'Restrained Lifestyle' a Valid Basis for an Equitable Distribution Award?

By Elliot Wiener

In *Cotton v. Roedlebronn*,<sup>1</sup> the trial court accepted findings of the Special Referee that valued two sets of the husband's business interests. The wife was awarded 10% of the marital portion of the first set of business assets because "the value of these businesses was primarily derived from efforts made by the [husband] and his partner prior to the marriage, and [the wife] made little, if any, contribution to the growth of these businesses. To the contrary," she at times "acted as a hinderance to the growth of these businesses."

The wife was awarded 40% of the marital portion of the second set of businesses which presented a totally different set of facts. These businesses were "formed during the marriage using mostly marital funds." She awarded 40% of these assets because, by virtue of this couple's "restrained lifestyle," they were not required to use the value of these businesses to pay their bills. The referee found that the wife "shared in the parties' restrained lifestyle that allowed these particular investments to grow. Under the circumstances, this was a provident exercise of discretion (see *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 420 [2009]; *Arvantides [v. Arvantides]*, 64 N.Y.2d 1033 [1985]."

The cases the court cites say that an equitable distribution award must be "fair and equitable under the circumstances," they do not refer to the parties' "lifestyle," restrained or otherwise. The *Cotton* court's failure to cite any other "restrained lifestyle" cases implies that this factor is unrecognized in the cases. But the "wasteful dissipation of assets"—a statutory factor at Domestic Relations Law § 236(B)(5)(d)(12)—is entirely focused on the manner in which parties use their assets. If we think of wasteful dissipation as a unilaterally unrestrained lifestyle, a remedy based on the parties' "restrained lifestyle" is justifiable, at least by analogy.

What remedies do courts employ that are responsive to the manner in which parties use their assets? The typical remedy for wasteful dissipation is a credit to the marital estate of the dollar amount that was wasted which is then divided "equitably." But that's because the waste is often restricted to one asset, e.g., cash, is quantifiable, and readily and directly remediable. In *Cotton*, the wife was able to show that the "restrained lifestyle" "allowed these particular investments to grow." As with wasteful dissipation, it makes sense to apply the remedy to the particular asset affected by the parties' conduct. But if a "restrained lifestyle" results in a larger pool of marital assets, not merely a larger value to a particular asset, it may be impractical or arbitrary to fashion a remedy that affects only one asset or a set of assets.

Regardless of the extent of the assets affected by a "restrained lifestyle," its presence or absence is manifest in the value of the asset(s) to be distributed. The more "restrained" the lifestyle, the larger the pool of marital funds. The parties are rewarded for their thrift by having a bigger pie to divide. Adjusting the distribution ratio on the basis of the parties' restraint accounts twice for the same conduct.

Beyond this, the negative implications for this factor are ominous because adjusting the distributive ratio is a zero sum; the greater the award to one spouse, the lesser the award to the other. If the parties' lifestyle was not "restrained," *Cotton* suggests that the non-market-active spouse would be entitled to a lesser, and the market-active spouse a greater, percentage of the marital assets. This would be true irrespective of whether the lack of restraint was compelled (e.g., private special education for a child) or chosen (e.g., the acquisition of non-durable luxury goods and services), mutual or unilateral. By *Cotton's* logic, if a family did not live a "restrained lifestyle," the ratio associated with "restrained" spending would not apply. In effect, the non-market-active spouse is punished for circumstances that were uncontrollable or were the result of choices the parties made together.<sup>2</sup> Importantly, the *Cotton* court did not examine the reason for the "restrained lifestyle," only the fact that the estate was larger due to restrained spending.

This mode of analysis invites us to go down the road that *Mahoney-Buntzman*<sup>3</sup> tells us we should not travel. "[D]uring the life of any marriage, many payments are made, whether of debts old or new, or simply current expenses. If courts were to consider financial activities that occur and end during the course of a marriage, the result would be parties to a marriage seeking review of every debit and credit incurred. As a general rule, where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments may, in some cases, have resulted in the reduction of marital assets."<sup>4</sup> The same logic should apply where restrained spending

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resulted in the enlargement of marital assets. *Cotton's* negative implication provides a legal basis for parties to argue, and therefore to develop a record, of the extent of each party's marital spending and its purpose. Moreover, the review of spending is not limited to wastefulness; under *Cotton*, it goes to the entirety of the level of "restraint" of marital spending.

The idea of adjusting the ratio of marital assets based on a "restrained lifestyle" applies as readily to personal assets as it does to the business assets involved in *Cotton*. Imagine two couples, both of whom used the funds from a HELOC to fund their lifestyle. Assume all other relevant facts about the couples are the same. In each family, there was a market-active spouse who earned the money that funded the lifestyle and there was a non-market-active spouse who cared for the home and family. Assume further that upon divorce the value of their homes, net of the HELOCs, was equal. Suppose one couple consumed their HELOC funds to pay for necessary services for their family, e.g., special education for a child. Suppose the other couple consumed their HELOC funds by purchasing non-durable luxury goods and services. Should the non-market-active spouses in these families walk away from the marriage with different percentage of the assets? The only distinction between them is the discretionary nature of their spending. Do we want to apply these kinds of moral

judgments to equitable distribution awards? Does the answer change if the bulk of the spending in the second family was attributable to the market-active spouse? What if the market-active spouse claimed that the keep-up-with-the-Joneses level of spending was less a choice than a necessity to maintain a lifestyle that attracted clients or customers for a business? If the second couple's spending level was agreed upon, expressly or tacitly, is it fair to punish the non-market-active spouse with a lesser percentage of the marital estate? All of these questions arise when we introduce "restrained lifestyle" as a factor to be considered in the calculus of equitable distribution. If we look in our rearview mirror, we can see the *Mahoney-Buntzman* stop sign fading into the distance.

### Endnotes

1. 170 A.D.3d 595 (1st Dep't 2019).
2. The husband in *Mahoney-Buntzman*, 12 N.Y.3d 415 (2009), did not have control over his obligation to pay maintenance to his first wife; that was the consequence of their divorce. The Court sidestepped the virtually bottomless, nasty rabbit-hole that would have ensued had it explored the issue of which spouse wanted the husband to get divorce.
3. *Mahoney-Buntzman v. Buntzman*, *id.*
4. *Id.* at 420.



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# Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

## Recent Legislation

### New York Increases Child Support and Maintenance Caps

New York State increased the parties' combined income child support cap from \$148,000 to \$154,000, and raised the income cap for the maintenance payor from \$184,000 to \$192,000. These changes went into effect on March 1, 2020.

The caps may be raised every two years, as required by the Child Support Standards Act and Maintenance Guidelines Act [DRL § 236(B)(5-a)(b)(5), § 236(B)(6)(b)(4)], which call for an increase every other March 1st to keep the levels in line with the Consumer Price Index.

### Domestic Violence Added as a Factor in Equitable Distribution, Effective May 3, 2020

On May 3, 2020, New York's legislature added domestic violence as a factor that courts must consider when determining equitable distribution. The change sharpens the language of DRL § 236(B)(5)(d), which codifies more than a dozen factors courts must evaluate when distributing the parties' marital property, including the parties' income, health, and the length of their marriage.

Before this amendment, the 14th factor contained amorphous language regarding "any other factor which the court shall expressly find to be just and proper." DRL § 236(B)(5)(d)(14) now requires courts to consider "whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts."

With this change, the equitable distribution factors now resemble the factors already in place for temporary and post-divorce maintenance. Under DRL § 236(B)(5-a)(h)(1)(g) and DRL § 236(B)(6)(e)(1)(g), courts are required to consider acts of domestic violence when determining tem-

porary and post-divorce maintenance, where such acts may "have inhibited or continue to inhibit [the victim's] earning capacity or ability to obtain meaningful employment."

### Revisions to Statement of Client's Rights and Responsibilities for *Pro Bono* Cases, Effective June 1, 2019

Effective June 1, 2019, the judicial departments of the Appellate Division of the New York Supreme Court issued significant revisions to the Statement of Client's Rights and Responsibilities ("Statement") under 22 CRR-NY 1400.2 regarding *pro bono* cases.

The changes offer broader warnings for clients who may mistakenly believe that securing an attorney *pro bono* means that pursuing a lawsuit is risk-free. The statement now indicates that clients, even those with *pro bono* attorneys, "may be responsible . . . to contribute to or pay the other party's attorney's fees and other costs if the Court has ordered you to do so." Similarly, the expanded Statement informs clients that if their "conduct . . . is found to be frivolous or meant to intentionally delay the case," they "could be fined or sanctioned."

The updated Statement also serves as a reminder to attorneys to review the basics of the DRL with each client. Attorneys are "required to discuss" the automatic orders; support guidelines of the Child Support Standards Act, if applicable; and the Maintenance Guidelines Statute, if applicable."

The full text of the updated Statement can be found at the following website: [www.bit.ly/statementofclientsrights](http://www.bit.ly/statementofclientsrights).



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## Ethics

### Ethics Opinion 1165: An Attorney Cannot Pay Himself Out of His Client's Escrow Account if Those Funds Are Still in Dispute

In this May 2019 opinion, NYSBA's Committee on Professional Ethics addressed one of the most common frustrations that we face as attorneys—clients who refuse to pay. In this case, the inquiring attorney represented a client in a bitter estate dispute that stretched out over nine years. The attorney held an escrow account for his client, with significant annuities that the Surrogate Court eventually ruled belonged to the client and could be distributed to him. By that point, however, the client disputed the attorney's legal fees of \$50,000. The client refused to pay, unless the attorney agreed to cut his bill by 20%. The attorney refused, noting that he had already voluntarily reduced his fee several times over the course of the case.

With the escrow account now flush with funds, and the court having given its green light to disperse that money, can the attorney pay himself out of the escrow account despite the fact that his bill remains hotly disputed by the client? Can the attorney withdraw an additional amount for interest on the unpaid bill? And, can the attorney withdraw an additional "cushion" of funds to cover legal expenses that he would surely incur if the client subsequently sued him to challenge his legal bill?

The Ethics Committee answers the attorney with a resounding "No" to all three questions. All three actions would violate Rule 1.15(b)(4) of the NY Rules of Professional Conduct, which states that a lawyer can only pay himself out of a client's escrow account if the lawyer's bill is not in dispute. Otherwise, "the disputed portion shall not be withdrawn until the dispute is finally resolved."

The Committee notes an important exception to its ruling: cases in which the attorney and client have a previously written agreement allowing for such withdrawals. The Committee also spotlights the freedom of this attorney to shape a new agreement with his client. For example, the two parties can execute an agreement in which the attorney commits to providing legal services over the coming months if the client first pays the current amount owed, along with interest on that bill.

## Cases of Interest

### Child Custody

#### Stepmother Awarded Custody, and Biological Parents Awarded Visitation

#### *In re Shanna O. v. James P.*, 136 A.D.3d 1334 (3d Dep't 2019)

A stepparent petitioning the court for custody of a child has the steepest of mountains to climb. Before the court can even consider whether the child's interests are best served by granting custody to the stepparent, that stepparent must first establish standing to bring the peti-

tion. Gaining standing is especially challenging in cases like this one, where both biological parents are alive, living nearby, and there are no accusations of abuse or neglect.

Notwithstanding, the stepmother in this case was granted custody of the 12-year-old subject child by the Family Court, and following a challenge from the boy's mother, the appellate court affirmed, reaching the same conclusion through a distinctly different rationale.

This case arose after the boy's biological parents separated, and the Family Court granted sole custody of the baby boy to the father. The father then married the stepmother at the core of the case. Nine years later, the father and stepmother separated, and the father left his son in the care of the stepmother, who then petitioned the court for legal custody.

The Family Court turned to *In re S.B. v. A.C.C.*, 28 N.Y.3d 1 (2016) in which the Court of Appeals ruled that, under DRL § 70(a), "either parent" had standing to apply to the court for custody and that the term "parent" included both biological or adoptive parents. Here, the Family Court viewed the stepmother as a "de facto parent" with equal standing to the biological parents, and ruled that the stepmother had standing, and granted her custody of the boy because it was in the child's best interests.

After the mother challenged the Family Court decision, the Third Department ruled that the Family Court had erred in considering the stepmother a "de facto parent" under DRL § 70(a). That statute addresses the rights of "either parent," indicating the legislature's intent to limit the designation of "parent" to two people, whether biological or adoptive parent. But the Family Court's interpretation of that law would improperly create three parents: a mother, father, and stepmother.

Recasting the stepmother as a "nonparent," the appellate court determined that she must demonstrate "extraordinary circumstances" to establish standing, as follows:

The extraordinary circumstances analysis must consider the cumulative effect of all issues present in the case, including among others, the length of time the child has lived with the nonparent, the quality of that relationship, and the length of time the parent allowed such custody to continue without trying to establish the primary parental role. (*In re Brown v. Comer*, 136 A.D.3d at 1174). Also see: *In re Banks v. Banks*, 285 A.D.2d 686 (2001). Only after the nonparent establishes extraordinary circumstances may a court consider the best interests of a child. (*see id.* at 1176, 25 N.Y.S.3d 424; *In re Banks v. Banks*, 285 A.D.2d 686, 687, 726 N.Y.S.2d 795 [2001]).

The boy had lived continuously with his stepmother from age two to 12, and he had developed a close bond with both her and her son, his half-brother. As his primary

caregiver, the stepmother had been instrumental to all medical, academic, and extracurricular decisions.

In contrast, the boy's mother had gone three years without seeing her son. She had made virtually no effort to learn about his academic and extracurricular activities. When she found out that the father and stepmother had split, and that the father had left the boy with his stepmother, the mother waited a full 10 months before taking any legal action.

This extensive parental commitment by the stepmother, her clear bond with the son, and the absence of interest by his mother established the "extraordinary circumstances" required for nonparent standing. Then the appellate court considered the child's best interests, and agreed with the boy's attorney: that his best interests would be served by granting custody to his stepmother.

### **'Reasonable Radius' Restriction of 10 Miles Placed on Future Relocation**

#### ***In re Ece D. v. Sreeram M.*, 177 AD3d 450 (1st Dep't 2019)**

The Family Court granted joint legal custody with residential custody of the parties' children to the mother, and granted the father liberal visitation time, including three consecutive weeks of summer vacation. The court restricted the mother's future ability to relocate without the father's consent or court order.

In court, the mother expressed her fear that the father would use his summer vacation time to kidnap the children to his native India. Because India is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, the mother feared that she would be left without legal recourse to have the children returned to the U.S.

The Family Court rejected that argument, and, on appeal, the appellate court rejected it as well. The father presented financial and testimonial evidence demonstrating that he had planted roots in New York, and did not present an abduction risk. The father had substantial real estate holdings in New York, managed those properties, had extended family in the state, and testified that he wanted his children, all of whom were American citizens, to be raised in the United States. Given the strength of these local roots, the court below had a sound and substantial basis in declining to limit the father's travels.

The Family Court erred in limiting the mother's ability to relocate. The appellate court acknowledged that the lower court had merely intended to safeguard the children's best interests by requiring the mother to obtain consent from the father or the court before relocating to a new home, especially given the father's liberal visitation schedule. But a consent requirement was not the proper tool; instead, the Family Court should have applied a "reasonable radius restriction," limiting the mother's moving options to any home within a 10-mile radius of her current

residence. This altered restriction avoids an undue burden on the mother's right to relocate while protecting the children's interest to remain close to both of their parents.

### **Child Support**

#### **Coaching and Paying for the Children's Travel Sports Are Not Extraordinary Expenses That Would Reduce the Basic Child Support Obligation**

#### ***In re Firenze v. Firenze*, 181 A.D.3d 1198 (4th Dep't 2020)**

The Family Court ordered the father to pay semi-monthly child support of \$1,206, which was in line with the presumptive obligation set forth by the CSSA. The father appealed, and argued that the court should have deviated downward from the strict application of the CSSA because he had equal parenting time and had been investing his time and money in his children, beyond the required child support payments.

The father had bought the children some sports equipment, paid their athletic registration fees, and had taken them to their games, and paid for their food, travel, and lodging for their sports. Beyond those expenses, the father also argued that his service as the children's coach on several of their sports teams and his decision to travel less for work to spend more time with the kids were non-monetary contributions to the care and well-being of the children under FCA § 413(1)(f)(5).

The appellate court affirmed the court below's order. Its ruling acknowledges that the father's purchasing of sports equipment for the children and his devotion to their sports teams may represent "non-monetary contributions" but did not rise to the level of "extraordinary expenses" incurred by the non-custodial parent, nor are they contributions that "substantially reduced" the custodial parent's expenses.

Housing, food, and lodging are not "extraordinary expenses" within the meaning of the FCA, nor is entertainment or sports. (*See In re Pandozy v. Guadette*, 192 A.D.2d 779, 780 [3d Dep't 1993].) Likewise, the father failed to prove that his service as the children's coach and his decision to travel less and spend more time with the children "substantially reduced" the mother's expenses.

### **Equitable Distribution**

#### **Parties' Vast Art Collection Ordered to Be Sold by a Receiver at Public Auction**

#### ***Macklowe v. Macklowe*, 181 A.D.3d 475 (1st Dep't 2020)**

After a half-century of marriage, real estate mogul Harry Macklowe and his wife Linda divorced and divided their \$2 billion in marital assets. The parties' most valuable marital asset was their internationally renowned collection

of modern art, including pieces by Pablo Picasso and Andy Warhol.

Arguing before New York County Supreme Court, the husband and wife championed dramatically different approaches for the disbursement of their private collection. The husband argued that the artworks should be sold and the proceeds divided equally. The wife argued that the entire collection should be awarded to her, and the parties' real estate granted to the husband, with a cash award to the husband to equalize the imbalance.

Rejecting both options, the court crafted its own solution, dividing the artworks into three collections. The first collection was awarded to the wife, with a 50% credit to the husband. The second and third collections were directed to be sold, with the proceeds to be divided equally between the parties. The wife appealed such ruling, and the appellate division affirmed.

The court's ruling set the stage for a subsequent legal brawl over how exactly the art would be sold. The husband pushed for a receiver to sell the art at public auction. The wife pressed for an internal auction, (i.e., that the art would go to the highest bidder between the parties, and party with the highest value of art would pay the other 50% of the difference in the total values.) The court sided with the husband, and ordered a public auction.

The wife appealed a second time, contending that the court erred in selecting a public auction over an internal auction. Again, the appellate court affirmed.

In its ruling, the appellate court claimed that the wife should not be permitted to re-litigate the issue of whether she could keep the artwork. The appellate court reasoned that the internal auction approach was not fair since neither party had sufficient cash necessary to buy the art collection from the other, and therefore, one party would have to wait until the art was actually sold in order to receive the distributive award.

## Counsel Fees

### Wife Ordered To Pay 60% of Husband's Legal Fees Due to Obstructionist Tactics

#### *Gordon v. Anderson*, 179 A.D.3d 402 (1st Dep't 2020)

In this divorce action, the wife established a pattern of delaying and obstructing the proceedings. She refused to comply with the husband's discovery demands, failed to disclose all of her assets, and repeatedly disrupted the courtroom during the trial. The court declared that "the wife's obstructionist tactics had needlessly [prolonged the] litigation," and awarded the husband more than \$41,000 in legal fees, approximately 60% of his total legal cost. The wife appealed.

While the appellate court modified the lower court's ruling, adjusting the division of property, it affirmed the court's award of counsel fees, clarifying that when one

party commits obstructionist tactics, the court has the discretion to go beyond its consideration of common factors, like the parties' respective financial circumstances and the relative merit of the parties' positions, and consider the financial damage caused by a party's improper legal maneuvers.

## Family Offense

### Conducting a *Lincoln* Hearing in an Order of Protection Case Would Have Violated Father's Due Process Rights

#### *In re Judith L.C. v. Lawrence Y.*, 179 A.D.3d 616 (1st Dep't 2020)

For years Lawrence Y. had bullied and beaten Judith L.C., the mother of his children, with little to no repercussions, until May 2018, when the New York County Family Court ruled that he had committed three counts of harassment in the second degree and menacing in the third degree. In her testimony, the mother described how the father grabbed her jaw and face so forcefully that she believed he might kill her. When she refused to have sex with him, he poked her all night and shook her to prevent her from sleeping. On one occasion, he lifted the wife under her chest while she was holding the child, and threw her into the apartment. During another fight, he slammed her into the sofa and pinned her down by the wrists.

Because the father perpetrated domestic violence against the mother in the presence of the children, the court granted a five-year order of protection to the mother and the children.

The father appealed, arguing that to properly assess the facts, the court should have conducted a *Lincoln* hearing, where the judge interviews the children *in camera* with only the children's attorney and a stenographer present. This is typically only done during a custody trial.

The appellate court affirmed. The father's argument for a *Lincoln* hearing was not properly preserved for appeal because he did not raise it at the order of protection hearing. However, even if the father did properly raise the issue, it would not be appropriate to have a *Lincoln* hearing since it would violate the parties' due process rights to cross-examine the children's testimony.

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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 Lee Rosenberg, Editor-in-Chief, at [lrosenber@scrllp.com](mailto:lrosenber@scrllp.com)

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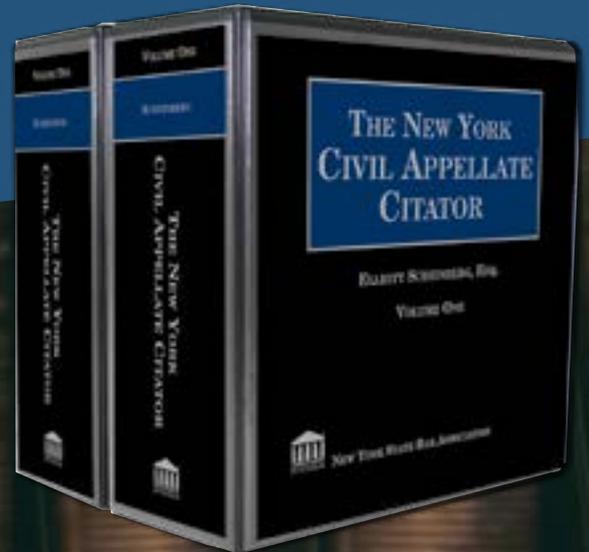
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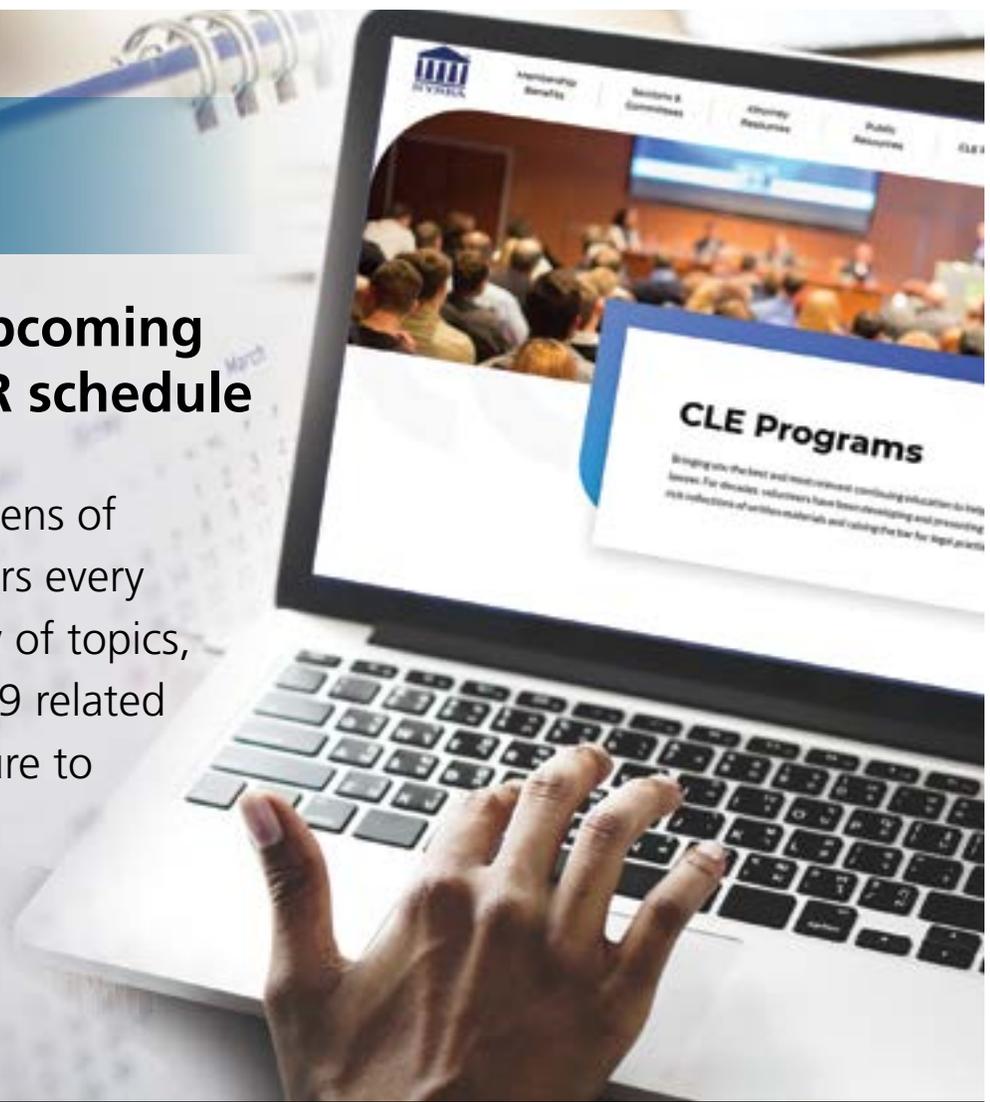
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