Avoiding The Pitfalls Of Matrimonial Litigation[1]

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Normative protracted matrimonial disputes foment unanticipated challenges in the unsteady and rapidly shifting adversarial sands. What may have once been perceived as resolved or resolvable may well explode into contention leaving counsel scrambling for nuggets of authority. Miscomprehension of law can be fatal. Client emotions loom large stirring the litigation caldron. This column offers guidance to avoidable pitfalls.

The Non-Custodial Parents' Rights

A common dilemma confronting the non-custodial parent is the custodial parent's malevolent denial of access to the children's academic and/or medical records where schools and service providers were improperly warned that neither the separation agreement nor the judgment of divorce provides the non-custodial parent with the right to such information. In *Fuentes v. Board of Educ. of City of New York*, 12 NY3d 309 (2009), the Court of Appeals resolved this issue definitively in favor of the non-custodial parent, stating that it his or her absolute right to access such records. Nevertheless, decision making on behalf of children is unavailable if such right was not specifically accorded by either agreement or judgment:

> 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 non-custodial 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.

Fee Arbitration and Legal Malpractice Actions

A proceeding to collect unpaid legal fees often evokes a kneejerk malpractice reaction to avoid such payment. The *manna* for counsel wrongly accused of malpractice distills into the general principle that, when a client has not prevailed in an action with counsel for the value of professional services, even after an arbitration proceeding under 22 NY ADC 137**,** a subsequent malpractice claim is barred.[2] Part 137.0 does no more than to "establish the [] Fee Dispute

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[1] N.Y.L.J., Aug. 1, 2011.

[2] Koppelman v. Liddle, O'Connor, Finkelstein & Robinson 246 A.D.2d 365 (1st Dept.,1998).

Resolution Program...for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation":

> In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances...

Part 137.1(a) is applicable to all civil cases commenced on or after January 1, 2002. Part 137.1(b)(3) excepts, inter alia, "claims involving substantial legal questions, including professional malpractice or misconduct." Counsel and client may submit their dispute to other forums for "final and binding arbitration." Significantly, "*arbitration in that [] forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part*" 137.2(d). That Part 137 did not abrogate substantive common law is underscored in *Kinberg v. Garr* 28 A.D.3d 245 (1st Dept. 2006)[3], decided well after the Part's effective date. Counsel had represented plaintiff in a divorce action. Plaintiff's adverse determination in defendant's prior action to recover fees for professional services precluded a finding of malpractice regarding the same services. *Altamore v. Friedman* 193 A.D.2d 240 (2nd Dept.,1993),[4] leave to appeal dismissed, 83 N.Y.2d 906 (1994), elucidates:

> Under established case law, [a] judicial determination fixing the value of a professional's services necessarily decides that there was no malpractice...Since there was a binding agreement to arbitrate, there was an identity of issues, and the parties stipulated that the arbitration award would have the same effect as a judicial determination, upon which a judgment could be entered.
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> The issues involving conflicts over professional services and those in malpractice actions are necessarily intertwined...[M]alpractice is a defense to an action to recover for professional services, and legal malpractice actions have been dismissed on the strength of prior adjudications involving fee disputes.

Citing the Court of Appeals, *Chisholm-Ryder Co., Inc. v. Sommer & Sommer* 78 A.D.2d 143 (4th Dept.,1980), explained:

> [T]he prior action between these parties necessarily determined that services were performed by the attorneys for the client and that compensation was due them, and it is the nature of that claim...which controls [] and estops the client from maintaining the present action...To hold otherwise would permit destruction of rights adjudicated in the first judgment by a different judgment in a subsequent action.

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[3] Citing Koppelman, FN1; See Zito v. Fischbein Badillo Wagner Harding, 80 A.D.3d 520 (1st Dept., 2011); Zupan v. Firestone, 91 A.D.2d 561 (1st Dept., 1982), aff'd, 59 N.Y.2d 709 (1983).

[4] Cited in Koppelman.

A Party May Testify as to Value of Assets

Valuation is a bedrock of equitable distribution. What to do when an asset requires valuation but an expert witness was not retained or unavailable? Valuation may, under certain circumstances, be introduced through party testimony: "the owner of property can testify as to its value regardless of any showing of special knowledge as to the property's value."[5] *Del Vecchio v. Del Vecchio* 131 A.D.2d 536 (2nd Dept.,1987), affirmed "[t]he court's valuation of the marital residence...based upon the plaintiff's testimony concerning her knowledge of the recent sale of a neighbor's house which was of similar design to the marital residence (Richardson, Evidence §§ 189, 364 [10th ed Prince])." Courts have also permitted testimony regarding jewelry, tools,[6] and household furnishings and equipment.[7]

In *McCauley v. Drumm* 217 A.D.2d 829 (3rd Dept.,1995), the husband had told his wife that their Mercedes was worth $65,000. His net worth statement, however, listed its value at $22,000. His out-of-court value was an admission which created a credibility question for the factfinder. Since the statement was an informal judicial admission the husband could have explained the inconsistency.

Automobile Valuation

Car valuation can be accomplished inexpensively by way of the Kelly Blue Book.[8] CPLR 4533 provides:

> A report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or in an official publication or trade journal is admissible in evidence to prove the market price or value of any article regularly sold or dealt in on such market. The circumstances of the preparation of such a report may be shown to affect its weight, but they shall not affect its admissibility.

A Party as the Expert Witness

A party may offer expert opinion if he or she can be so qualified.[9] This method of

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[5] Tulin v. Bostic 152 A.D.2d 887 (3rd Dept.,1989); Felicello v. Felicello, 240 A.D.2d 625 (2nd Dept., 1997).

[6] Cuozzo v. Cuozzo 2 A.D.3d 665 (2nd Dept. 2003) (Supreme Court properly credited the plaintiff's testimony as to the value of certain jewelry and tools, since he was familiar with the items – the defendant did not challenge that testimony.)

[7] Fassett v. Fassett 101 A.D.2d 604 (3rd Dept.,1984).

[8] See Dobson v. Saal, Civil Court, Kings County (Dear, J.), NYLJ 5/16/11, for a good review.; McKinney's Statutes Practice Commentaries, Vincent Alexander, CPLR 4533.

[9] A.C. Elec. Co. v. Bellino, 135 A.D.2d 678 (2d Dept 1987) ("The court's refusal to allow the defendant to testify as his own expert was correct.While interested witnesses may testify in

introducing expert opinion should be avoided unless other expert testimony is unavailable. Due to his adversarial status, the trial court, in *Thoma v. Thoma,*[10] precluded the husband, an architect, from testifying as an expert regarding the wife's earning capacity in architecture and interior design. The Appellate Division reversed because, under CPLR 4512, "[a] party may testify as an expert witness. However, since the plaintiff never made an offer of proof as to his qualifications to testify . . . it [wa]s impossible to determine whether this error had an effect on the outcome." The matter was remanded to permit the husband to "attempt to qualify himself as an expert or to submit other expert testimony."

Counsel Fees

Statutory and decisional authority aim to neutralize financial disparity in the litigation theater. While much has been written about the simultaneously enacted no-fault divorce law (Domestic Relations Law (DRL) 170[7]),[11] and pendente lite spousal maintenance, the well intentioned amendment to DRL § 237, "counsel fees and expenses",[12] has received no critical review. By way of background, *Hinden v. Hinden*, 122 Misc.2d 552 (Sup.Ct., Nassau Co. 1983), one of the earliest forerunners on this issue, emphasized the need for financial parity so that negotiations "are truly free of duress and overreaching and are arrived at fairly and equitably" to avoid an inequitable result upon the financially dependent spouse:

> In a matrimonial action where both parties are presumed to be entitled to relief...there should be rough equality in the resources available to each party in the course of the contest.
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> [S]hould one spouse have substantially greater economic leverage during the litigation (and negotiation) process...that fact may have a profound effect on the ultimate resolution both because of its psychological impact on the parties and because of its effect on their ability to finance the litigation.

Analyzing the evolution of the "deep statutory roots" behind counsel fee awards, the

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their own behalf . . . the court may not only assess the credibility of such witnesses, but also their qualifications to testify as experts . . . The defendant's own testimony indicated his ignorance of the refinements of electrical work, and demonstrated his lack of qualifications as an expert in evaluating the cost of electrical work").

[10] Thoma v. Thoma, 21 A.D.3d 1080 (2nd Dept 2005).

[11] E. Scheinberg, No-Fault Divorce, Defenses, Pleadings, Independent Actions, NYLJ 11/30/10; Hon. Sondra Miller, No-Fault, Clear and Simple NYLJ 12/3/10; T. Tippins, No-Fault Divorce and Due Process, NYLJ 3/3/11; Jurisdiction, Due Process and No-Fault Divorce, E. Scheinberg, Hon. Sondra Miller, Prof. Andrew Schepard NYLJ 3/14/11; Prof. E. Freedman, Further Discussion of No-Fault Divorce and Due Process NYLJ 3/16/11.

[12] (L.2010, c. 329, § 1, eff. Oct. 12, 2010).

Court of Appeals, in, *O'Shea v. O'Shea*, 689 N.Y.S.2d 8 (1999),[13] emphasized economic endurance: "marital litigation is best shaped not by the power of the bankroll but by the power of the evidence." *O'Shea* placed additional emphasis on the thesis in *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879 (1987), about "adjusting financial disparities in litigation" so that "the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet."

Charpie v. Charpie, 271 A.D.2d 169 (1st Dept., 2000), similarly placed in its crosshairs the dependent spouse's "access to funds" and the imminent harm resulting from unequal financial stations. The foregoing notwithstanding, pendente lite counsel fee awards proved unpredictable. The Legislature thus amended DRL § 237, "counsel fees and expenses", (L.2010, c. 329, § 1, eff. Oct. 12, 2010)) to include the "rebuttable presumption":

> There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding.

Its curative intent notwithstanding, the implementation of the phrase "[i]n exercising [] discretion, the court shall seek to assure that each party shall be adequately represented" gives pause. Assume two attorneys of varying experience, one a seasoned attorney extraordinaire with an unshakeable knowledge of the law who commands significant retainers and hourly rates. The other, perhaps a general practitioner or a younger attorney, has not yet achieved a similar mastery. By what measure can a court implement "assurance" that the spouse with the lesser experienced attorney will receive "adequate representation"? How minimal is "adequate"? Should "adequate" be all we strive for?

Courts are indubitably restricted from acting as filters: they may not counsel lesser-represented parties to retain new counsel until the gladiators are evenly matched. Logic further dictates that simply throwing equal sums of money at lesser experienced counsel cannot compensate for inexperience, long term skill, or knowledge. This phrase is thus limited to a precatory reflection of the legislative spirit and momentum – courts must review each fee application judiciously. Although decided well before the amendment, *Prichep v. Prichep* 52 A.D.3d 61 (2nd Dept.,2008), addressed this issue head on and hit the bull's eye:

> [C]ourts should not defer requests for interim counsel fees to the trial court, and should normally exercise their discretion to grant such a request made by the nonmonied spouse, in the absence of good cause-for example, where the requested fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case-articulated by the court in a written decision.

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[13] Two must read decisions:m Frankel v. Frankel, 2 N.Y.3d 601 (2004) and Prichep v. Prichep, 52 A.D.3d 61 (2nd Dept., 2008).

Evidence

The underlying foundation of the rules of evidence is that knowing how to present a case is as important as knowing what to present. An oft encountered winnable scenario is a disabled party's application for a downward modification of child support or spousal maintenance, or a disabled spouse's application for increased spousal maintenance. In each situation the disabled party is receiving Social Security Disability payments following a determination of disability by the Social Security Administration (SSA). These parties routinely come to court armed with no more than a letter from the SSA attesting the disabilities.

First, the letter containing the medical conclusions is hearsay in its purest form.[14] Second, "[i]t is well settled that the determination of one administrative agency is not binding on another agency considering the same question under a different statute.[15] Although this rule traces back to inter-agency litigation, an ample body of decisional authority extends the rule to courts. It is, therefore, necessary to bring in the treating physician or to introduce the medical records under CPLR 4518 (the business record rule). Nothing less will do.

Collateral Sources Must Be Vetted

Trial counsel must be aware of settled law that expert opinion based on statements made by out-of-court sources who did not testify during trial, and were thus not subjected to cross-examination, which statements are introduced into the record by the expert are worthless hearsay – it is the evidentiary equivalent of a scorpion sting.[16] *Murphy v. Woods*, 63 A.D.3d 1526 (4th Dept.,2009), correctly held:

> Family Court erred in permitting a "licensed mental health counselor" to offer an opinion that was based in part upon his interviews with collateral sources who did not testify at trial...and there was no evidence establishing their reliability. We cannot conclude that the admission of the expert's opinion is harmless error because, without the admission of that opinion or the testimony of the collateral sources, there is insufficient evidence in the record to support the court's determination.

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[14] Wagman v. Bradshaw, 292 A.D.2d 84 (2nd Dept., 2002); Keller v. Regan 212 A.D.2d 856 (3rd Dept.,1995).

[15] Bukovinsky v. Bukovinsky 299 A.D.2d 786 (3rd Dept.,2002); Wilson v. Lamountain, 83 A.D.3d 1154 (3rd Dept., 2011); Karagiannis v. Karagiannis, 73 A.D.3d 1064 (2nd Dept., 2010); Aranova v. Aranova 77 A.D.3d 740 (2nd Dept.,2010); Grasso v. Grasso 47 A.D.3d 762 (2nd Dept.,2008); Marrale v. Marrale 44 A.D.3d 773 (2nd Dept.,2007).

[16] See Valuation, § 46.05[3][a]-[n], Elliott Scheinberg, New York Civil Practice, Matrimonial Actions, Matthew Bender, for a detailed analysis of The Professional Reliability Rule.

Conclusion

The best preparation is to anticipate the unexpected and to research the issues well in advance to avoid being caught off guard.

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