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The New 'Irretrievable Breakdown' Ground for Divorce

By Bari Brandes Corbin and Evan B. Brandes

Domestic Relations Law (DRL) § 170 was amended in 2010 to add "irretrievable breakdown" in subdivision 7, a "no-fault ground" for divorce. After it became effective on Oct. 12, 2010, many thought that the new ground would make it possible for one party to the marriage to unilaterally end it. Not so fast.

In order to establish a cause of action and obtain a divorce under DRL § 170 (7), the party seeking the divorce on irretrievable breakdown grounds must, in addition to satisfying the residence requirements of DRL § 230, establish that: 1) the relationship between husband and wife has been irretrievably broken; 2) for a period of at least six months. In addition, the plaintiff or defendant must state under oath that the relationship is irretrievably broken.

What Constitutes an 'Irretrievably Broken' Relationship?

The legislature failed to define the term "irretrievably broken" in the statute, which leaves the question open to interpretation. Black's Law Dictionary (8th ed. 2004) states that an "irretrievable breakdown of the marriage" is a ground for divorce based on incompatibility that is used in

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Dealing with Emotions and the Law

Practice Tips for the Matrimonial Attorney

By Elliott Scheinberg

Unique to matrimonial litigation is the collision of law and emotion. Malevolence and other primal drives often fuel the process, whether deservedly or not. Irrespective of its origin, emotion must be defused (or backed up) with law.

Furthermore, a common dilemma attendant to matrimonial litigation, which has been bemoaned by appellate justices from the First Department, is that the matrimonial bar, unlike the criminal or personal injury bar, lacks an intimate knowledge of the rules of evidence. The most oft-heard canard in the matrimonial courtroom is: "There's no jury. I'll take it for what it's worth." The truth is that the rules of evidence are very much alive in matrimonial litigation. Knowing how to present a case is as important as knowing what to present.

When emotional issues manifest themselves during the life of a divorce, keeping the case in line with the law and presenting the evidence properly become highly important. Getting carried away with expedient means to attain the client's ends could lead to loss on appeal. This article presents a few of the emotional and evidentiary issues that often manifest themselves during the life of a divorce.

Criminal Prosecution

Spouses in heated divorce contests are typically eager to identify criminal activity by the other spouse and press for incarceration. Assume, for example, that a spouse has committed unquestionable perjury or forgery. Perhaps your client's spouse is even guilty of bigamy for remarrying, religiously or civilly, without the benefit of a civil divorce decree. May the "righteous" spouse seek the relief of imprisonment within the divorce action? In *Kinberg v. Kinberg,* 48 AD3d 387 (1st Dept. 2008), the wife sought the husband's imprisonment and a fine for, *inter alia*, his perjury and bigamy. The Appellate Division cited to County Law, § 700 and *Pietra v. State*, 71 N.Y.2d 792, (1988), for the proposition that, with few exceptions, the legislature has delegated the responsibility for prosecuting those accused of crime solely to the District Attorneys. Her allegations were, therefore,

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dismissed for failure to state a cause of action.

Timely Stock Transfers

Judgments or agreements incorporated into judgments often divide stock in-kind between the parties, with the title holder being required to transfer a specific number of shares to the other spouse. Not surprisingly, not every title holder complies, often requiring judicial assistance to compel compliance. Can the non-titled spouse recover for damages resulting from the loss of value of stock as a result of the titled spouse's failure to timely effect its transfer under an settlement agreement? *Kinberg v. Kinberg*, 59 AD3d 236 (1st Dept. 2009), declined to dismiss the action by the aggrieved spouse.

The Non-Custodial Parent's Rights: Medical And Educational Decisions

A common dilemma of non-custodial parents is the custodial parent's hurtful denial of access to the children's academic or medical records. Typically, the school or the medical provider is told that either the agreement or the judgment does not provide the non-custodial parent with the right to such information. The Court of Appeals, in *Fuentes v. Board of Educ. of City of New York*, 12 NY3d 309 (2009), resolved this issue definitively in favor of the non-custodial parent, stating that it is his or her absolute right to access such records. Nevertheless, the non-custodial parent may not make decisions on behalf of the children if that right was not specifically accorded by either agreement or judicial order.

It is now well settled in the Appellate Division that, absent specific provisions in a separation agreement, custody order, or divorce decree, the custodial parent has sole decision-making authority with respect to practically all aspects of the child's upbringing. Note the distinction between a noncustodial parent's right to participate in a child's education and the right to control educational decisions. Generally, there is nothing that prevents a noncustodial parent (even one without any decision-making authority) from requesting information about, keeping apprised of, or otherwise remaining interested in the child's educational progress. Such parental involvement is to be encouraged. However, unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, a non-custodial parent has no right to control such decisions. This authority properly belongs to the custodial parent.

Leading Questions

It is widely believed that when a party calls the adverse party as a witness on his or her direct case leading questions may automatically be asked throughout the questioning because the adverse party is, by definition, a hostile witness. This assumption is inaccurate. The right to conduct direct examination of an adverse party in cross-examination manner rests within the discretion of the court, as ample authority holds. *Ferri v. Ferri*, 60 AD3d 625 (2nd Dept. 2009), stated that while an adverse party is a hostile witness leading questions are discretionary. The court stated that, when "an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross examination by the use of leading questions."

Impeachment of One's Own Witness

Ferri also addressed CPLR 4514, covering impeachment of a witness by prior inconsistent statement, which provides: "In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement

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The New Temporary Maintenance Guidelines

A Practical Guide

By Karen M. Platt and Alton L. Abramowitz

The year 2010 saw a sudden and unexpected interest by the legislature in the reform of New York's Matrimonial Law. In mid-October, three important changes took place: New York joined the ranks of no fault divorce jurisdictions; equivalent counsel fees for the non-moneyed spouse became the "law of the land"; and temporary maintenance formulas provided the latest wrinkle in divorce litigation. Much has been written and said about the statute enacted this past year regarding temporary maintenance awards (DRL § 236B(5-a)) and much criticism has been offered of the new law and its shortcomings. Practically speaking, for the moment, we need to live with the statute in its current form. To that end, following is a user guide to the new statute.

The Temporary Maintenance Formula

Under the new Temporary Maintenance Guidelines, which apply only in actions commenced on or after Oct. 12, 2010, the presumptive amount of maintenance is determined based on a two-pronged formula. The results of the two formulas are compared, and the lesser amount is the presumptive award. The net effect of the formulas is that there will only be a presumptive award of temporary maintenance if the payee's income is less than 60% that of the payor's.

First, some definitions: The "payor" is the spouse with the higher income; the "payee" is the spouse with the lower income. Note that the value of separate property owned by each party is not relevant to this determination. "Income" is as defined in the Child Support Standards Act, plus income from income producing property (which, theoretically, is a part of the income as defined by the CSSA). The "payor's income" is capped, for purposes of the formulas, at $500,000, which amount is subject to be adjusted on Jan. 31, 2012, and every two years thereafter, following the change in the consumer price index.

Formula A: Subtract 20% of the Payee's Income from 30% of the Payor's Income.

Formula B: Multiply the sum of the Payee's Income plus the Payor's Income by 40%; then subtract the payee's income from the result.

Application of the Formula

To see how the formulas work, let's look as some examples.

Scenario 1:

Payor's Income: $80,000
Payee's Income: $40,000
Formula A: (.3 x 80,000) – (.2 x 40,000)
24,000 – 8,000 = 16,000
Formula B: (.4 x 120,000) – 40,000
48,000 – 40,000 = 8,000
Presumptive Award: $8,000
Result: Payor's Net Income (not tax adjusted): $72,000
Payee's Net Income (not tax adjusted): $48,000

Scenario 2:

Payor's Income: $250,000
Payee's Income: $100,000
Formula A: (.3 x 250,000) – (.2 x 100,000)
75,000 – 20,000 = 55,000
Formula B: (.4 x 350,000) – 100,000
140,000 – 100,000 = 40,000
Presumptive Award: $40,000
Result: Payor's Net Income (not tax adjusted): $210,000
Payee's Net Income (not tax adjusted): $140,000

Scenario 3:

Payor's Income: $1,000,000; capped at $500,000
Payee's Income: $400,000
Formula A: (.3 x 500,000) – (.2 x 400,000)
150,000 – 80,000 = 70,000
Formula B: (.4 x 900,000) – 400,000
360,000 – 400,000 = less than 0
Presumptive Award: $0
Result: Payor's Net Income (not tax adjusted): $1,000,000
Payee's Net Income (not tax adjusted): $4,000,000

The reader will note that in both scenario #2 and scenario #3, the Payor's Income starts out at 2.5 times that if the Payee; however, as a result of the Income Cap, there is no presumptive temporary award under scenario #3.

What the Formula Doesn't Tell Us

The new guidelines do not address the interplay of the temporary maintenance guidelines and temporary child support, or tell us which formula is to be applied first in determining the awards of both child support and maintenance. We do not know if the presumptive amount of temporary maintenance is to be taxable to the payee and deductible by the payor if the parties are to file separate returns. We are left to wonder who is to pay the mortgage, the maintenance, the utilities, and real estate taxes on any jointly owned and occupied property, and whether any part of such payments is to be deducted from the presumptive award if the payee is occupying the former marital residence.

When the Presumptive Amount May Be Adjusted

There are two scenarios under which the court may make an award that deviates from the amount derived from application of the formulas. First, pursuant to the new statute, courts "shall order the presumptive award of temporary maintenance … unless the court finds that the presumptive award is unjust or inappropriate and adjusts

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Temporary Guidelines

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the presumptive award … based on consideration of" a series of 17 factors. Most of these factors are familiar to us, as they are the same factors that the court is to consider in determining maintenance awards under the prior statute. The seven new factors are discussed below.

Additionally, as discussed above, the formula applies to the first $500,000 of the payor's income (the "income cap"); however, if the payor's income exceeds the income cap, the court is to determine "any additional guideline amount of temporary maintenance through consideration of [19] factors." The two additional factors considered under this analysis (but not explicitly included in the deviation factors if the award is unjust or inappropriate) are the length of the marriage and the substantial differences in the incomes of the parties.

The New Factors

Most of the criteria to be considered by the court in deviating from the results of the formula are the same factors that the court is to consider in determining maintenance awards under the prior statute. There are, however, seven new factors for the court to consider in deviating from the results of the application of the formula. Several of these factors relate directly to the inability of one party (presumably the payee) to earn income that allows him or her to be self-sufficient. These include the need of a party to incur education or training expenses, the inability to obtain meaningful employment due to age or absence from the workforce or, relatedly, the role that the care of children, stepchildren, disabled adult children or stepchildren, elderly parents or in-laws has played in inhibiting one's earning capacity or ability to obtain meaningful employment. Another new factor is the acts by one party against the other that have inhibited the other's earning capacity, such as acts of domestic violence.

One very practical new factor is the need to pay for exceptional expenses for the children, including schooling, day care and medical treatment, although one would have thought that the legislature would have done more to integrate this provision with the CSSA. Another interesting one is the existence of a premarital joint household or a pre-divorce separate household. The final new factor is the marital property subject to distribution; a factor that may well not be determinable at the time of the temporary maintenance award.

It should be noted that the new factors are also to be considered by the court in determining awards of post-divorce maintenance.

What if You Don't Know the Parties' Respective Incomes?

It is often the case that at the time of an award of interim support, discovery has only just begun and we do not know the parties' true incomes. In such an event, paragraph g of the new DRL § 236B(--a) applies, and "the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater." This, of course, leaves us back where we started before the new statute went into effect; however, unlike under the prior statute where the remedy for a perceived unfair award of pendente lite support was a speedy trial, now, at least with regard to awards made under paragraph g, the "order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence."

Opting Out

The new statute allows parties to resolve temporary maintenance issues without submitting the matter to the court, and to have their agreement incorporated in an order of the court. It should be noted that if the agreed upon amount of temporary maintenance deviates from the statutory formulas, the agreement must specify the amount that the presumptive award would have been, and the reasons for deviation. This requirement, which is substantially the same as the requirements for final settlement agreements regarding child support, cannot be waived by counsel or the parties.

Some Observations

As of this writing, there is yet to be a published decision applying the new temporary maintenance guidelines. These decisions will be challenging for courts to write in the event that they opt to deviate from the formula, as they are required to set forth the factors considered in the deviation; however, it will be interesting to see what consideration is given to the seven new factors.

As with the prior maintenance statute, as regards deviations related to both the income cap and the "unfair and inappropriate" amount of support under an application of the formula, there is a "catch-all" factor. It will likely get a lot of use by both courts and practitioners opting out.

An important part of the newly enacted statute is the requirement that the Law Revision Commission conduct a study of the state's maintenance laws. The Commission is charged with reporting to the legislature and governor, no later than Dec. 31, 2011. It will report its findings and conclusions following its review, which will assess the economic consequences of divorce on the parties and review the state's maintenance laws and their effect on post-marital economic disparities. The Commission is also to make recommendations with proposed revisions to the maintenance statute with the goal of meeting the state's "objectives of ensuring that economic consequences of a divorce are fairly and equitably shared by the divorcing couple."

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NJ & CT NEWS

NEW JERSEY

Court Denies Wife's Bid To Be Declared Mother of Husband's Surrogate Child

New Jersey has no constitutional or legal basis for recognizing an infertile wife as the mother of her husband's child born to a surrogate, an appeals court held Feb. 22 in a ruling that harkens back to the landmark *Baby M* case. The court said it did not deny the "intrinsic societal worth, emotional appeal, and compelling logic" of granting parenthood to the infertile wife. But it said adoption remains the means chosen by the legislature to create that status. "Indeed, nothing in our Constitution or law provides that an adult — male or female — with no biological or gestational connection to a child has a fundamental right to create parentage by the most expeditious or convenient method possible," the court held. The panel said its ruling, in *Matter of the Parentage of a Child by T.J.S. and A.L.S.*, A-4784-09, flows directly from *In re Baby M.*, 109 N.J. 396 (1988), which voided surrogacy-for-hire contracts and rejected an equal protection challenge to the New Jersey Parentage Act provision in question.

CONNECTICUT

Grandparent Visitation: Jurisdictional Prerequisites Cannot Be Waived

In *Warner v. Bicknell*,126 Conn. App. 588 (2/15/11), the Appellate Court of Connecticut recently held that a trial court erred in entertaining a grandparent visitation case in which the grandparent did not, in accordance with *Roth v. Weston*, 259 Conn. 202 (2002), allege a parent-like relationship with the child or that denial of visitation would cause the child real and significant harm. The case involved a paternal grandmother who sought contact with her grandchild. The mother acquiesced, entering into a temporary agreement with the grandmother and later allowing expansion of the grandmother's access through supervised visits (through the Southern Connecticut State University Family Clinic program). The parties also agreed to go to court with a report from the program. In May 2008, the court ordered a continuation of supervised visits. The grandmother next petitioned for unsupervised visits. After the mother failed to appear, the court granted the petition. The mother, who claimed she did not receive notice of the hearing at which unsupervised visits were ordered, unsuccessfully tried to get the court to reconsider. On appeal, the mother, who for the first time now had the assistance of counsel, claimed that the court should not have entertained the grandparent visitation case because the plaintiff failed to satisfy the two-part test for standing established by Connecticut's Supreme Court in *Roth v. Weston*. The appellate court agreed, and was not persuaded by the grandmother's argument that, since the mother had already agreed to some form of visitation and had submitted the question to the court, she could not now cry foul. In answer to this, the court stated: "The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings."

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Grounds for Divorce

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many states as the sole ground of no-fault divorce. It defines "irreconcilable differences" as "persistent and unresolvable disagreements between spouses, leading to the breakdown of the marriage. These differences may be cited — without specifics — as grounds for no-fault divorce. At least 33 states have provided that irreconcilable differences are a basis for divorce.

An examination of the case law in other states that have adopted the "irretrievable breakdown," as opposed to "irreconcilable differences" as a ground for divorce appear to indicate that a marriage has irretrievably broken down when the relationship is for all intents and purposes ended. 27A C.J.S. Divorce § 30. Where no guidelines are established as to what constitutes an irretrievable breakdown, courts consider each case individually, (*see, e.g., Flora v. Flora*, 166 Ind. App. 620 (1st Dist. 1975); *Joy v. Joy*, 178 Conn. 254 (1979)) and the determination whether the marriage is broken must be based on an inquiry into all the surrounding facts and circumstances. In general, a marriage is irretrievably broken when, for whatever reason or cause and no matter whose fault, the marriage relationship is for all intents and purposes ended; when the parties are unable, or refuse, to cohabit; or when it is beyond hope of reconciliation or repair. The principal question to be determined is whether the marriage is at an end and beyond reconciliation.

In some states irretrievable breakdown of a marriage may be sufficiently shown by both parties alleging the breakdown. In others, one party seeking a divorce or dissolution on the ground of irretrievable breakdown, and the other seeking divorce or dissolution on a ground involving misconduct, will suffice (*see, e.g., Herring v. Herring*, 237 Ga. 771 (1976)). In some states, the decision that a marriage is irretrievably broken need not be based on any identifiable objective fact. It is sufficient that one or both parties subjectively decide that their marriage is over and there is no hope of reconciliation. *See, e.g., Caffyn v. Caffyn*, 441 Mass. 487 (2004).

Irretrievable breakdown has been adopted as a ground for divorce in

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the following 17 states: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Missouri, Nebraska, Pennsylvania, and Wisconsin. However, none of the state laws define the term irretrievable breakdown. The consensus among the states appears to be that the term "irretrievable breakdown" means a breakdown of the marriage to the point that reconciliation is not possible or probable. In adition, the Uniform Marriage and Divorce Act § 305 (c) defines a finding of irretrievable breakdown as "a determination that there is no reasonable prospect of reconciliation." *See* Ula Marr & Divorce § 305.

A Matter of Proof

It is clear from the statute that in New York the court must find that the marriage is irretrievably broken as a predicate to the granting of a divorce. On its face, D.R.L. § 170(7) appears to allow the court to grant a judgment of divorce where one spouse states under oath that the relationship between husband and wife is irretrievably broken. This construction would eliminate any defenses to this ground. However, the authority in other jurisdictions that have adopted this ground for a divorce supports the conclusion that the defendant can raise the defense that the marriage is not irretrievably broken. States where irretrievable breakdown is a ground for divorce have held that the court presiding over an action for divorce on the ground of irretrievable breakdown has a duty to determine whether the marriage is, in fact, irretrievably broken. *See, e.g., Mize v. Mize*, 891 S.W.2d 895 (Mo. Ct. App. W.D. 1995).

Moreover, this construction does not eliminate the five-year statute of limitations applicable to actions for a divorce. The Domestic Relations Law provides that no action for divorce may be maintained on a ground that arose more than five years before the date of the commencement of the action except where abandonment or separation pursuant to agreement or decree is the ground. D.R.L. § 210.

Problems of proof arose recently in *Strack v. Strack,* N.Y.S.2d, 2011 WL 356058 (N.Y.Sup.), the first reported case to construe the statute. There, the Supreme Court found that the grounds set forth in D.R.L. § 170(7) were subject to the five-year statute of limitations and that the legislative history pertaining to D.R.L. § 170(7) supported its conclusion that D.R.L. § 170(7) was simply a new cause of action subject to the same rules of practice governing the subdivisions that have preceded it. It noted that D.R.L. § 173 provides that "[i]n an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce" and, that the legislature failed to include anything in D.R.L. § 170(7) to suggest that the grounds contained therein were exempt from this right to trial. It noted that the phrase "broken down such that it is irretrievable" is not defined in the statute, and the determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact. The court held, however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties, and that the fact-finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation.

One More Consideration

It should be noted also that no judgment of divorce may be granted upon a finding of irretrievable breakdown unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce. D.R.L. § 170 (7) as added by Laws of 2010, Ch 384.

Where the parties to a contested action for a divorce have agreed that the divorce will be uncontested, it has been the practice of New York courts to permit them to submit the matter to the court for determination upon affidavits and the required papers, or to hold an inquest on a fault ground. Where the papers were submitted, the court would reserve decision until the resolution of the ancillary issues. Where the court held an inquest, the court would grant a judgment of divorce, but hold the entry of the judgment in abeyance pending the resolution of the ancillary issues. The practice of granting the judgment and holding its entry into abeyance pending the resolution of the ancillary issues is not permitted under subdivision 7, which prohibits the granting of a judgment of divorce until all of the ancillary issues are resolved by the parties, or determined by the court and incorporated into the judgment of divorce. However, the court can still hear the testimony and reserve decision.

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was made in a writing subscribed by him or was made under oath." The word "any" means precisely that, including one's own witness. However, while a non-party witness called as one's own witness may not be impeached with a prior oral statement, an adverse party witness may be impeached with prior oral statements not only if the elements of CPLR 4514 are met, but also in other cases, because such oral statements are admissions of a party.

Audio and Photo Evidence

Matrimonial litigation has undoubtedly spurred the video and audio recording industries because embattled litigants commonly try to capture one another in acts of "something" that can be flashed before the court. This is especially true in the preservation of evidence associated with orders of protection. Admission of such evidence is routinely challenged because of the proponent's failure to have demonstrated the chain of custody. Significantly, a chain of custody is not a predicate for the introduction of audiotapes and photographs into evidence. All that is necessary is testimony by anyone who can authenticate the accuracy of their contents, irrespective of whether or not he or she recorded or photographed the event.

In *Hirsh v. Stern* 74 AD3d 967 (2nd Dept. 2010), the petitioner testified that the appellant had threatened her physical safety on several occasions, which the appellant denied. The appellant attempted to offer into evidence an audiotape of a conversation between him and the petitioner that took place on one of the days she alleged he had threatened her. The appellant testified that he had recorded the conversation using a pocket cassette recorder, that the recording accurately portrayed the conversation on the subject date, and that the tape established that he never threatened or raised his voice to the petitioner during the subject conversation. The petitioner challenged the admission of the tape on the ground that a proper foundation had not been laid.

The Appellate Division, citing the holding in *People v. Ely*, 68 N.Y.2d 520, stated that a "chain of custody ... [is] not a requirement as to tape recordings." It went on to quote *People v. McGee*, 49 NY2d 48, cert. denied sub nom, for the proposition that proof that the audiotape had not been altered was properly established by the appellant, "a participant to the conversation who testifie[d] that the conversation ha[d] been accurately and fairly reproduced." Since the Supreme Court erred in depriving the appellant of his right to place admissible evidence supporting his defense before the fact finder, and since the alleged information on the tape was critical to the appellant's defense, the appellant was entitled to a new hearing on whether an order of protection should be issued.

The *Ely* decision, cited in *Hirsh*, describes the several ways to lay a foundation for audio recordings. There, the court of appeals noted that the admissibility of tape-recorded conversation requires proof of the accuracy or authenticity of the tape by "clear and convincing evidence" establishing "that the offered evidence is genuine and that there has been no tampering with it." The necessary foundation may be provided through:

- Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered (*People v. McGee*, 49 NY2d 48, 59, cert denied sub nom; *Waters v. New York*, 446 U.S. 942; *U.S. v. Sandoval*, (D.C.Cir.), 709 F.2d 1553, 1555);
- Testimony of a witness to the conversation or to its recording, such as the machine operator, to the effect that the recorded conversation is a complete and accurate reproduction of the discussion that has not been altered (*United States v. Hassell*, (8th Cir.), 547 F2d 1048, 1054, cert. denied sub nom; *McIntosh v. U.S.*, 430 U.S. 919); or
- Testimony of a participant in the conversation, together with proof by an expert witness that after analysis of the tapes for splices or alterations there is, in his or her opinion, no indication of either (*U.S. v. Craig*, (7th Cir.), 573 F.2d 455, 477 478, cert. denied 439 U.S. 820).

Similarly, a photo or videotape may be admitted in a variety of ways. In *People v. Patterson,* 93 N.Y.2d 80, 688 NYS2d 101 (1999), the court of appeals stated that a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted (*People v. Byrnes*, 33 NY2d 343). Testimony, expert or otherwise, may also establish that a videotape "truly and accurately represents what was before the camera" (*Id*. at 349, 352 N.Y.S.2d 913). Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering (cf., *People v. Ely*, *supra*).

Judicial Favoritism Toward Pro Se Litigants

A common complaint in matrimonial matters is that courts bend over backwards in favor of the pro se litigant, according him or her latitude far beyond that granted to represented parties. Pro se litigants are often permitted to enter flawed and even incompetent evidence into the record where an attorney's efforts to do so would have been rebuked. *Bush v. Bush*, 74 A.D.3d 1448, 902 N.Y.S.2d 697 (3rd Dept., 2010), leave to appeal denied, 15 N.Y.3d 711, 938 N.E.2d 1010, 912 N.Y.S.2d 575 (2010), involving a pro se litigant, stated that a court "[c]ourts are obligated to 'keep the respective parties focused upon a succinct presentation of evidence relevant to the issues to be decided [and to] ... insure an orderly and expeditious trial.'"

Conclusion

Counsel must always be on guard to defend the divorcing litigant on

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DECISIONS OF INTEREST

MOVE TO CONNECTICUT DID NOT TERMINATE NY DOMICILE

Though a couple moved to Connecticut for educational reasons, their domicile remained in New York and a divorce action brought in New York therefore need not be dismissed for lack of jurisdiction. *P.C. v. K.K.*, 53782/10, NYLJ 1202479408573, at *1 (Fam. Ct., Kings Cty. 1/7/11) (Thomas, J.).

The wife moved for dismissal of her husband's divorce action, claiming that they did not meet the jurisdictional requirements of Domestic Relations Law § 230. Under DRL § 230 (1), an action for divorce may be maintained only when "[t]he parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding." The wife based her argument on the fact that she and her husband had been living in Connecticut together less than a year prior to the filing of the divorce. (There was no dispute concerning the facts that the parties were married in New York and the wife was a resident of New York at the time of filing.) The court found New York jurisdiction proper because the couple had lived in New York prior to their move to Connecticut, and had moved to that state only so that the wife could pursue a graduate degree at Yale University. All indications were that their move there had been considered by both parties as temporary, so their domicile at the time of the move — New York — should be presumed their continuing domicile. Therefore, as the wife was a domiciliary of New York for several years, despite her temporary residency in Connecticut, and the parties were married in New York, the requirements of DRL § 230 were met and the court need not dismiss the divorce action for lack of jurisdiction.

IN PROBATE CASE, FIRST DEPARTMENT SAYS CANADIAN SAME-SEX MARRIAGE VALID

The Appellate Division, First Department, finding that a couple's same-sex Canadian marriage must be recognized in New York, affirmed an order of the Surrogate's Court, New York County (Kristen Booth Glen, S.), which denied a petitioner's motion to vacate the probate of his brother's will. *H. Kenneth Ranftle v. Craig Leiby*, 4214, NYLJ 1202483192791, at *1 (Surr., NY, Feb. 24, 2011) (Mazzarelli, J.P., Catterson, Manzanet-Daniels, Romn, JJ.).

The deceased married the respondent in a legally authorized same-sex marriage in Canada, on June 7, 2008. When he died several months later his spouse, who had been named in the will as executor, filed a petition for probate in the Surrogate's Court. In his will, the deceased left $30,000 to each of his three brothers.The respondent identified himself as the decedent's surviving spouse and the sole distributee, and he served the legatees with notice of probate. On Dec. 15, 2008, the Surrogate's Court issued a decree granting probate. On Jan. 26, 2009, the Surrogate's Court issued an opinion finding that the respondent was "decedent's surviving spouse and sole distributee" (Estates Powers and Trusts Law (EPTL) 4-1.1) and, therefore, citation of the probate proceeding need not issue to anyone under Surrogate's Court Procedure Act (SCPA) § 1403(1)(a). The appellant, one of the deceased's brothers, petitioned the Surrogate's Court for vacatur of the probate decree and permission to file objections, alleging that the court was without jurisdiction to grant probate without citation having been issued on the decedent's surviving siblings. He argued that the recognition of the decedent's same-sex marriage violated public policy in New York and that he, as a distributee, should have been cited in the probate proceeding and provided with an opportunity to file objections to it. Citing to *Martinez v. County of Monroe*, 50 AD3d 189 [2008], lv dismissed 10 NY3d 856 (2008), a case in which the Court of Appeals held that out-of-state same-sex marriages would be recognized in New York because such recognition is not against natural law or public policy, the Surrogate's Court found the appellant's appeal was without merit. The brother appealed.

The First Department agreed with Surrogate's Court, rejecting the appellant's contention that same-sex marriage should not be recognized because New York's legislature has not passed laws permitting same-sex marriage or authorizing the recognition of such marriages legally entered into elsewhere. In affirming the Surrogate Court's decision, the First Department, citing to *Moore v. Hegeman*, 92 NY 521, 524 (1883), stated: "In the absence of an express statutory prohibition … legislative action or inaction does not qualify as an exception to the marriage recognition rule."

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Dealing with Emotions

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both fronts — the legal and the emotional — because they are inextricably intertwined. *Fuentes* is an exceptional bit of magic that should be glued to counsel's briefcase. A copy to the presiding justice during conference or oral argument can save motion practice and provide immediate relief. The other cases can help counsel deliver the message to the court in a manner that will be upheld on appeal. The most effective way to be a successful litigator is to think that you are trying your case to an appellate court and ask yourself, "Will my evidentiary delivery system withstand scrutiny by an appellate panel?"

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