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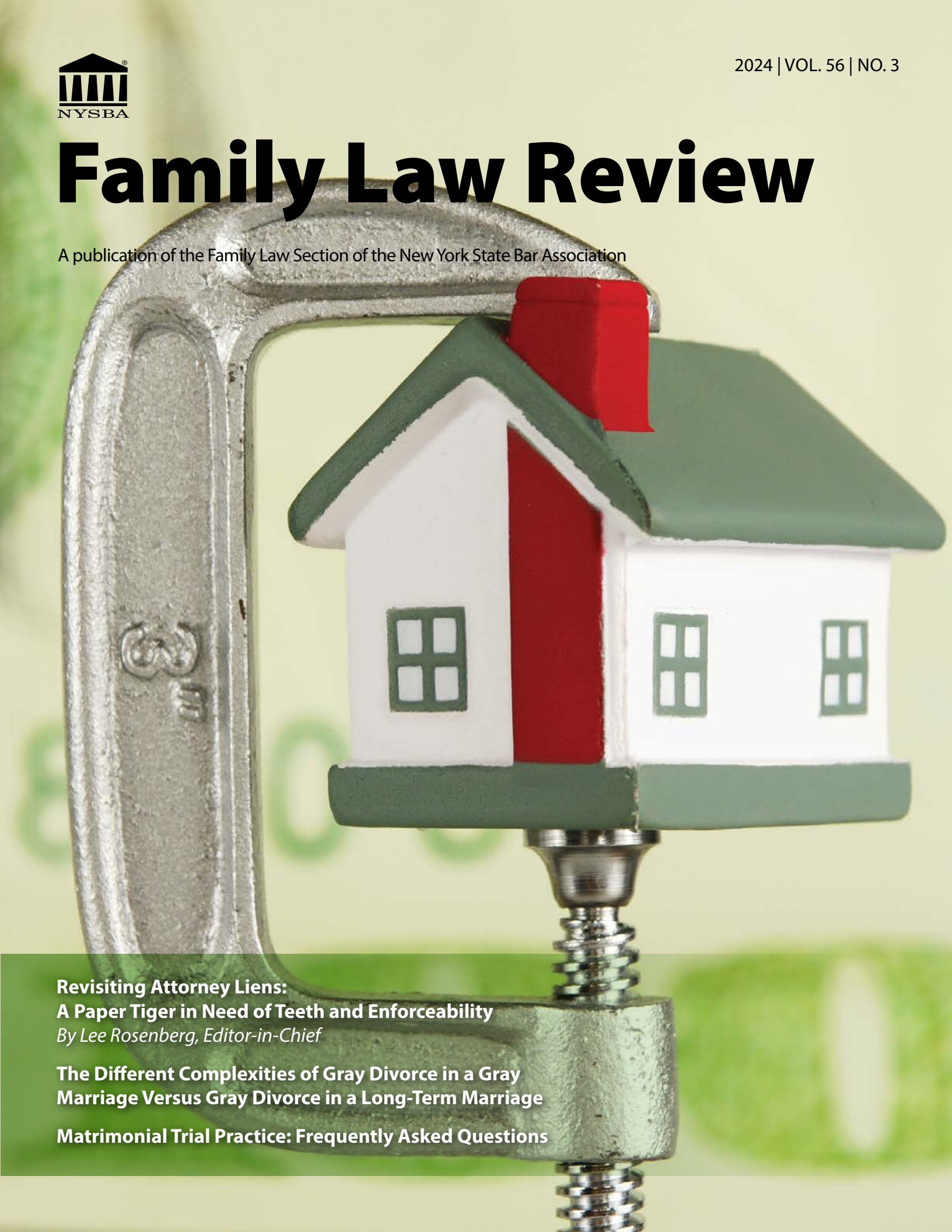

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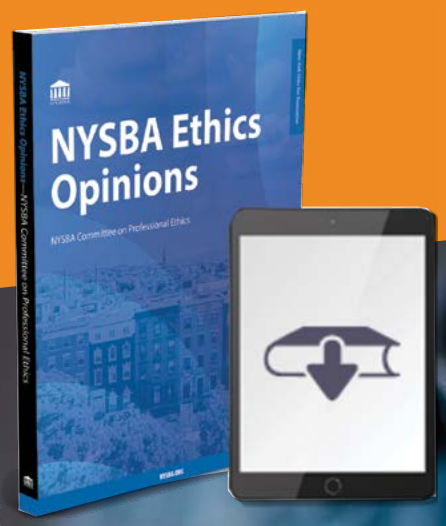

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FAMILY LAW REVIEW

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Revisiting Attorney Liens: A Paper Tiger in Need of Teeth and Enforceability

By Lee Rosenberg

While attorney liens – charging and retaining – have a long history of viability and effectiveness, those protections can be valueless in the context of a divorce case. Just as the system has singled out family law practitioners by being subject to additional ethical boundaries that other attorneys do not have, we are also singled out in the stripping away of security for our fees that other practice areas benefit from. Given the undermining of the retaining lien resulting from the provisions of the Matrimonial Rules[1] that mandate that the client be provided with case-related documents, the easy availability to access filed court documents through the court's electronic portal, and the availability of the client to assert a "compelling need" for the file, the security of holding on to the file as security for the fees due, often has no teeth. Similarly, the charging lien – security in the assets retained or distributed by settlement or disposition at trial – has been pared back by case law and thus also readily rendered ineffective. The charging lien is often additionally subject to initial establishment of the entitlement of the fee whether or not challenged by the client by fee arbitration requirements and limitations on security interests also governed by the Matrimonial Rules.[2] In some instances, the court may also reject the retaining lien and relegate the attorney to the charging lien alone. It would appear then that the protection of our outstanding fees by the court is by and large often non-existent. As a result, legislative or rule change is required.

A Look Back

Attorney liens were initially established under English law in 1779 as a continuation of Roman tradition and then accepted in New York after prior common law rejection in 1840 although the retaining lien – as a general lien – had been recognized. The charging lien later became statutory in 1879.[3]

As later developed, in New York, a retaining lien is a possessory lien recognized under common law over all property documents, moneys or securities that come into a lawyer's possession in the course of employment as a lawyer.[4] This right excludes the attorney acting as a trustee or escrowee.[5]

The charging lien, as stated, was later codified and is set forth in Judiciary Law § 475, and is intended to protect against the "knavery" of the client by permitting the attorney to acquire an interest in the client's claim.[6] It becomes effective only upon the commencement of an action or proceeding or initiation of ADR.[7] It attaches to the fund created by the attorney as a result of a favorable result of the litigation.[8] It may be asserted within the existing proceeding or by plenary action.[9] Such lien, however, may be forfeited if the attorney withdraws from representation without good cause.[10] So, presuming all is well ethically and the attorney fulfills their obligations to the client, what could go wrong?

The Retaining Lien

As indicated, this long existing general lien presumes to provide the attorney with security in their earned fee by way (primarily) of his or her file. In other words, the lawyer holds the client file from the client and usually from incoming counsel until payment is made for the outstanding fee. This is a substantial piece of leverage when the case is ongoing, much has transpired and incoming counsel needs all of the papers, motions, records, financial documents, transcripts, and communications which have gone before. The client's (and new counsel's) recourse would (in year's past) be to go to the county clerk's office and stand in front of an available copy machine with dollars or quarters in hand and copy only what was filed with the clerk – and not remove any staples in the process.

In the digital age with documents being scanned, certain documents can be printed by the clerk for the related fee. The non-filed documents – particularly financials – were often still in the outgoing attorney's file. In cases where many motions have been filed – it was a daunting and time-consuming task indeed to spent hours or days at the clerk's office getting access to a working copy machine and retrieving the file on a page-by-page basis. All of the forgoing being a great incentive for the client to satisfy or settle the outstanding fee and retaining lien.

The mandatory terms of the Statement of Client's Rights and Responsibilities[11] and Retainer Agreement provisions[12]

that are contained in the Matrimonial Rules undercuts much of the security which existed in the retaining lien.

From the Statement of Client's Rights and Responsibilities:

> You are entitled to be kept informed of the status of your case and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

From the Retainer Agreement:

> The agreement shall contain the following information . . . . :10. Client's right to be provided with copies of correspondence and documents related to the case, and to be kept informed of the status of the case.

With essentially all of the contents of the file having to be provided to the client and all filed information accessible on the court's electronic portal,[13] other than attorney work product/notes, there is little in the retaining lien left to secure the fee.

The Charging Lien

The creation of a fund by the attorney which may be liened in the context of a matrimonial matter is obviously different from that in other fields. As an example, in a personal injury matter there is recovery for pain and suffering; in a commercial matter there is recovery of compensatory damages or breach of contract; in tort claims there is recovery for compensatory losses and possible punitive damages. In a matrimonial matter, establishment of support is off limits, so from whence does the fund come? Certainly, those funds may arise from trial or settlement where a distributive award is determined to be appropriate – say the "out-spouse's" entitlement to the value of a business interest or where a similar pool of funds is claimed from the lawyer's efforts.

In 2015's *Charnow v. Charnow*,[14] the Appellate Division, in a painfully short decision, addressed the most common of circumstances by way of both trial and settlement – the value of a spouse's interest by way of distribution from the marital residence. How often is the fee secured by a provision in an agreement which states that the attorney will be paid from the proceeds of sale? What if a spouse – or both – refuse that provision. What if there is a challenge to the fee by way of arbitration to be determined? What if a conflict arises mid-trial and the court will not permit a withdrawal and unpaid fees escalate? What if the fee, upon application by counsel for a lien, is sent back by the court for such arbitration or if the right to the lien itself is challenged? The latter is *Charnow.*

Charnow, which arises from the attorney's assertion of a charging lien against the proceeds of the marital residence,[15] denies that lien in two short paragraphs:

> A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client" (*Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222, 223 [2005] [citation omitted]; *see* Judiciary Law § 475). In a matrimonial action, a charging lien will be available "to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client" (*Moody v. Sorokina*, 50 A.D.3d 1522, 1523 [2008] [internal quotation marks omitted]). However, "[w]here the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest" (*Theroux v. Theroux*, 145 A.D.2d 625, 627-628 [1988]).
>
> *In this case, the plaintiff and the defendant already owned the marital residence jointly as tenants by the entirety. Thus, the parties' settlement agreement merely permitted the plaintiff to retain her existing interest in the marital residence*. "Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, *no equitable distribution fund to which a charging lien can attach was created by the efforts of the [plaintiff's] attorney*" (*Id.* at 628; *see Matter of Golden v. Whittemore*, 125 A.D.2d 942 [1986]). (emphasis added)

What is missing from the court's analysis (or lack thereof) is that since the enactment of the Equitable Distribution Law in 1980, New York is an equitable distribution state and *not* a title state. The fact that the parties are equally in title does not, by way of the Domestic Relations Law, mean that they have an entitlement of equality of equitable distribution, and certainly *not* without the efforts of the attorney.

As the Third Department held in *Solomon v. Solomon*,

> While the distribution of the parties' marital assets must be equitable, there is no fixed rule that distribution be equal even in marriages of long duration (*see O'Connell v. O'Connell*, 290 A.D.2d 774, 776, 736 N.Y.S.2d 728 [2002], *lv. granted sub nom. O'Connell v. Corcoran*, 99 N.Y.2d 503, 753 N.Y.S.2d 806, 783 N.E.2d 896 [2002]; *Goudreau v. Gou-*

> *dreau*, 283 A.D.2d 684, 686, 724 N.Y.S.2d 123 [2002].[16]

The Second Department in 2024's *D'Ambra v. D'Ambra*,[17] citing *Solomon, id.* makes a similar finding,

> "A marriage has been characterized, among other things, as an economic partnership[,] which upon its dissolution necessitates a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets" (*Schanback v. Schanback*, 130 A.D.2d 332, 341, 519 N.Y.S.2d 819 [citation and internal quotation marks omitted]). "Equitable distribution law does not mandate an equal division of marital property" (*Jones v. Jones*, 182 A.D.3d 586, 587, 120 N.Y.S.3d 831 [internal quotation marks omitted]). Indeed, "there is no fixed rule that distribution be equal even in marriages of long duration" (*Solomon v. Solomon*, 307 A.D.2d 558, 560, 763 N.Y.S.2d 141). Instead, "[t]he equitable distribution of marital assets must be based on the circumstances of the particular case and the consideration of a number of statutory factors. Those factors include: the income and property of each party at the time of marriage and at the time of commencement of the divorce action; the duration of the marriage; the age and health of the parties; the loss of inheritance and pension rights; any award of maintenance; any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property by the party not having title; and any other factor which the court shall expressly find to be just and proper" (*Jones v. Jones*, 182 A.D.3d at 587–588, 120 N.Y.S.3d 831 [citations and internal quotation marks omitted]). "The trial court is vested with broad discretion in making an equitable distribution of marital property . . . and[,] unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed" (*Morille–Hinds v. Hinds*, 169 A.D.3d 896, 898, 94 N.Y.S.3d 336 [internal quotation marks omitted]). However, "this Court has discretion to determine issues of equitable distribution that is as broad as that of the trial court (*DeVries v. DeVries*, 35 A.D.3d 794, 796, 828 N.Y.S.2d 142).

The First Department in *Campbell v. Campbell*[18] holds,

> However, equitable distribution does not mean equal (*see Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 489 N.Y.S.2d 58, 478 N.E.2d 199 [1985]), and "an unequal distribution is appropriate when a party has not contributed to the marital asset in question" (*Del Villar v. Del Villar*, 73 A.D.3d 651, 652, 902 N.Y.S.2d 43 [1st Dept.2010]).

In *Culman v. Boesky*[19] from 2022, the court found:

> Specifically, and of great relevance to this case, our precedents support a smaller percentage distribution to the nontitled spouse of the value of a business created and managed by the titled spouse. Accordingly, reducing equitable distribution to a single fraction reflecting the value of the assets distributed divided by the total amount of marital assets does not accurately represent the equity of the distribution. Rather, in a situation like this, where the complex marital estate is composed of multiple assets of varying natures, many of which cannot be distributed in kind, the court must carefully consider the equitable distribution of *each asset based on the applicable statutory equitable distribution factors, which frequently leads to an unequal distribution that is nevertheless equitable*. (Emphasis added.)

These cases are not outliers. The requirement of equitable and not equal distribution is clear and was made so by the enactment of the law and the factors the court is to consider in fashioning is rulings. While equal is often the case, it is not required. This principle is again reiterated in the October 22, 2024 decision by the Court of Appeals in *Szypula v. Szypula*, at 2024 N.Y. Slip Op 05177, which appears in this issue as the decision of interest. This point is missing from *Charnow.* Further hamstringing us is that as an appellate determination, it is binding until it is otherwise determined not to be. The court in *Dayan v. Dayan*,[20] found itself so bound.

In an extensive analysis of retaining and charging liens, the *Dayan* court considers the binding precedent of *Charnow.* Although the charging lien issue was determined not to be ripe under the circumstances presented, and referred the issue for additional proceedings to determine the viability of an "interim" lien, the court reflected,

> Plaintiff has been placed in a position by the defendant while at the same time his own counsel has been paid in excess of $200,000.00 according to plaintiff's former counsel, ostensibly by defendant's father, which has not been disputed by defendant.

> Thus, the plaintiff, who was benefitting from the parties' prior lifestyle, the less-monied spouse, is left with very few remedies based upon her husband's actions and the inability to obtain her case file and transfer it to her newly retained counsel.

The issue of title which appears key in *Charnow* again remains puzzling. Under Equitable Distribution, the court can award the entirety of the house to one; the court can direct a sale and award a greater amount of proceeds to one;[21] the court can direct a sale and find that an equal distribution is appropriate; the court may find separate property credits attach thereby skewing a distribution which would otherwise be equal. Title, as it were, is irrelevant to all of the foregoing.

By way of settlement, assuming the agreement is silent on the payment of counsel from proceeds of the house sale, that settlement is, like a trial determination, brought about through the efforts of counsel – perhaps sacrificing the payment language to get the agreement signed, but anticipating the ability to collect at the time of sale by an order of the court that might not come. So, what is equitable for the litigant remains inequitable for the matrimonial attorney.

Going Forward

As cases cite to *Charnow,* including *Dayan, supra*, and given the massive hole in the retaining lien brought about by changes in the Uniform Rules applicable only to domestic relations matters, matrimonial attorneys will continue to receive short shrift in trying to enforce their right to secure earned fees when title to an asset – such as the marital residence – is held jointly and is the only path to such security. And so all of the efforts for the client may become a pyrrhic victory for counsel – a job well done and a hard way forward to obtain the fruits of that labor – plenary action or arbitration requiring confirmation of the arbitration, and then the longer path to collection.

Just then, as the Matrimonial Rules (which undercut the retaining lien) were enacted to protect the client, a rule change or legislative change is needed to protect the matrimonial attorney. It is only equitable.

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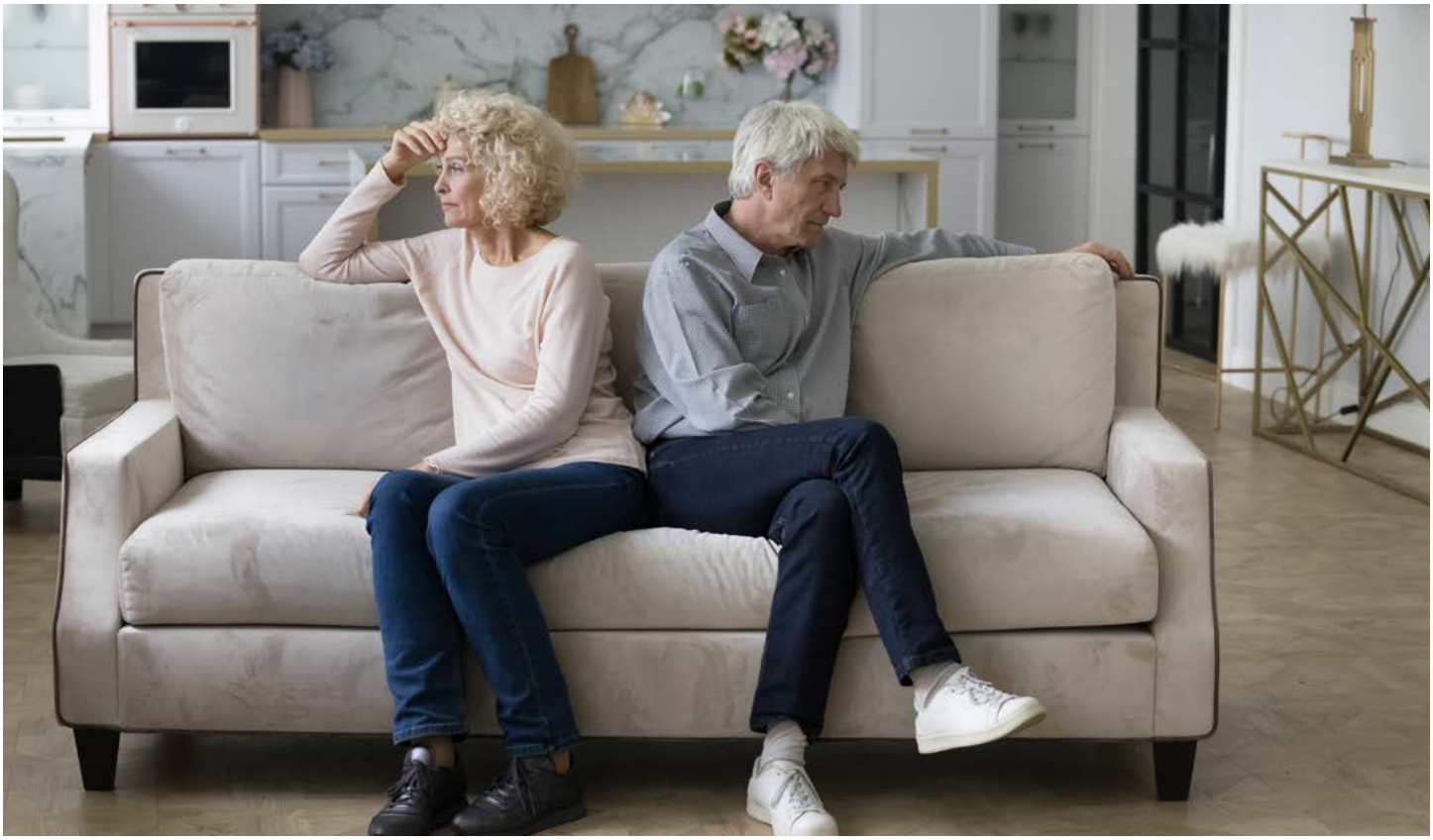
Endnotes

1. 22 N.Y.C.R.R. Part 1400, *et seq*.
2. See 22 N.Y.C.R.R. 1400.2, 1400.3; 1400.5, and 1400.7. *See also* 22 N.Y.C.R.R. 137 (Fee Arbitration Rules) and 22 N.Y.C.R.R. 1200, Rule 1.5 (d) and (e) – ethical rules regarding fees in domestic relations matters.
3. *See* Berman, Frederick S., *The Attorneys Lien in New York – A New Look*, NYLS Law Review, vol. 6, issue 3, July 1960.
4. See *Robinson v Rogers*, 237 N.Y. 467 (1924); *Matter of Heinsheimer*, 214 N.Y. 361 (1915).
5. *See, e.g., Mayeri Corp v. Shea & Gould*, 112 Misc2d 734 (1982).
6. *In Re City of New York*, 5 N.Y. 300 (1959).
7. Jud. Law § 475.
8. *LMWT Realty Corp v. Davis Agency*, 85 N.Y.2d 462 (1995); *Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222 (1st Dep't, 2005).
9. *Wasserman v. Wasserman*, 119 A.D,3 932 (2nd Dep't, 2014).
10. *Tucker v. Schwartzapfel*, 196 A.D.3d 527 (2nd Dep't, 2021).
11. 22 N.Y.C.R.R. § 1400.2.
12. 22 N.Y.C.R.R. § 1400.3.
13. NYSCEF.
14. 134 A.D.3d 875 (2nd Dep't, 2015).
15. The dilemma posed by *Charnow* was explored at length by Dolores Gebhardt in *Charging Liens in Matrimonial Actions*, NYLJ, Aug. 23, 2017.
16. *Solomon v. Solomon*, 307 A.D.2d 558 (3rd Dep't, 2003).
17. *D'Ambra v. D'Ambra*, 225 A.D.3d 662 (2nd Dep't, 2024).
18. *Campbell v. Campbell*, 149 A.D.3d 560 (1st Dep't, 2017).
19. 207 A.D.3d 18 (1st Dep't, 2023) *leave to appeal denied*, 39 N.Y.3d 907 (2023).
20. 58 Misc 3.d 957 (Sup Court, Kings County 2017, Sunshine, J.).
21. See *G.S. v. B.S.*, 63 Misc. 3d 1202(A) (Sup Court, Richmond County 2019, DiDomenico, J.), "Pursuant to Judiciary Law § 475, an attorney in an action or proceeding has a statutory lien against his or her client's cause of action. This lien, known as a 'charging lien,' does not provide for an immediately enforceable judgment, like a money judgment, but rather provides a security interest against an asset, i.e., a judgment or settlement in their client's favor." *See Bernard v. De Rham*, 161 A.D.3d 686 (1st Dep't, 2018). In the context of a matrimonial proceeding, a charging lien is available to the extent that an equitable distribution award creates an award for the client "greater than the value of the interests already held." *See Charnow v. Charnow*, 134 A.D.3d 875 (2d Dep't, 2015). A charging lien is only payable when an attorney is discharged without cause as was the case here. *See Sprole v. Sprole*, 151 A.D.3d 1405 (3rd Dep't, 2017). As per this decision, wife succeeded in obtaining 55% of the equity in the former marital home, and as such, Mr. Baum shall be entitled to the sum of $31,253 payable to him "off the top of any proceeds distributed to wife by husband in a buyout, or at closing if the house is sold to a third party. A redacted copy of this decision shall be forwarded to Mr. Baum, as former counsel, so that he can be advised of his right to recovery herein."

The Different Complexities of Gray Divorce in a Gray Marriage Versus Gray Divorce in a Long-Term Marriage

By Emily Pollock



It is now commonly acknowledged that gray divorce – the unnecessarily insulting moniker for divorce among people aged 50 and over – is on the rise. While the overall rate of divorce in New York has decreased almost every year since 1990,[1] the divorce rate for adults 50 and older nearly doubled between 1990 and 2010 and has continued to increase thereafter.[2] We also know that second marriages are more likely to end in divorce than are first marriages, and almost 75% of third marriages end in divorce.[3]

So, the rate of divorce among people aged 50 and older is increasing, and many of those people are ending second or third marriages. Thus, when we examine gray divorce, we must distinguish between two scenarios: gray divorces occurring after a long-term marriage, and gray divorces occurring after a gray marriage – a marriage later in life, often a second or third, typically when parties have accumulated significant premarital assets and may have obligations arising from prior relationships and/or retirement assets already depleted through division with a prior spouse.

The financial, legal, and emotional considerations in these two scenarios differ significantly. This article explores the distinct concerns for each of these versions of gray divorce and the critical benefits that can be derived from prenuptial agreements and estate planning in protecting the interests of stakeholders in both.

Gray Divorce of a Long-Term Marriage: Divorcing After Years of Joint Accumulation

While there is no statutory definition of what constitutes a long-term marriage, and the case law is inconsistent in applying the term, the Legislature has provided some guidelines for how long maintenance (the term for spousal support in New York) should be paid based upon the length of the marriage. Such guidelines divide marriages into three tranches: those lasting up to 15 years, for which the proposed maintenance period is between 15% and 30% of the length of the marriage; those lasting between 15 and 20 years, for which the proposed maintenance period is between 30% and 40% of the length of the marriage; and those lasting over 20 years, for which for which the proposed maintenance period is between 30% and

40% of the length of the marriage.[4] It can be inferred, then, at least for support purposes, that a marriage of less than 15 years would not be deemed a long-term marriage, a marriage of 20 years or more would, and the marriages that end between years 15 and 20 are somewhere in between.

1. Equitable Distribution

In long-term marriages, it is common that most of the couple's wealth accumulated during the marriage. Separate property assets will be retained by the titled spouse, so long as the proper documentation and tracing is provided, but all other property will be classified as marital. In most long-term marriages, the bulk of such marital property derives from earnings during the marriage, whether such property be in the form of residences, retirement assets, business interests, or cash and investment accounts. Marital property will be equitably distributed between the parties pursuant to the factors listed in Domestic Relations Law (DRL) § 236B(5)(d), the second and, for our purposes here, the most important of which is "the duration of the marriage and the age and health of both parties."

While *equitable* distribution does not mean *equal* distribution, largely in reliance on this second factor, equitable distribution of assets in a long-term marriage is generally equal, resulting in each party receiving half of the value of each marital asset unless one or more of the other 15 equitable distribution factors provides a particularly compelling reason for an unequal distribution. The most common exception to such an equal distribution of asset value is a business or professional practice titled in the name of only one spouse. For such assets, the non-titled spouse is usually awarded less than 50% of the value, even in long-term marriages.[5]

The considerations for each spouse in the preference of retaining certain assets will impact how the various assets in the marital pot should be distributed. A spouse who will be a primary custodial parent may want to stay in the marital residence. If there is a significant age disparity between the spouses, an older spouse's primary goal may be retaining retirement assets, so making a tax-impacted equalization payment from other liquid assets may make more sense than distributing the marital portion of the retirement assets. A spouse nearing a planned retirement also may prefer to limit future support obligations by agreeing to a lesser distribution of marital assets. Older parties may jointly decide that downsizing and adjusting the percentage of the overall asset picture dedicated to real estate makes sense. Evaluating the concerns specific to each party, with particular consideration given to their respective ages, is important in distributing the assets in a manner that may be equal in the aggregate, but not necessarily with respect to each asset.

Further, in long-term marriages, there may be less obvious assets, like embedded tax losses in certain investment holdings or tax loss carry-forwards that have accrued during the marriage. Different assets within the same investment account that have the same fair market value may have differing values to the parties depending on the tax basis in the assets, especially assets that have been held over a long period, as is often the case in a long-term marriage. Similarly, there may have accrued during the marriage net operating losses or other loss carryforwards tied to marital assets that can continue to be used in future years to offset applicable gains. But there are rules as to who can claim which losses based on the titled ownership of the asset that gave rise to the loss, and limits as to what income can be offset. Aggregated losses like these are more likely to occur in long-term marriages and their value should be carefully evaluated: what is the value of these carryforwards? Will a spouse who is unlikely to have the relevant gains on future tax returns or who was not a titled owner of the asset giving rise to the loss be able to take advantage of them and, if not, should there be an offset of other payments to equalize the value to the spouse who will use them?

2. Spousal Support

The issue of maintenance in gray divorce of a long-term marriage presents conflicting legislative intents: a longer marriage should mean a longer period of maintenance, but older payors should not be required to work beyond appropriate retirement age simply to continue maintenance payments. The statute is explicit that "when determining duration of post-divorce maintenance, the court shall take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision."[6]

Last year, the Second Department addressed these conflicting interests in a case where the parties had been married 24 years, the payor-husband was 57 at the time of trial, and the payee-wife had not worked outside the home for most of the marriage. The Second Department upheld the award of $12,000 per month in maintenance for a period of nine years, or 37.5% the length of the marriage, which required the husband to continue maintenance until he turns 66.[7]

Earlier this year, in Richmond County, in a 30-year marriage, the court awarded the wife 14 years of maintenance, where the husband was 57 at the time of trial, notwithstanding that the wife would be eligible to collect Social Security before the termination of this payment period. The court accordingly required the husband to pay maintenance past the age of 70.[8] Also this year, a Westchester County court awarded 12 years of maintenance in a 26-year marriage, notwithstanding that the payor husband was 60 years old at the time of trial and claimed to have "health concerns," which will result in his paying maintenance until he is 72.[9]

These cases raise the issue of what age constitutes "retirement eligibility" under the statute. For Social Security benefits, the early retirement eligibility age can be as young as 62

and the oldest possible full retirement age, which is based on the year of birth, is 67. Many defined benefit plans are based on annuity calculations assuming a retirement age of 65, and most qualified retirement plans require that mandatory minimum distributions commence at age 70.[10] But we need only look at some of our most visible current political figures to be reminded that people often work well beyond these purported retirement ages, regardless of the wisdom in doing so.

3. Retirement Asset Division

In long-term marriages, most if not all of the accumulated retirement assets, whether they be pension benefits, 401K accounts, 403(b) plans, IRAs, or other forms of benefits, were funded with marital property and are subject to equitable distribution. However, distributing such assets can still be a complex process, particularly if the couple is nearing or already in retirement, with different distribution methods and tax consequences applying to different assets. It is important that parties work with counsel and advisors to ensure that plan administrators are distributing the benefits as the parties intend.

Spouses in long-term marriages also should be educated about their Social Security benefit eligibility: A non-working or lower-earning spouse can claim Social Security benefits based on their ex-spouse's earnings record if the marriage lasted at least 10 years, they are at least 62 years old, and they have not remarried.[11] Divorced spouses can receive up to 50% of their ex-spouse's full retirement benefit amount and taking this benefit does not reduce the benefits received by the income-earning-spouse. Such entitlement to benefits exists even if the income-earning spouse has not yet filed for benefits.

4. Support of Adult Children and Estate Planning

For couples divorcing after a long-term marriage, child support often is no longer an issue as children of the marriage often already are emancipated, but it is worth noting that retirement concerns are not a basis for decreasing the duration or, typically, the amount of child support to be paid. Accordingly, some gray parents of minor children who would have been able to consider retirement in the intact marriage may have to defer such plans post-divorce.

Further, parties gray divorcing after a long-term marriage are often in conflict about payments on behalf of emancipated adult children: graduate school tuition, health insurance and unreimbursed medical expenses, a housing subsidy for the child pursuing a theater career, paying for a child's fairytale wedding, etc. None of these are obligations a parent would be ordered to pay by a court, but many are expenses at least one parent may have believed they would incur if the marriage had continued.

Similarly, gray divorcing parents may find that their estate planning objectives conflict. The division of marital assets may affect the inheritance plans for adult children. The definition of the marital estate itself may be in dispute if one party believes marital assets were improperly removed from the marital estate and placed into irrevocable trusts, a common estate planning vehicle in high-net-worth cases. Even if such trusts provide a spouse with income or other benefits during their lifetime, if the corpus of the trust is comprised of assets that a spouse would have otherwise obtained outright, putting the assets in the trust prevents them from applying the principal as desired. A party may also be concerned that their ex-spouse may dissipate their share of the assets accrued during the marriage, which they intended and hoped would be handed down to their children, by supporting a new spouse and, in some cases, any children of that new marriage.

It is crucial that parties who jointly prepare estate planning documents during the marriage do so with counsel who can advise them how to draft around these concerns that could arise in the event of divorce. It is also important that divorcing couples who continue to have shared goals regarding the distribution of their respective estates to their adult children revisit their post-divorce wills and estate plans to ensure their assets will be distributed according to their wishes. In New York, for example, the entry of a final judgment of divorce automatically revokes all prior provisions or bequests in a will to a former spouse.[12] Continuing such collaborative estate planning can be an act of co-parenting after divorce.

Gray Marriage: Divorcing Later in Life With Pre-Accumulated Assets

The financial considerations in divorce of a gray marriage generally do not involve the same concerns relating to long-term asset accumulation and post-divorce support obligations. Instead, parties entering gray marriages often have already been through gray divorce. These parties are entering a union to build a life together, but they are funding that life with assets that they accumulated separately and, often, do not intend to share post-divorce, should there be one.

1. Prenuptial Agreements

In a gray marriage, a prenuptial agreement is critical for protecting pre-existing assets and defining the parties' financial intentions and obligations to each other. Parties to gray marriage are often balancing the desire to protect inheritances for their adult children, depleted retirement assets that have been shared with a prior spouse, and a desire to provide financial stability for a new spouse.

A prenuptial agreement can define how the parties will balance those interests with provisions that include waiving rights to retirement benefits and/or spousal estate rights, and defining what, if any, post-divorce support obligations may be. The balancing of these interests can also be achieved through the creation of trusts – separately or as part of a prenuptial agreement – like a qualified terminable interest property trust

(QTIP) or qualified personal residence trust (QPRT). These may give a surviving spouse limited access to specific assets – a residence, for example – during their lifetime, while ensuring that such assets are distributed to children from a prior marriage at the end of the surviving spouse's period of entitlement. That period may be that surviving spouse's death in a QTIP.

2. Social Security and Spousal Benefits

In many gray marriages, one or both spouses may already be receiving Social Security benefits, including spousal benefits from previous marriages. This makes more complex divorce issues like the timing of benefits, eligibility for ex-spouse benefits, and the division of retirement income. The likelihood is that Social Security spousal benefits will not accrue significantly during a gray marriage, even if it occurs before the spouses have reached their full retirement age, because they will have fewer years of earned income and will typically be earning less. In a gray marriage occurring after a spouse reaches full retirement age, the new spouse generally will have no spousal benefits unless the eligible spouse dies during the marriage.[13] However, such survivor benefits, which are 100% of the deceased spouse's Social Security benefit, will be waived by a widowed spouse who remarries before age 60.

3. Retirement Assets and Pensions

Similarly to Social Security benefits, it is not uncommon for spouses in gray marriages to accrue limited marital retirement assets. Interests in pensions, defined benefit plans, and retirement accounts that accrued prior to the gray marriage will be the titled spouse's separate property. Importantly, however, if the retirement plan is an ERISA qualified plan, such as a 401(k), 403(b) or other employer-sponsored plan, the law requires the non-participating spouse to be the primary beneficiary, unless otherwise waived in writing. Designating an adult child as the beneficiary, for example, is not sufficient to overcome this presumption for the non-participating spouse. Plan participants entering a second or third gray marriage, therefore, must ensure that plan waivers are executed so the intended beneficiary designations will control, and they should ensure such waiver is in the form accepted by the plan administrator.

In some gray divorces of gray marriages, retirement benefits will have accrued during the marriage but untangling the marital portion from the separate property portion and, with respect to some defined benefit and pension plans, differentiating between the benefits payable to the first former spouse and the second former spouse will require experienced counsel and accounting professionals.

4. Health Care Proxies and Elder Care Concerns

A final important consideration for parties entering gray marriage are the parameters of their "in sickness and in health" obligations to each other. In a long-term marriage, as parties enter an age where debilitating and chronic health concerns become more likely, they generally have shared resources and family members to help in shouldering the financial and emotional burdens of such illnesses. In a gray marriage, one spouse may take on a primary caretaking role for a chronically ill spouse without having access to such spouse's assets as they would have if such assets had accrued during their marriage. Similarly, the ill spouse's children from a prior relationship may be less available or willing to support the caretaker.

If there is divorce of such a gray marriage, there may be minimal marital assets to be distributed and there may be a minimal income stream. It is difficult, then, for the court to address maintenance obligations, even when a spouse requires ongoing support. Similarly, if the caretaking spouse entered the marriage with minimal assets and spent a good portion of the marriage caring for the ill spouse, he or she may be left with little to no equitable distribution of assets upon divorce because the majority of the ill spouse's assets are separate property and/or tied up in an estate planning structure designed to protect adult children and support a prior spouse.

Parties entering gray marriage, therefore, should include in their financial and estate planning provisions to ensure the financial security of both parties and lessen the emotional toll of end-of-life decision making. These may include long-term care insurance, living wills, health care proxies, trusts created to provide distributions necessary for the ill spouse's health and wellness, and advanced life directives.

Conclusion: Navigating the Challenges of Gray Divorce

Whether divorcing after a gray marriage or a long-term marriage, couples face a range of financial and legal considerations that require careful planning and negotiation. In gray marriages especially, prenuptial agreements, estate planning, and protection of pre-existing assets are essential to safeguard the interests of both the divorcing couple and their respective families. In long-term marriages, considered division of jointly accumulated wealth, support obligations, and retirement planning is necessary to position both spouses well for their lives after divorce, including lives that may include a gray marriage.

Regardless of the circumstances, seeking the guidance of financial, tax and accounting professionals, as well as trust and estate and matrimonial attorneys can help ensure that both parties navigate the complexities of gray divorce with their financial futures intact. Proper planning and clear legal agreements can protect all interested parties, from the divorcing spouses to the children and other dependents who rely on the estate for financial stability.

Emily Pollock (she/her) was named one of the top 10 divorce attorneys in New York City by Forbes Advisor in 2024. She can be contacted directly at epollock@donohoetalbert.com.

Endnotes

1. CDC summary of divorce rates by state 1990, 1995, and 2000-2022, https://www.cdc.gov/nchs/data/dvs/marriage-divorce/state-divorce-rates-90-95-00-22.pdf.
2. Susan L. Brown and I-Fen Lin, *The Graying of Divorce: A Half Century of Change,* J. Gerontol B Psychol Sci Soc Sci, 1710-1720 (2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9434459.
3. Christy Bieber, *Revealing Divorce Statistics in 2024*, Forbes Advisor, https://www.forbes.com/advisor/legal/divorce/divorce-statistics.
4. DRL § 236B(6)(f).
5. *See, e.g.*, *Novick v. Novick*, 185 N.Y.S.3d 793 (2d Dep't 2023); *Lieberman-Massoni v. Massoni*, 186 N.Y.S.3d 336 (2d Dep't 2023); *Miller v. Miller*, 189 N.Y.S.3d 732 (2d Dep't 2023). *Cf*, *Parker v. Parker*, 188 N.Y.S.3d 55 (1st Dep't 2023) (modifying lower court's ruling to change award to wife from 30% to 50% of business interests, even though there was no evidence she was involved in them, because they were jointly-titled).
6. DRL § 236B(6)(f)(4).
7. *Novick v. Novick*, 185 N.Y.S.3d 793 (2d Dep't 2023).
8. *T.H. v. I.H.*, 208 N.Y.S.3d 821 (Sup. Ct, Richmond Co. 2024).
9. *J.D.D. v. A.D.*, 203 N.Y.S.3d 864 (Sup. Ct, Westchester Co. 2024).
10. IRS Retirement Topics – Significant ages for retirement plan participants, https://www.irs.gov/retirement-plans/retirement-topics-significant-ages-for-retirement-plan-participants.
11. 20 CFR § 404.331, *available at* https://www.ssa.gov/OP_Home/cfr20/404/404-0331.htm.
12. EPT § 5-1.4.
13. Social Security Administration Survivor Benefits, https://www.ssa.gov/survivor/eligibility.

Matrimonial Trial Practice: Frequently Asked Questions

By Joel R. Brandes

As the author of a treatise on New York divorce and family law[1] and a Matrimonial Trial Handbook,[2] I frequently receive email communications from lawyers with questions about matrimonial trial practice. The questions come from attorneys with all levels of experience. My answers to their questions are based on my experience as a trial and appellate lawyer.

An attorney who is a friend of mine recently served as the moderator of a mock trial program. After the program, she commented to me that a lot of lawyers do not know how to conduct a matrimonial trial. She pointed out that many attorneys who have not had trial experience do not know the fundamentals of trial practice. The questions that I have received[3] and my responses to their questions, which explain some of the basics of trial practice, are the focus of this article.[4]

Document Admitted in Evidence Without Testimony

Q: If I put documents in evidence, such as the husband's W-2 forms and his bank statements, is that enough without the husband's testimony or with limited testimony? When I inquire about a document that is already in evidence, the judge says to me, "Counsel, the document is in evidence!" He says it in a tone of voice which implies that I should move on because the document is in evidence and that's enough. Is it enough? How do I know the court will read all of these exhibits?

A: You do not have to ask questions about the details of a document already in evidence. The entire contents of the document are before the court and it is expected that the court would read it. Actually, the judge may not read it unless counsel points out what he or she wants to direct the court's attention to something in the document.

For example, "Your Honor, I direct the court's attention to that part of Exhibit __ that states . . . . "

Once a document is in evidence you can refer to it during cross-examination in the summation and in a post-trial memorandum to get the court to notice something in it that you believe is important.

You have the right to question a witness about its contents. For example: "What was the withdrawal of $_____for?"

Document Admitted in Evidence Without Testimony

Q: I am concerned that my adversary puts a lot of documents in evidence, without eliciting any testimony from his client. How does that work? Is the court expected to review tens of thousands of pages without testimony? Is there any motion we can make to strike all the documents that weren't supported by testimony?

A: The documents are in evidence and may be read and considered by the judge if he or she chooses to do so. If the documents were offered and admitted into evidence without any foundational testimony and without objection, that was a mistake, since there is nothing that can be done to strike the documents that were not supported by testimony.

Exhibits 'For ID Only'

Q: The court asked counsel to pre-mark exhibits. So, before the trial starts, on any given date, we begin by handing the pre-marked exhibits to the court and adversary. After that, the court requests the adversary to either stipulate to put exhibits in evidence, or "reserve." If the adversary "reserves," then the exhibit is marked "For ID Only." What happens with the "ID Only" exhibits? How do I get them moved in evidence? What do I tell the court when he asks me for a "proffer"?

A: Proffer is another way of saying the offer of proof. That is all. An offer of proof is a presentation of evidence for the record (outside of the jury's presence, if there is a jury) usually made after the judge has sustained an objection to the admissibility of that evidence so that the evidence can be preserved on the record for an appeal of the judge's ruling. It may be made to demonstrate the relevancy of challenged evidence, to clarify or specify the purpose or justification for a line of questioning on cross-examination, and to justify reopening the case after the close of evidence to allow the presentation of additional evidence. In New York, the common law provides the principal authority for making an offer of proof. An offer of proof, which may be used to persuade the court to admit the evidence, consists of three parts: (1) the evidence itself, (2) an explanation of the purpose for which it is offered (its relevance), and (3) an argument supporting admissibility. Such an offer may include tangible evidence or testimony (through questions and answers, a lawyer's narrative description, or an affidavit). Where there is an objection to an offer of evidence, the proponent of the evidence must take advantage of an opportunity to make an offer of proof to demonstrate the relevance of disputed evidence. Marking a document "For ID Only" does not place it in evidence. All that it does is save time so that the document does not have to be marked for identification when it is being offered into evidence. You get documents into evidence by laying a proper foundation for them. The necessary foundation depends upon the particular document.

Method of Making an Offer of Proof

(By Counsel)

I respectfully submit that the question propounded to the witness (is material and relevant) (to the following issue) (to clarify the following): _____

Q. There are about 12 documents that my adversary objected to and therefore did not go into evidence, but were marked as "ID Only." This happened either because the referee sustained my adversary's objection or because I simply missed requesting to mark them into evidence. Do I get a second bite? Am I allowed to go back and try to put these documents in evidence?

A: If the exhibits were not admitted into evidence because there was an objection that was sustained, you have to lay a proper foundation for them and offer them again. This will require a witness being on the stand who you can question to lay the foundation.

If the exhibits were not admitted into evidence because you failed to offer them into evidence after laying a proper foundation, then you can offer them one by one at any time before you rest. I suggest that you be prepared with references to the transcript, to show the court that you laid a proper foundation.

Voir Dire

Q. What is *voir dire* and how does it work when a witness offers an exhibit into evidence?

A: The direct testimony of a witness may be interrupted, in the court's discretion, by cross-examination, known as "voir dire." As a general proposition, a party who desires a voir dire hearing when the adverse party makes an offer of some matter in evidence need not show any affirmative grounds but is entitled to attempt to elicit from the adverse party's witness sufficient grounds for its inadmissibility. Voir dire may be requested when the adversary wishes to challenge the foundation for the introduction (or exclusion) of evidence, such as questions concerning the qualifications of an expert witness, the competency of a witness, the facts upon which a claim of privilege is based, and the authentication of evidence. If the voir dire exposes a defect in the foundation for the admission of the evidence, the inadmissible evidence will be excluded.

Pressure To End Direct Examination

Q. The judge is pressuring me when we are in chambers to end the direct examination of my client before I am ready to do so. He expects me to finish tomorrow, and I'm not sure if I can finish on time. What should I do?

A: Attempt to offer all of your evidence as planned. Do not cut it short. The judge cannot prevent you from presenting relevant and admissible evidence and testimony that was not previously offered. The pressure is off the record, and if you succumb to it, you will not have an appealable ruling. You must make a record to have an appealable ruling. Respectfully tell the judge if his rulings are not on the record you have to make a record and can only do that by calling witnesses to testify and presenting relevant evidence that has not yet been offered.

Direct Testimony of My Expert

Q: I have questions prepared to ask my expert witness when he testifies which refer to his report. What if the court doesn't admit his report in evidence? Can he still refer to that report?

A: If your expert report is not in evidence he cannot refer to it. You will have to ask him questions on direct examination to elicit everything in his report. After he completes his testimony, you can try to offer his report into evidence as an aid to the court and the court might admit it, but do not count on it.

Q: I want to ask my expert how he interprets the *DeJesus* case, which established the methodology that he followed in doing his evaluation of the husband's retirement benefits. My expert is not a lawyer . . . I am concerned that the court may sustain an objection to such a question. What is the best way to approach his direct examination?

A: Here is some sample language to use:

- Please explain the methodology (steps you took) you followed in doing your evaluation of the plaintiff's retirement benefits.
- Why did you use that methodology?

Failure To Retain an Expert To Value Marital Residence

Q: My client never retained an expert witness to value the marital residence. I am engaged in the trial and the judge has indicated that he will not let me call an expert witness at this late date because I did not comply with CPLR 3101(d). What do I do?

A: Have a lay witness testify. Opinion evidence is admissible as to the value of real and personal property and personal services by anyone with a reasonable basis for the opinion. However, a witness must provide a basis of knowledge for his statement of value before it can be accepted as legally sufficient evidence of such value.[5] The Court of Appeals has held that:

> As a rule, witnesses must state facts, and not draw conclusions, or give opinions. It is the duty of the jury, or court, to draw conclusions from the evidence, and form opinions upon the facts proved. The cases in which opinions of witnesses are allowable, consti-

> tute exceptions to the general rule, and the exceptions are not to be extended or enlarged, so as to include new cases, except as a necessity to prevent a failure of justice, and when better evidence cannot be had. . . . On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks. Persons should be conversant with the particular article, and of its value in the market, as a farmer or dealer, or a person conversant with the article, as to the value of lands, cattle, produce, etc. These stand upon the general ground of peculiar skill and judgment in the matters about which opinions are sought.[6]

Redirect of My Expert

Q: Am I required to ask re-direct questions for the experts?

A: No

Best Way To Impeach Credibility

Q: My goal is to impeach the plaintiff's credibility on cross-examination. What is the best way to go about it?

A: The court will be able to see if they are not credible witnesses based on evasive and unresponsive responses to your questions. Don't waste your time searching for something that might not happen. The first and most important rule of cross-examination is to never ask a question for which you are unsure about the answer. The second guideline for cross-examination is to refrain from asking questions that will enable the witness to support the claims made by your adversary.

Offering New Exhibits During Cross-Examination

Q: When my adversary cross-examines my client, is she permitted to put new exhibits in evidence? She has already provided me with additional new exhibits that she intends to put in evidence. Can she do so? I thought she couldn't do it after she rested.

A: She is permitted to examine your client on cross-examination, mark documents for identification, and offer them and have them admitted into evidence if a proper foundation is laid. She can then cross-examine your client about the document to impeach her prior testimony. If it is a document, she would have to establish there is an exception to the hearsay rule, which allows its admission, and would have to lay a proper foundation. For example, she would have to demonstrate it was a business record, or an admission. Documents don't automatically come into evidence. A proper foundation must be laid, usually by a witness testimony.

Judge Curtailing Cross-Examination

Q: The judge is running out of patience and threatened me twice that he will curtail my cross-examination because I am not addressing relevant aspects of the case. What do I do?

A: The judge did not threaten to curtail all your cross-examination. He told you to move on, which is proper. You have the right to ask any proper question no matter how many times the court asks you to move on, but you can't repeat yourself.

Witness Failure To Respond to Question Propounded

Q: When the plaintiff responds to a question propounded by me, he frequently does not answer my question but rambles on with extraneous matter that is on his agenda, which has nothing to do with the question he was asked. What can I do to stop this and get him to answer my question?

A: Move to strike his answer or the part of his answer that is not responsive to your question. When he does not answer your question, ask the court to direct him to answer the question propounded.

Judge Tells You To 'Move On'

Q: When I ask a question and the judge sustains an objection to it, and I rephrase it, and the court sustains another objection, the court often tells me to "move on." Does this mean that I cannot elicit the testimony I was hoping to elicit?

A: When the court tells you to move on to another, that does not mean that you cannot rephrase your question and ask it another way or ask another question. No matter what the judge says, you have the right to ask relevant and proper questions if you feel it is necessary. Don't let yourself be bullied from asking relevant questions.

Redirect Examination

Q: After my clients' cross-examination, I have to do "re-direct." I'm not sure how to do it; am I limited by the contents of the cross-examination?

A: After the adverse party cross-examines the witness, the proponent of the testimony may examine the witness to rehabilitate or question him or her about matters brought out on cross-examination. This is called "redirect" examination. A party whose witness has been cross-examined is entitled to conduct redirect examination of the witness, and the redirect is confined to those matters that were brought out on cross-

examination to allow the witness the opportunity of explaining any new facts that were brought out.

The scope of redirect examination is a matter within the discretion of the trial court and may be allowed concerning an issue raised on cross-examination that was not explored on direct examination.

The rule of completeness is a rule of fairness that applies where a witness is cross-examined by reference to only a portion of their prior statements or admissions.

Where only a part of a statement is drawn out on cross-examination, the other parts may be introduced on redirect examination to explain or clarify that statement.

Completeness evidence may be admitted when portions of a party's prior statements have been introduced against them as admissions or when they have been cross-examined about portions of prior statements for purposes of impeachment. The attorney who called that witness to testify may then elicit testimony as to the omitted portions of the documents or conversations that tend to provide an explanation or qualification of the testimony.

The adverse party may be allowed to question the witness as to anything elicited on "redirect examination" and to attempt to impeach the witness. This is called "re-cross examination." Sometimes the court will allow re-redirect examination and re-re-cross examination. Re-cross-examination is limited to facts produced on redirect examination.

Method of Refuting Spouses' Testimony

Q: What is the proper way to offer testimony of my client refuting testimony of her spouse?

A: When the client is attempting to refute the testimony of her husband, ask:

- Do you recall him [your husband] testifying on [date of testimony] that . . . [paraphrase what he testified to] [or [read from transcript indicating its date and page number] It is not mandatory that you give the date or page number.
- Was his testimony accurate?
- In what respects wasn't it accurate?

Note: It is important to have the client give specific dates. If the date is not available give the month or year and place or places. Identify people by name or occupation.

Rebuttal

Q: My adversary told the judge that she did not intend to have "rebuttal." What does rebuttal mean? If the plaintiff doesn't have rebuttal, is the defendant permitted to do it?

A: The party holding the affirmative may offer rebuttal evidence and the other party may offer sur-rebuttal evidence. A party is entitled to give rebuttal evidence. When the party holding the negative of an issue rests, the party who first put in their evidence may then put in evidence that rebuts or contradicts the evidence produced by the adverse party. The evidence may not only contradict the evidence on the opposite side and corroborate that of the party who began but also may controvert some affirmative fact that the answering party has endeavored to prove.

Rebuttal evidence means not merely evidence that contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. Evidence that would have been proper as part of the plaintiff's affirmative case, and which they have no right to introduce as affirmative evidence after the defendant has rested, may still be offered by the plaintiff if it tends to impeach or discredit the testimony of the defendant.

What evidence may properly be introduced in rebuttal rests in the sound discretion of the trial court, and the court's exercise of that discretion is ordinarily subject to review only for clear abuse or an improvident action.

Offering New Exhibits After Resting

Q: Can you let me know what you think about my adversary's attempt to put new exhibits in evidence after the plaintiff rested?

A: She would have to ask for permission to reopen her direct case after she rested and call a witness to testify to offer additional evidence. It is up to the discretion of the judge. If permitted, you will have the right to cross-examine the witness about the new evidence. You would also have the right to recall your client to testify on her direct case about that evidence.

What Is 'Secondary Evidence'?

Q: What is "secondary evidence" and can you give me a sample of how you lay a foundation for it? I thought secondary evidence is about offering copies of original documents that are lost or difficult to locate.

A: Secondary evidence is about offering copies of original documents that are lost or difficult to locate when the best evidence rule comes into play. The best evidence rule applies only where a party seeks to prove the contents of a writing. It provides that when the terms of a writing are to be proved, the original document must be produced unless the proponent of the evidence can show it to be unavailable for reasons other than their own fault. If the absence of the original can be satisfactorily accounted for, secondary evidence will be admissible. The best evidence rule does not apply where the fact to be proved is independent of the writing and the proof is the tes-

timony of a witness with personal knowledge of the fact. For example, the payment of maintenance or child support may be evidenced by a written receipt. Nevertheless, the payor may testify that they paid the maintenance without producing the receipt or explaining why they do not have it. The payment is an independent event. It is not dependent on the receipt of evidence that it has been made. Thus, in such case, the best evidence rule does not apply. However, if title to property is in dispute and the deed is not produced, the best evidence rule applies and a foundation will have to be laid for the production of secondary evidence. This is because a transfer of property does not exist independently of the deed. The deed is a legally operative instrument. [7]

Documents Admitted for Demonstrative Purposes Only

Q: The court has admitted documents my adversary offered into evidence for demonstrative purposes. What does that mean?

A: A document may be admitted into evidence for purposes of demonstration only and not admitted for its truth. The judge has the discretion to permit demonstrative evidence. Some factors the judge will consider include whether the evidence will assist the jury in understanding the evidence, whether it might complicate the issues or confuse the jury, or particularly, whether it might be inflammatory or prejudicial.[8] Writing that would be hearsay may be admissible for demonstrative purposes. In *Hinlicky v. Dreyfuss*, the Court of Appeals held that an algorithm was admissible as a non-hearsay demonstrative aid demonstrating the steps an anesthesiologist had taken in clearing the patient for surgery.[9]

Admissibility of Net Worth Affidavit

Q: Is the net worth affidavit required by DRL § 236(B)(4) admissible in evidence over objection?

A: The net worth affidavit is a disclosure device available in matrimonial actions. DRL § 236(B)(4), which deals with the net worth statement, is titled "compulsory financial disclosure." It is a document that the parties are required to "provide" upon demand, or file with the court if not demanded. There is a split of authority on whether the court can take judicial notice of the contents of a filed statement of net worth and no case that holds that it is admissible in evidence.

The Appellate Division, Second Department has held that it was not error for the court to take judicial notice of the defendant's net worth statements in the court file which he or she was required to file pursuant to DRL§ 236. In *Baumgardner v. Baumgardner*,[10] the Appellate Division found no merit to the plaintiff's contention that the Supreme Court erred in taking judicial notice of the defendant's net worth statements that had been filed with the court pursuant to § 236 of the Domestic Relations Law and 22 N.Y.C.R.R. § 202.16(b).

The Appellate Division, Third Department, has held that a court may not take judicial notice of the factual material in the parties' worth statements and financial affidavits in the court file. In *Halse v. Halse*,[11] the Appellate Division pointed out in a footnote that although the defendant filed a statement of net worth with the Supreme Court in 2008, it was not proper for the court to take judicial notice of the factual material contained therein.[12] In *Matter of Grange v. Grange*, the Appellate Division held that Family Court erred in taking judicial notice of the contents of financial disclosure affidavits filed with Family Court in 1999, which were neither offered nor admitted into evidence at any of the hearings. The mere presence of those documents in the court file does not mean that judicial notice properly can be taken of any factual material asserted therein.

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Endnotes

1. Law and the Family New York, 2024-2025 Edition (12 Volumes, Thomson Reuters).
2. New York Matrimonial Trial Handbook (Bookbaby).
3. The questions are from emails I received from counsel. Some of the questions are multiple questions.
4. These questions originally appeared in the 2022 Cumulative Update to the New York Matrimonial Trial Handbook (Bookbaby).
5. *People v. Lopez*, 79 N.Y.2d 402, 404–05 (N.Y. 1992).
6. *Terpenning v. Corn Exch. Ins. Co*., 43 N.Y. 279, 281–82 (N.Y. 1871) (citing Nelson, Ch. J., *Lincoln v. Schenectady and Saratoga R. R. Co.* (23 W. R., 433); *Bull v. Flagler* (23 Wend., 354); *Norman v. Wells* (17 Wend., 136); *Lamoure v. Caryl* (4 Denio, 370). Nelson Ch. J., *Lincoln v. Schenectady and Saratoga R. R. Co*. (23 W. R., 433); *Bull v. Flagler* (23 Wend. 354); *Norman v. Wells* (17 Wend. 136); *Lamoure v. Caryl* (4 Denio, 370)).
7. McCormick on Evidence § 234 (6th Ed.); *see Glatter v. Borten*, 233 A.D.2d 166, 649 N.Y.S.2d 677 (1st Dep't 1996).
8. *Rojas v. City of New York,* 208 A.D.2d 416, 617 N.Y.S.2d 302 (1st Dep't 1994); *People v. Estrada*, 109 A.D.2d 977, 486 N.Y.S.2d 794 (3d Dep't 1985).
9. *Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 815 N.Y.S.2d 908 (2006)
10. 98 A.D.3d 929, 951 N.Y.S.2d 64 (2d Dep't 2013).
11. 93 A.D.3d 1003, 940 N.Y.S.2d 353 (3d Dep't 2012).
12. *Citing Matter of Grange v. Grange*, 78 A.D.3d 1253, 1255 (2010).

Szypula v Szypula
2024 NY Slip Op 05177
Decided on October 22, 2024
Court of Appeals
Wilson, Ch. J.
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Decided on October 22, 2024

No. 76

[*1]Meredith Szypula, Appellant,

v

John Szypula, Respondent.

R. James Miller, for appellant.

Emily Barnet, for respondent.

WILSON, Chief Judge:

In this case, a couple used marital funds to augment the husband's Foreign Service pension so that it included credit for his pre-marriage military service. The issue is whether the portion of the pension related to the pre-marriage military service is separate or marital

property. We hold that the portion of the Foreign Service pension related to credit for that service is entirely marital property because marital funds were used to transform the credits into pension rights. We therefore reverse and remit to Supreme Court for further proceedings.

I

John Szypula joined the Navy in 1987, when he was 22. He and Meredith Szypula were married nine years later. Two years later, in 1998, Mr. Szypula left the Navy. In general, members of the armed services become entitled to retirement pay only after they complete twenty years of service. When Mr. Szypula left the Navy, he was not entitled to military retirement benefits.

From 1998 to 2012, Mr. Szypula worked in the private sector. In 2012, he joined the Foreign Service and enrolled in the Foreign Service Pension System (FSPS). Veterans who join the Foreign Service—like Mr. Szypula—may add their years of military service to their FSPS pensions by making additional contributions for the years they served in the military. Mr. and Ms. Szypula took advantage of this benefit. From 2012 to 2018, a portion [*2]of Mr. Szypula's earnings was withheld to enhance his Foreign Service pension by "buying back" his eleven years of Navy service, at a total cost of $9,158.00 [FN1]. As a result of those payments and his eleven years of Navy service, Mr. Szypula's FSPS pension will vest sooner and be worth more.

In 2019, the Szypulas filed for divorce. The parties settled some issues but could not resolve whether the portion of the FSPS pension attributable to Mr. Szypula's

nine years of pre-marriage Navy service was separate or marital property [FN2].

Supreme Court held that the value of the FSPS pension related to Mr. Szypula's nine years of premarital Navy service was marital property subject to equitable distribution because the couple "used marital funds to buy back" the Navy credits during the course of their marriage. The Appellate Division reversed, holding that the Navy pension credits were Mr. Szypula's separate property because they were the product of his "sole labors" and were "not due in any way to [Ms. Szypula's] indirect contributions" (211 AD3d 156, 159 [3d Dept 2022]). The Appellate Division held, however, that the marital funds used to purchase the credits were subject to equitable distribution and remitted to Supreme Court to make the appropriate calculations (*id.*). On remittal, Supreme Court adjusted the award accordingly. Ms. Szypula now appeals.

II

Under Domestic Relations Law § 236, marital property includes "all property acquired by either or both spouses during the marriage" except separate property (*id.* § 236 [B] [1] [c]). As relevant here, separate property includes "property acquired before marriage . . ." (*id.* § 236 [B] [1] [d] [1]) and "property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse" (*id.* § 236 [B] [1] [d] [3]).

Marital property "should be 'construed broadly,'" and separate property "should be construed 'narrowly'" (*Fields v Fields*, 15 NY3d 158, 162-163 [2010], quoting *Price v Price*, 69 NY2d 8, 15 [1986]). The Domestic Relations Law "creates a statutory presumption that 'all property, unless clearly separate, is deemed marital property' and the burden rests with the titled spouse to rebut that presumption" (*id.* at 163, quoting *DeJesus v DeJesus*, 90 NY2d 643, 652 [1997]). That presumption reflects the legislature's "unmistakable intent to provide each spouse with a fair share

of things of value that each helped to create and expects to enjoy at a future date" (*DeLuca v DeLuca*, 97 NY2d 139, 144 [2001], citing *DeJesus*, 90 NY2d 643).

In *Majauskas v Majauskas*, we held that vested pension rights "are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action" (61 NY2d 481, 485-486 [1984]). We reasoned that a pension right is marital property because it is received "in lieu of higher compensation which would otherwise have enhanced either marital assets or the marital standard of living" (*id.* at 491-492), in other words, that a pension "is a form of deferred compensation" (*Olivo v Olivo*, 82 NY2d 202, 207 [1993], citing *Majauskas*, 61 NY2d at 491-492). In the years since *Majauskas*, we have consistently held that pension rights attributable to work during marriage are marital property (*id.* at 210; *Burns v Burns*, 84 NY2d 369, 376 [1994]; *DeLuca*, 97 NY2d at 145).

The pension rights at issue in this case differ from the benefits addressed in our prior caselaw. As we recognized in *Majauskas*, an employee's pension rights generally accrue incrementally over time (61 NY2d at 490). The accrual of those rights is tied to the employee's service but may also require a financial contribution from the employee. Usually, where that is the case, the employee works and pays into the plan at the same time.

Here, however, the parties made a financial contribution during the marriage to transform premarital service into pension rights. When Mr. Szypula left the Navy, the nine years of pension credits he accrued before marriage were his separate property, but they did not entitle him to any pension benefits. He had, instead, an opportunity to [*3]make a payment to acquire up to eleven years of pension rights, provided that he later took a job whose pension plan allowed for the credits to be used to augment its value.[FN3]

Mr. and Ms. Szypula used marital funds to convert those eleven years of Navy service, including the nine years he worked prior to marriage, into additional value to

Mr. Szypula's Foreign Service pension. The pension rights at issue in this case are therefore the product of both his pre-marriage service and the Szypulas' contribution of marital assets.

Separate property that is commingled with marital property presumptively becomes marital property (*see Fields*, 15 NY3d at 167; *see also Weiss v Nelson*, 196 AD3d 722, 725 [2d Dept 2021] ["Separate property that is commingled with marital property loses its separate character, and here, the plaintiff failed to overcome the presumption that her commingled separate property was converted to marital property"]; *Bailey v Bailey*, 48 AD3d 1123, 1124 [4th Dept 2008] [holding that the defendant failed "to rebut the presumption that (commingled funds) were marital property"]; *Judson v Judson*, 255 AD2d 656, 657 [3d Dept 1998] ["(O)nce separate property is commingled with marital funds it becomes marital property"]; *Pullman v Pullman*, 176 AD2d 113, 114 [1st Dept 1991] ["[T]here is a presumption that assets commingled with other property acquired during the course of the marriage are marital property"]).

Although Mr. Szypula's pre-marriage military service may have had some appreciable though contingent value as separate property, by combining it with marital funds the Szypulas transformed the pension credits from separate property into marital property. Mr. Szypula acquired the eleven years of pension rights only by entering qualifying federal employment and paying to incorporate his Navy pension credits into his new pension. Those credits are thus distinct from unvested pension credits that vest so long as an employee continues to work for the same employer (*cf. Burns*, 84 NY2d at 377). The use of marital funds to "buy back" Mr. Szypula's Naval service created the pension entitlement he has today, at least in part. The pension rights at issue here are therefore marital property.

Our decision recognizes that marriage is an economic partnership in which each spouse is entitled to share in "things of value arising out of the marital relationship" (*O'Brien v O'Brien*, 66 NY2d 576, 583 [1985]). Had the Szypulas chosen to use their

marital funds to invest in a home or a financial investment rather than to purchase pension rights, Ms. Szypula would be entitled to share in the asset, not just to recover half the purchase price. That Mr. and Ms. Szypula were entitled to invest in Mr. Szypula's pension only because of his prior military service does not change the outcome: the investment was an investment of marital property, and the resulting asset is marital.

III

Although courts may award a spouse credit for the value of separate property used to create a marital asset, the entirety of the asset is deemed marital (*Fields*, 15 NY3d at 166). In situations where a marital asset was acquired in part with separate property funds, "courts have usually given the spouse who made the separate property contribution a credit for such payment before determining how to equitably distribute the remaining value of the asset" (*id.* at 168; *see also Traut v Traut*, 181 AD2d 671, 671 [2d Dept 1992]; *Lolli-Ghetti v Lolli-Ghetti*, 165 AD2d 426, 432 [1st Dept 1991]). The burden is on the spouse claiming recapture of a separate property contribution to prove that contribution's value (*see Kaufman v Kaufman*, 189 AD3d 31, 64 [2d Dept 2020]). The Foreign Service pension rights attributable to Mr. Szypula's nine years of premarital service are marital property in their entirety. Here, the record is not sufficient to determine the value of Mr. Szypula's inchoate Navy pension credits at the time he contributed them to create a marital asset. On remittal, Mr. Szypula may make a claim for the value of that separate property.

It also bears note that marital property need not be distributed 50/50 (*see Fields*, 15 NY3d at 170; *see also Valitutto v Valitutto*, 137 AD3d 1526, 1528 [3d Dept 2016] [affirming a 70/30 distribution of a pension]; *Auriemmo v Auriemmo*, 87 AD3d 1090, 1091 [2d Dept 2011] [affirming a 55/45 distribution of a pension]). In making an equitable distribution of marital property, the court must consider a wide range of factors (Domestic Relations Law § 236 [B] [5] [d]). As we explained in *DeLuca*, "under the broad interpretation given marital property, formalized [*4]concepts such

as 'vesting' and 'maturity' are not determinative," but "they do affect valuation and distribution" (97 NY2d at 144, 146).

It is the responsibility of the trial court to equitably distribute marital property in the first instance (*Majauskas*, 61 NY2d at 493). That fact intensive determination requires a detailed and wide-ranging understanding of the marriage and the situation of each individual spouse. Our decision, in contrast, is limited to addressing the legal question of whether the pension rights at issue here are marital property and therefore subject to equitable distribution on remittal, based on "the circumstances of the case and of the respective parties" (Domestic Relations Law § 236 [B] [5] [c]).

IV

The pension credits at issue here became marital property when Mr. and Ms. Szypula used marital funds to transform them into pension rights, commingling separate property with marital property. Accordingly, the amended judgment appealed from and Appellate Division order brought up for review should be reversed, with costs, and the case remitted to Supreme Court for further proceedings in accordance with this opinion.

Amended judgment appealed from and Appellate Division order brought up for review reversed, with costs, and case remitted to Supreme Court, Tompkins County, for further proceedings in accordance with the opinion herein. Opinion by Chief Judge Wilson. Judges Rivera, Garcia, Singas, Cannataro, Troutman and Halligan concur.

Decided October 22, 2024

Footnotes

Footnote 1: Mr. Szypula does not dispute that the portion of the pension attributable

to his Navy service during the marriage (approximately two and a half years) is marital property. Supreme Court calculated that the total of the payments to "buy back" Mr. Szypula's premarital Navy service (approximately nine years) was $7049.46.

Footnote 2: The parties have not raised any issue relating to valuation of the portion of Mr. Szypula's pension based on his Foreign Service employment that postdated the commencement of divorce proceedings, and we express no opinion thereon.

Footnote 3: Mr. Szypula might also have become entitled to a Navy pension based on his service had he returned to the Navy, but he did not do so.

Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Gay couple sues New York City over denial of IVF coverage

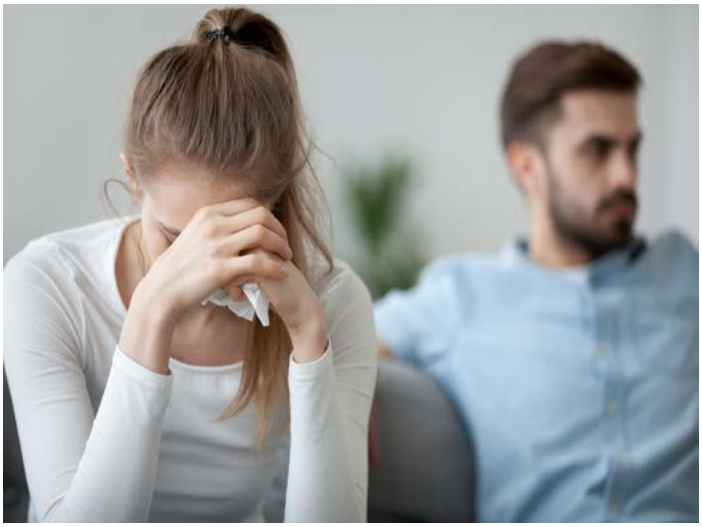
A gay couple has filed a class-action lawsuit against New York City, challenging the city's employee health plan for denying them coverage for in vitro fertilization (IVF) treatments. This case, *Briskin v. City of New York*, was filed in May 2024 in the U.S. District Court for the Southern District of New York, and it could have far-reaching implications for health care policy, employee benefits, equal access, and LGBTQ rights.

Corey Briskin, an assistant district attorney, and his husband, Nicholas Maggipinto, have been together since 2016, when they married, with hopes of starting a family through egg donation, IVF, and surrogacy. However, building a family through these means is prohibitively expensive, costing upwards of $200,000. Briskin anticipated that his city-provided health insurance would alleviate a significant portion of the cost, given its comprehensive coverage for infertility treatments, which includes IVF for female employees both straight and gay – and male employees with female partners.

In 2021, the city rejected Briskin and his husband's request for IVF coverage, arguing that coverage for infertility treatments was reserved for those experiencing infertility, a category that excluded Briskin and his husband. Following this denial, the couple filed a discrimination charge with the Equal Employment Opportunity Commission and have now escalated the matter by filing a broader class-action suit. The lawsuit argues that the city's policy, by denying IVF benefits to gay men while granting them based on an employee's partner's sex and the employee's sexual orientation, is discriminatory and lacks any legitimate, non-discriminatory explanation. The plaintiffs claim this unequal treatment violates Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the New York City Human Rights Law, and the equal protection and due process clauses of both the U.S. and New York constitutions.

In a recent interview with ABC News, Maggipinto expressed the couple's desire to alter the legal and medical landscape, to ensure that, when an employer offers a benefit like access to IVF to its employees, it does so on an equal basis regardless of the sex, sexual orientation, [or] marital status by changing its definition of infertility and updating its policies to include gay and single men.

We will update you on this case after the district court's ruling or if any settlement is reached.



Cases of Interest

Equitable Distribution

Court grants sole custody and substantial financial award to wife due to husband's domestic violence in high stakes divorce

***G.K. v. S.T.*, 213 N.Y.S.3d 705 (Sup. Ct., N.Y. Co. 2024)**

The parties were married for nearly 11 years and had three daughters. During the divorce, the wife sought sole custody of the children, alleging mental and physical abuse by the husband. The court granted the wife's request, awarding her sole legal and physical custody, with supervised visitation to the husband. This decision stemmed from the substantial evidence presented during a six-day trial, detailing the husband's abusive behavior toward both the wife and the children.

The case was further complicated by the father's persistent failure to meet court-ordered support obligations, leading to multiple contempt motions and even his incarceration. Financial issues were a focal point of the proceedings, with the court needing to determine the value and division of various assets, including the husband's anesthesiology businesses, their Manhattan apartment, a vacation home in North Creek, and multiple financial accounts. The husband's repeated efforts to obstruct the legal process, such as filing for bankruptcy, lodging unsuccessful appeals, and attempting to disqualify the wife's attorneys significantly prolonged the proceedings. His unwillingness to participate in discovery resulted in a preclusion order, barring him from presenting evidence to contradict the wife's financial claims.

The court ultimately ruled in favor of the wife, awarding her a substantial portion of the marital assets, including an unusual award of 50% of his business interests, 50% of his TD Ameritrade and Chase bank accounts, 50% of the net value of the North Creek home, exclusive occupancy and control over the sale of the North Creek home, and 100% of her own retirement accounts. The husband was also ordered to replenish funds he had taken from the children's 529 college savings accounts.

Regarding the equal division of the husband's business interests, the court considered both indirect and direct contributions that the wife contributed to the marriage and the husband's businesses. The court noted that since the wife left the workforce to raise their three children, this was an indirect contribution to the husband's success. The court also acknowledged her direct contributions, such as helping with office management, making phone calls, ordering supplies, facilitating work events, and depositing her earnings into a joint account for family expenses when she returned to work. Additionally, the court considered the husband's physical, emotional, and financial abuse of the wife and their children as a factor in determining the equitable distribution of assets.

The court also ordered the husband to pay $10,029.17 per month in basic child support for the 38 months that he would also be paying post-divorce maintenance. During this period, the husband would be responsible for 83% of the children's add-on expenses, which included costs for private school tuition, extracurricular activities, and therapy. When maintenance is terminated, the husband's basic child support obligation will increase to $10,886.54 per month, and he will be responsible for 90% of the children's add-on expenses. Additionally, the court mandated that he cover the wife's attorney fees which totaled over $906,000.

Cash business divorce case

***M.I. v. C.I.*, 215 N.Y.S.3d 919 (Sup Ct., Nassau Co. 2024)**

The parties were married for 28 years and have two children, both of whom are emancipated. The case involved a complex and contentious divorce, with disputes focused on spousal maintenance, the equitable distribution of marital assets, allegations of marital waste, and counsel fees.

First, the central question was whether the wife was entitled to post-divorce maintenance, and if so, what amount and duration would be appropriate considering the length of the marriage, the parties earning capacities, and alleged unreported income, and the 16-year age gap between the parties. The court ultimately held that the wife was entitled to post-divorce maintenance, recognizing the significant contributions she made as a homemaker and primary caregiver during the marriage. However, the court deviated from the statutory guidelines, finding that a rigid application would lead to an unjust result given the circumstances of the case. The court meticulously analyzed the parties' financial situations and found their accounts unreliable. Therefore, the court imputed an annual income of $660,000 to the husband based on his signed vehicle lease application, acknowledging that this figure aligned with the lifestyle analysis conducted by an expert. The court also imputed an annual income of $150,000 to the wife based on her credit application. Notably, considering these various factors, the court ordered the husband to pay the wife $2,500 per week for a period of eight years.

Second, the court had to classify, value, and distribute the parties' assets, considering their lack of credibility and complexities surrounding specific assets. The court first had to determine whether the Wantagh property (commercial property acquired during the marriage), was subject to equitable distribution. The court determined that it was, since assets acquired during the marriage are generally considered marital property in New York. Therefore, the court ordered the sale of the Wantagh property, with the net proceeds divided equally between the parties.

Next, the court had to determine whether the husband's equitable life estate in the Bellmore residence, a property that was held in an irrevocable trust established by his father, constituted a marital asset and if the residence itself was subject to equitable distribution. After analyzing the trust document and relevant case law, the court held that the Bellmore residence was the husband's separate property because it was placed in an irrevocable trust. Further, the court found that the husband's life estate was extinguished upon divorce according to the specific terms of the trust.

The court also had to determine the value of the husband's business M&M LD, Inc., and the wife's equitable share. The complexity arose from allegations of substantial unreported cash income and conflicting accounts from the parties regarding their respective roles in the business. The court ultimately held that the business was a marital assert subject to equitable distribution and rested on the principle that businesses, even if solely operated by one spouse, are typically considered marital property if they were operated during the marriage. Despite the husband's attempts to downplay the wife's involvement, the court recognized her contributions, both direct (bookkeeping and banking) and indirect (as a homemaker, enabling husband to focus on business). The court adopted the business expert's valuation of $456,000 and awarded the wife 35% of this value ($159,600), a share that reflected her contributions without overstating her role in the business. The court also awarded the wife 4.5% interest in this amount, accruing from the date of commencement to compensate for the delay in receiving her share.

Third, the court had to assess the validity of the husband's allegations regarding the wife's wasteful dissipation of marital assets. Based on its detailed analysis of all the bank records,

the court held that the wife engaged in wasteful dissipation of marital assets. However, the court rejected some of the husband's claims, finding insufficient evidence to support the full extent of his allegations. The court's review revealed a pattern of the wife's excessive withdrawals, unexplained cash transactions, and checks written to cash, all pointing to economic misconduct. Ultimately, the court determined that the wife had wastefully dissipated $272,168. This amount was factored into the overall equitable distribution scheme, specifically offsetting the wife's share of the Wantagh property proceeds to compensate the husband for the dissipated funds. Lastly, both parties requested reimbursement of their counsel fees, and the court had to determine whether either party was entitled to such an award, and if so, in what amount. The court, emphasizing the procedural requirements of DRL § 237(a), held that both parties' applications for counsel fees were procedurally defective. The court highlighted their failure to submit the mandatory financial affidavits detailing the financial arrangements between themselves and their attorneys. Therefore, the court denied both requests for counsel fee reimbursement without prejudice, providing the parties with the opportunity to refile their requests with the proper documentation.

Abuse and Neglect

Family court utilizes hearsay exception to admit child's testimony

***King v. Pelkey*, 229 A.D.3d 1161 (4th Dep't 2024)**

In a child custody dispute, the mother alleged that the father had abused and neglected their children. The father responded by filing a cross-petition, presumably seeking custody of the children for himself. The case proceeded to trial.

The central issue before the court was determining the best interests of the children and awarding custody accordingly. During the proceedings, the father requested access to the mother's mental health records, arguing that they were relevant to her fitness as a parent. The court, however, denied his request for a judicial subpoena duces tecum for these records. The court also allowed certain hearsay statements made by one of the children to be admitted into evidence, a decision contested by the father and the attorney for the children.

The family court ultimately issued an order awarding sole legal custody of the children to the mother. The Appellate Division, Fourth Department, upheld this decision, finding no error in the family court's handling of the father's request for the mother's mental health records or the admission of the child's hearsay statements. The appellate court determined that the father had not sufficiently demonstrated the need for the mother's mental health records to be disclosed, as he had failed to establish that her mental health was a material factor in the custody determination.

Regarding the hearsay statements, the appellate court acknowledged the existence of an exception to the hearsay rule in child custody cases involving allegations of abuse and neglect, provided the statements are corroborated. The court found that the child's statements in this case were sufficiently corroborated by other evidence. Therefore, the family court's custody decision was well supported by the evidence and aligned with the children's best interest.

Neglect finding upheld despite improper admission of mother's mental health evidence

***In re Veronica M.*, 229 A.D.3d 626 (2d Dep't 2024)**

In a child neglect proceeding brought by the Administration for Children's Services (ACS) against the mother, the family court held a fact-finding hearing to determine whether the neglect allegations were substantiated. During this hearing, the court considered various pieces of evidence, including the children's out-of-court statements about their mothers' disciplinary methods, the caseworker's testimony and observations about injuries seen on the children, photographs of those injuries, and audio recordings of events where excessive corporal punishment allegedly occurred.

The family court determined that the mother had neglected her three children. The court based its decision on two key findings. First, the court found that the mother had used excessive corporal punishment on her children, exceeding the bounds of what is considered reasonable or acceptable discipline. The court determined that the children's out-of-court statements describing this punishment were sufficiently corroborated by other evidence, including the caseworker's observations, the photographs of the children's injuries, and the audio recordings of the alleged incidents. Second, the court found that the mother had neglected her children by failing to address an untreated and undiagnosed mental illness. Therefore, the mother's mental health posed a risk of harm to the children's overall well-being.

The mother appealed against this decision to the Second Department. The Appellate Division reviewed the family court's findings and agreed with the family court's determination that the mother had used excessive corporal punishment, constituting neglect. However, the Appellate Division disagreed with the family court's finding of neglect based on the mother's alleged untreated and undiagnosed mental illness. The Appellate Division determined that ACS had not presented sufficient evidence to prove that the mother's mental health condition created an imminent risk of harm to the children's physical, mental, or emotional well-being. Therefore, the Appellate Division modified the family court's order by removing the provision regarding the mother's untreated and undiagnosed mental illness as a basis for neglect, while affirming the remaining portion of the order.

Agreements

Stipulation of settlement upheld by court despite wife's allegation of language barrier

***Anonymous A-1 v. Anonymous B-1*, 83 Misc. 3d 1218(A) (Sup. Ct., Bronx Co. 2024)**

The parties were married for over 25 years and have one child together who was 16 years old at the time of the court's decision. In December 2023, the parties entered into a settlement agreement, and both parties stated that they carefully reviewed the document, they fully understood its provisions and language and affirmed that they did not face any duress before signing. Two months later, the wife, with a new attorney, filed a motion to vacate the stipulation of settlement.

The wife argued that she had not understood its terms at the time she signed it, due to her limited English proficiency and lack of access to a Spanish language interpreter. She also argued that the agreement was unconscionable, unfair, and a mistake. The husband, in defense, asserted that the terms were not unconscionable and that the wife fully understood and agreed to the stipulation.

The court, in reviewing the case history, including the parties' allocation on the record and prior court filings, noted that at no point in the proceedings going back to 2020 had the wife or her prior attorney requested an interpreter. Ultimately, the court found that the wife had not made reasonable efforts to have the stipulation explained to her before its execution and denied the wife's motion to vacate the stipulation of settlement.

The court also reviewed the substance of the wife's claims that the agreement was unconscionable and unfair but concluded that she failed to demonstrate that the agreement was either procedurally or substantively unconscionable. The court found no evidence of deceptive tactics or disparity in bargaining power during the negotiations. Furthermore, the court stated that the wife failed to show that any specific term of the stipulation was so one-sided that it would "shock the conscience" of the court. Ultimately, the court dismissed the plaintiff's argument that she was misled by her previous attorney about her rights to the defendant's retirement account, finding that she had not submitted evidence to support her claims that the stipulation was unfair. Finally, the court determined that the wife's claim that she made a unilateral mistake was insufficient to overturn the agreement, as she failed to establish that her alleged mistake was induced by the husband's fraudulent or wrongful conduct.

Child Support

Family court imputes $100,000 to father's income for support determination

***Fallin v. Haruna*, 229 A.D.3d 1257 (4th Dep't 2024)**

The mother filed a petition for child support in the Erie County Family Court against the father. The support magistrate ordered the father to pay $1,737 per month in child support. The father objected to this order, arguing that the support magistrate had improperly inputted $100,000 in income to him when calculating the support award.

The family court denied the father's objections, and he appealed to the Fourth Department, which affirmed the lower court's decision. The Appellate Division noted that courts have considerable discretion to impute income to a parent in fashioning a child support award, and a court's imputation of income will not be disturbed so long as there is record support for its determination (*Lauzonis v. Lauzonis*, 964 N.Y.S.2d 796 [4th Dep't 2013]; *see Matter of Muok v. Muok*, 30 N.Y.S.3d 776 [4th Dep't 2016]). The court also stated that the general rule is that child support is determined by the parent's ability to provide for their child rather than their current economic situation (*Irene v. Irene* [Appeal No. 2], 837 N.Y.S.2d 797) [4th Dep't 2007].

Furthermore, the Appellate Division explained that courts can impute income based on a variety of factors, including a parties employment history, earning capacity, educational background, and money received from friends and relatives. Ultimately, the Appellate Division found that the family court's decision to impute income to the father was supported by the evidence, including the father's significant household expenses, including payments for private school tuition, a vehicle for the wife, and child care, as well as his access to financial support from family.

Enforcement

Father held in contempt for failing to pay child support and provide court-ordered medical insurance

***Lombardi v. Lombardi*, 229 A.D.3d 537 (2d Dep't 2024)**

In a divorce action, the wife filed a motion requesting that the court hold the husband in contempt for violating a 2011 court order that required him to pay her $350 per week in temporary child support and to maintain medical and dental insurance for her and their son. The wife also requested interim counsel fees in the same motion. Subsequently, the husband filed a cross-motion asking the court to impose sanctions against the wife.

The Appellate Division, Second Department, held that the Supreme Court correctly found the husband in civil contempt of court for failing to pay child support and maintain medical insurance, as ordered by the court. The court explained that once a party demonstrates a knowing violation of a court order, the burden shifts to the accused party to prove he was unable to comply. In this case, the husband did not meet this burden. The Appellate Division also upheld the lower court's decision to award the wife $10,000 in interim counsel fees, citing the considerable difference in their financial situations

and the need for the wife to have funds to continue the litigation. Finally, the court affirmed the Supreme Court's denial of the husband's request to sanction the wife because there was no evidence that her actions were frivolous.

Paternity

Appellate Court upholds ruling for genetic testing in paternity case involving two potential fathers

***Brandon J. v. Leola K.,* 214 N.Y.S.3d 530 (3d Dep't 2024)**

Brandon J. asserted he was the biological father of a child and initiated a paternity action against the child's mother. The matter was initially brought before a support magistrate, who later referred it to a family court judge when the mother, along with Aaron L., the putative father, raised the defense of equitable estoppel to prevent genetic marker testing. Aaron L., although not formally listed as a respondent in the petition, participated fully in the proceedings, with his counsel present during the fact-finding hearing. He testified, his counsel cross-examined witnesses, and presented closing arguments advocating for the application of equitable estoppel to bar the genetic marker test.

The Third Department held that the family court's failure to amend the caption to formally recognize Aaron L. as a respondent was a minor procedural issue that did not impact the enforceability of the genetic marker testing order. They also held that the mother and Aaron L. effectively demonstrated the existence of a parent-child relationship between Aaron L. and the child. However, the court ultimately found it was in the best interests of the child to conduct the genetic marker test to determine the child's biological father, thus not upholding the equitable estoppel defense.

The Appellate Division affirmed the family court's order for genetic marker testing. They highlighted that while a parent-child relationship existed between Aaron L. and the child, the child's best interests were paramount. The court considered the child's young age, the fact that the mother and Aaron L. were no longer romantically involved or living together, and the efforts made by the petitioner, Brandon J., to establish a relationship with the child and provide financial support. Based on these factors, they concluded that resolving the question of paternity through genetic testing was in the child's best interests.

Evidence

Court upholds subpoena for GPS tracking records in domestic violence divorce case, emphasizing stalking as a factor in equitable distribution

***A.S. v. A.B.,* 215 N.Y.S.3d 731 (Sup. Ct., Kings Co. 2024)**

Justice Sunshine's decision in this case emphasized the seriousness of unauthorized GPS tracking as a form of domestic violence and highlighted its potential relevance in divorce proceedings under DRL § 236 B (5)(d)(14), as amended on April 3, 2020, domestic violence as a factor to be considered under Equitable Distribution.

The wife discovered a tracking device on her car and believed her husband had placed it there, violating a temporary order of protection issued by the Kings County Criminal Court. This order specifically prohibited the husband from using any means, including technology, to monitor or track the wife's movements. The wife subpoenaed the tracking device company to obtain information about the device's user, but the husband filed a motion to quash the subpoena.

The court denied the husband's motion and his application for a protective order. The court rejected the husband's arguments that the information sought was irrelevant to the divorce proceedings, overly broad, or unduly burdensome. Rather, the information related to the tracking device fell under the compulsory disclosure provisions of the Domestic Relations Law, since tracking someone's movement without their consent is considered stalking, which constitutes domestic violence. The court emphasized that domestic violence is a crucial factor to consider when deciding issues like equitable distribution, maintenance, child custody, and visitation.

Ultimately, the court ruled that the wife could access the records obtained from the tracking device company, and these records could be used by both parties in the divorce proceedings and were to be shared with the children's attorney. The court also denied the husband's request for sanctions against the wife.

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