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Notes and Comments

By Elliott D. Samuelson, Editor

Wegman Revisited or Why Should Business Assets Be Appraised at Less Than Optimum Value?

If the matrimonial court is a court of social justice, should not the intent of all jurists sitting in the marital part be to do equity and not afford to either husband or wife an unfair financial advantage? Certainly, this desire to do the right thing and to fairly adjust the parties' interests, has been a hallmark virtue of the New York divorce courts.

With this observation in mind, it is difficult to understand why the lower courts seem to be having difficulty in selecting the proper date for the evaluation of marital assets, and the appreciated value of separate assets.

The new statute, DRL Section 236B(4)(b), recently enacted to eliminate such difficulty, only applies to actions commenced after September 1, 1986 and limits the court's choice to dates between the commencement of the action and the date of trial. It precludes the court from fixing an earlier or later date, no matter what compelling circumstances may exist to do so. This may create an injustice. Where a spouse, without any justification, abandons his family at a time when his business is flourishing and prosperous, and because of his own wrongful acts (which might include non-support, carrying on a meretricious relationship and/or becoming addicted to drugs), causes a precipitous decline in the business value, it would seem unjust under these extreme factors to value the business within the prescription of the statute—and for this reason, the legislature may wish to consider an amendment which would give to the court further flexibility to deviate from this proscription upon good cause shown.

However, the vast majority of cases, which will include hundreds of pending actions not subject to DRL Section 236B(4)(b), will necessarily tussle with whether to evaluate a marital asset at the date of trial or the commencement of the action. Because of the increasing calendar congestion in the metropolitan area, and the zeal with which contested matrimonial actions are waged, it is no wonder that there are several years that separate these two focal points. It should be readily apparent that once a marital action is commenced, especially by the

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Inside this issue. . .

Boden: A Decade Later

By Elliot Scheinberg*

A thorny issue that has plagued both bench and bar alike is this: under what circumstances will a custodial parent be successful in seeking an upward modification of child support in the face of a non-merged agreement which spells out the non-custodial parent's child support obligation?

Although *Boden v. Boden*[1] was not the first case to involve such an application, the Court of Appeals ruling in that case seems to have marked the dawn of a new era in judicial effort to structure an approach to such cases. Despite the dynamic symmetry of the Court's reasoning, the guidelines have sparked confusion among the various lower judicial decision-makers, leading to inconsistent and often seemingly irreconcilable decisions.

History of *Boden*

James and Janet Boden were married in June, 1956 and had one child. In May, 1960, the parties entered into a separation agreement which fixed the amount of child support at $150 per month and also obligated the father to fund the child's college tuition via a life insurance endowment plan.

Family Court had noted that, at the time of the hearing, Mrs. Boden's annual income exceeded that of Mr. Boden by approximately $2,000.00. Additionally, Mr. Boden had remarried and had assumed the responsibilities of providing for a new family. Based on the facts adduced at the hearing, Family Court denied the petition for increased child support.

With two judges dissenting, the Appellate Division, First Department, reversed the Family Court and awarded Mrs. Boden the $100.00 a month increase. The Court of Appeals reversed the Appellate Division and denied Mrs. Boden the increase.

In a brief two page decision that was destined to confound both attorneys and judges (not to mention litigants), the Court of Appeals made various declarations that would vastly alter the course of post-judgment litigation. The Court's method was to devise a series of tests, each acting as a backdrop, which must be viewed against another immediately behind it. If all the tests are satisfied an upward modification of child support may be awarded.

The first few comments of the Court were relatively innocuous. We were simply reminded that the terms of a separation agreement, "like any other contract clauses, are binding on the parties of the agreement," and that "the mother's financial status is also a proper consideration for the court in making its determination." *Boden v. Boden.*

The Court of Appeals, however, underscored that the central focus of such matters is "*...insuring that the child be adequately provided for...*" (emphasis provided). The term "adequate" would subsequently evolve into a legal term of art.

It appears from the decision that one method of proving inadequate child support, enough to upset the provisions of a separation agreement, has been met as a matter of law if the petitioner has made a showing of "an unanticipated and unreasonable change of circumstances."

In support of that statement, the Court cited the following cases: *Matter of Halpern v. Klebanow;*[2] *Matter of Lewis v. Lewis,*[3] *Unger v. Schiff.*[4]

A reading of the above cases reveals that the "unanticipated and unreasonable change in circumstances" language does not appear as such in any of those decisions.

In *Halpern*, the parties entered into a separation agreement which contained carefully arrived at provisions regulating the custody, control and support of three minor children. The Appellate Division held that:

> Although power resided in the Domestic Relations Court to order support for children, despite the existence of a separation agreement, that power was not to be exercised where a separation agreement made *adequate* provision for support and there was no showing of a compelling change of circumstances of the respective parties. (emphasis added)

In *Unger*, the father, pursuant to the terms of a separation agreement, established a trust to insure the monthly child support payments. The mother received an increase in child support based on the allegation that "the children were a little older" and "the cost of living has risen".

In a memorandum decision, the Second Department held that the original terms of the agreement were not to be disregarded.

Lewis v. Lewis involved a mother's effort to receive "fair and reasonable support for the children" beyond the amount in a foreign divorce decree. The Children's Court entered an order directing the father to pay an amount in excess of the sums agreed to in a separation agreement between the parties.

In denying the increase, the Second Department:

> a) held "...the amounts provided for in the decree were not so small in comparison with the father's income and reasonable needs and expenses of the mother's circumstances as to render it inequitable to permit the father to rely upon the terms of the divorce decree," at 476; and
>
> b) noted: that since the Alabama courts could not modify the terms of the decree under these

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circumstances, New York courts could not do so either.

In essence, none of the brief decisions relied upon by the Court of Appeals in support of the "unanticipated and unreasonable change in circumstances" language even remotely hints as to what "unanticipated and unreasonable" means or even should mean.

The stylistic flow of *Boden* dictates that there is a logical nexus between the sentence containing the unanticipated and unreasonable thought and the sentence that immediately follows. In other words, that the second sentence defines the language of the first sentence.

The second sentence, which provides that:

> Unless there has been (1) an unforseen change of circumstances and (2) a concomitant showing of need an award of child support in excess of that provided for in the separation agreement should not be made *based solely* on an increase in cost where the agreement was fair and equitable when entered into.[5] (emphasis provided)

sets up a two-prong test, stated in the conjunctive, which, if satisfied, must then be examined in light of whether the agreement was "fair and equitable when entered into" before an award of increased child support will be allowed to stand.

Otherwise stated, a motion for increased child support, beyond the terms contained within the four corners of a separation agreement, is dismissable, as a matter of law, if the terms of the agreement were fair and equitable when entered into and the heart of the petition merely revolves around increased costs due to the growth of a child without a showing of inability to provide the support contemplated in the agreement.

At first blush, a somewhat disquieting inference could be drawn from this language that a petition for increased support should fail even where the petitioner can meet the two-prong test but cannot establish that the agreement was not fair and equitable when entered into. Mercifully, such is not the case because it is highly improbable that a court would drive a needy parent away and deny a child "adequate" support. Also, the language in *Brescia* disjoins the "fair and equitable when entered into" test from the two-prong test. *Infra*.

The citations relied upon by the Court of Appeals in support of the two-prong test and the fair and equitable standard (*McMurray v. McMurray*[6];*Matter of Best v. Baras*[7]; *Matter of Klein v. Sheppard*[8]), reached the following conclusions:

> a) *McMurray* - "The agreement was fair when made, *and* there has been no showing of *special circumstances* to warrant a modification."
> b) *Best* - "There is no claim or showing...of '*special circumstances*' or that Lisa's needs are greater than now provided for, or that...support payments for Lisa are *inadequate*."
> c) *Klein* - Petitioner "and her family *live well* but she seeks an increase in the father's payment-...because *her expenses have overall increased. The agreement made initially was very fair. There is no showing of specific need*." (emphasis provided)

It is readily apparent that the Court of Appeals rallied behind these decisions by combining them in a judicial skillet to create a set of standards that would lend form to the amorphous terminology "special circumstances".

Last but not least, *Boden* brought two powerful legal presumptions to life:

> Where...the parties have included child support provisions in their separation agreement, the court should consider these provisions as between the parties and the stipulated allocation of financial responsibility should not be freely disregarded. *It is to be assumed that the parties anticipated the future needs of the child and adequately provided for them.* It is also to be presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child.[9] (emphasis provided)

Therefore, absent clear evidence from within the agreement to the contrary, it is presumed that the future circumstances of the child have been contemplated and provided for by the parties.

Additionally, these presumptions seem to reenforce the first part of the two-prong test, to wit: the unforseen change in circumstances. So that there exists a legal presumption of forseeability and one must defeat it in order to satisfy the first test.

Five Years Later...

Five years later the Court of Appeals was once again confronted by a mother seeking to have the child support obligation increased beyond that which had been contemplated in the separation agreement. In *Brescia v. Fitts*[10], the petitioner and respondent entered into a separation agreement which provided for the support of the parties' two children. The agreement was incorporated into the judgment of divorce.

Shortly after the mother's remarriage, she petitioned the Family Court for an increase in child support alleging a change of circumstances arising from: "the children's having grown older thereby resulting in increased needs, and that the father's income had increased."

After a hearing, Family Court granted the mother the increase that she had wanted. The Appellate Division, relying on *Boden*, reversed, finding "that the petitioner's *generalized* claim of the children's increased needs and her showing of a significant increase in respondent's income did not warrant an increase in child support."

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Boden
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The Court of Appeals now had the long desired opportunity to once again be heard and to tell the world what *Boden* really meant and how it should be applied. The Court acknowledged the broad reading that *Boden* had received and told the legal community that its holding was not to be applied with a broad stroke, disregarding the circumstances of each individual case.

The Court said that although everything enunciated in *Boden* is still applicable, *i.e.*, that parties are bound by the terms of a separation agreement relating to financial allocation of child support and that it is to be assumed that the parties contemplated and adequately provided for the present and future needs of the children, there are still situations where a court may properly restructure the parties' respective financial obligations vis-a-vis the children. Such a restructuring is correct "if the agreement was not fair and equitable when made *or* that an unanticipated and unreasonable change in circumstances has occurred, resulting in a concomitant showing of need."[11]

As stated earlier, the language in *Boden* seems to suggest that in addition to satisfying the "unanticipated and unreasonable" criteria, a parent must also demonstrate concurrently that the agreement was "*not* fair and equitable when entered into" before an upward modification of child support may be awarded. The language in *Brescia* states that satisfying either the "unanticipated and unreasonable" test (which results in concomitant need) or the "not fair and equitable when entered into" test will be sufficient, as a matter of law, to allow a court to review and alter, if necessary, the parties' financial obligations.

There is one question that continues to gnaw at the back of the mind: cannot a reasonable mind construe then, that, according to *Brescia*, a litigant may now bring the entire circumstances of the negotiations into a *nisi prius* court for complete review, and if it can be shown that the property settlement was not fair and equitable then, that it could now serve as a basis for an upward modification of child support, even though it is unrelated to child support? Even more inconsistent and strange to a matrimonial practioner's strategy would be to try the issue of "not fair and equitable" in Family Court where it is beyond the court's jurisdiction to delve into such matters, a matter that the *Bresica* court itself addressed. But the Catch-22, then, is that a party seeking to avail himself of Family Court's services (which he may be entitled to do if he is seeking upward modification of the support provisions of a judgment of divorce which has incorporated a separation agreement) may be restricted from raising the circumstances of the negotiations in a Family Court proceeding, thereby restricting his strategy and access to any court but Supreme.

In any event, *Bresica* distinguished its holding from that of *Boden* and limited its holding in *Boden* to *Boden*-like facts by characterizing *Boden* as a proceeding having been brought simply to *readjust* the child support obligations of the parties without satisfying the two-prong test. Readjustment was defined as follows:

> In seeking increased child support from the father, the mother was not asserting the right of the child to be supported by the father, *as the child's needs could clearly have been met by either parent*, given their respective financial situations. Rather, *the mother was asserting her own interest in having the father contribute more to the financial burden of raising the child*. Thus, the principles set forth in *Boden* apply only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child."[12] (emphasis provided)

In other words, readjustment is synonymous with a shifting of the financial obligations or a reallocation of the financial responsibilities between the parties where one parent, who can meet the increased needs of the child from his/her independent resources without risking the child's adequate support, seeks to have the other parent shoulder more of the burden.

The *Brescia* court highlighted that it was permitting an upward modification because the petitioner had evidenced that the combination of her earnings and the respondent's support payments did not *adequately* address the children's needs.

And once inability to provide "adequate" support to meet the child's needs is raised and proved, a court may consider, *inter alia*, the increased needs of the children due to special circumstances or to the additional activities of growing children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent and the current and prior lifestyles of the children in fashioning its award.[13]

Otherwise, none of these factors, standing alone or together, may be considered by a court unless the *Boden* test is met and satisfied. However, it is nearly impossible to glean the exact meaning of "adequacy" and when it is satisfied from *Brescia* alone. It would not be until its companion case, *Michaels*, *infra*, would be handed down for that to be possible.

Michaels

Annette Michaels commenced a proceeding under Article 4 of the Family Court Act seeking, *inter alia*, an upward modification of the $57.70 weekly child support payments.

> To substantiate the requested increase, petitioner maintained that the child, now older, had greater needs for his maintenance, clothing and education. Family Court increased the amount of child support to $92.70 per week, awarded petitioner $500 in counsel fees, and concluded, *inter alia*, that the original weekly amount was fair and reasonable at the time and consonant with the respective circumstances of the parties; that re-

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> spondent father's earning power and assets have greatly increased since 1973, while the mother was not in the best of health, possessed only a limited education and minimal employment skills, and was only capable of earning a mere pittance in comparison with the father; that the original amount could not be considered as fair and reasonable support for the child for the remaining 19 years of the father's obligation to pay support where the agreement made absolutely no provision for modification in the event of changed circumstances; that substantial increases in expenses owing to inflation should be considered to be a significant and unforeseen change in circumstances sufficient to justify modification in support payments even in those cases where nonmerged separation agreements existed.[14]

On August 3, 1981, the Appellate Division, Second Department reversed the award of upward modification of child support holding that:

> The showing of a significant increase in the income of the appellant and a generalized claim that the child's needs have increased as he has matured and because of inflation are insufficient to warrant an increase, in child support (see *Matter of Brescia v. Fitts*;[15] (other cites omitted) *Michaels v. Michaels*)

On appeal, the high Court reversed and remitted *for a review of the facts*. It held that:

> Inasmuch as the request *here* for increased child support was predicated on *the child's right to receive adequate support*, it was not necessary to demonstrate an unanticipated and unreasonable change in circumstances to justify an increase (see *Matter of Brescia v. Fitts*). It is sufficient in *such* a case that a change in circumstances has occurred warranting the increase in the best interests of the child. And, on *this* record, it cannot be said as a matter of law that the circumstances shown did not warrant an increase in the child support originally provided in the divorce decree.[16] (emphasis provided)

Very simply stated, the Court of Appeals reiterated its position in *Brescia* by saying that if it can be shown that the child's *adequate support* is not being provided for or is in jeopardy, then it is not necessary to satisfy the "unanticipated and unreasonable test *in the conjunctive* and one may proceed directly to the conditions set forth at 451 N.Y.S.2d 68, at 72.

The simple key that simultaneously unravels the mystery and acts as the unifying thread in the string of the high Court's decisions is to understand that when it comes to children, the Court will always consider what is best for the child, *i.e.*, that the child receive a measure of support that is consonant with the needs of the child and in harmony with the standards contemplated by the parties as reflected in the agreement.

Rubin

Recently, the Court of Appeals broke another five year hiatus of silence and addressed the issue in a terse decision affirming the Appellate Division, First Department's decision of *Rubin v. Rubin*.[17]

In 1976, the Rubins, represented by respective counsel, entered into a separation agreement which contained, *inter alia*, child support provisions, including primary, secondary and college education. After a hearing, the Supreme Court held that although the wife did not adduce any valid evidence to rescind the agreement, she was entitled to an increase in child support due to the "expanding interests and needs" of the child.

Setting the stage for the reversal of the lower court's upward modification, the Appellate Division reminded us of the general rule in *Boden* that "a court, in determining a child's need for support, is not bound by the parent's separation agreement."[18]

It, further, noted that the petitioner's financial situation had shown marked improvement since the execution of the agreement. Specifically, the reasons for the denial were:

1) the parties had been represented by experienced counsel;
2) there was no misrepresentation of assets by the father;
3) there was no evidence of the agreement's unfairness to the plaintiff;
4) the separation agreement had specifically anticipated the future of the child;
5) there was no assertion that the child's needs were not being adequately met;
6) the plaintiff did not claim an inability to meet her portion of the burden of rearing the child;
7) that the child's needs can clearly be met by either party, and
8) that "the case fell squarely within *Brescia's* definition of the *Boden* principle, viz, 'it is the mother's interest in having a greater financial contribution from the father that is involved, not the needs of the child'."[19]

It merits our attention that, in reaching the denial, the First Department applied every test announced by the Court of Appeals: (a) need, (b) adequacy, (c) fairness of the agreement, (d) forseeability and (e) ability of either party to meet the needs of the child.

The majority also underscored that the First Department's decision in *Boden* was reversed on facts similar to those in *Rubin*.

The dissenters were far afield in their interpretation of the *Boden-Brescia* doctrine. They did not seize the high

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Court's meaning that an award in excess of the terms of an agreement may not be had whenever one or several of the various factors set forth in the penultimate paragraph of *Brescia*, standing alone or together, are met. If the mother can meet the needs of the child with her own assets and/or income combined with the father's support, then that application must be treated as one that asserts the mother's *personal* interest in having the father contribute more in order to relieve the mother's financial obligations toward the child and the petition must be dismissed.

Instead, the dissent snipped and pasted and said that *Boden-Brescia* held that you must apply the best interests of the child test. And it reasoned that since Mr. Rubin had realized $3.1 million from the sale of his shares of stock in his business coupled with the child's entering adolescence thereby resulting in increased needs beyond those he had at the age of three (when his parents had first executed the agreement), a sufficient basis existed for an upward modification (because they are amongst the enumerated factors in *Brescia*).

Nothing could be further from accurate. Firstly, how can anyone possibly claim that a child's growing older is unanticipated? It simply defies logic. Secondly, the *Rubin* agreement clearly showed an effort to forecast the child's growing needs by including provisions to satisfy them. Thirdly, increased costs due to inflation are not only not unforseen, but often predictable with precision.

In upholding the majority ruling, the Court of Appeals simply stated that it was affirmed for the reasons stated by Justice Lynch. It is much clearer now as to what the State's highest court meant in its decisions on how to dispose of such cases.

Are "Adequacy" and *Boden* Coextensive and Reconcilable or Has the Court of Appeals Announced a New Standard?

Q.1(a): Did the Court of Appeals modify *Boden* when it promulgaged the new "adequacy" standard?

Q.1(b): When the Court talks about an unforseen change in circumstances, whose circumstances is it referring to?

Q.2(a): Can "adequacy" be seen as a form of *Boden*?

Q.2(b): What does "adequacy" mean in light of *Boden* and what does *Boden* mean in light of the "adequacy" standard?

Q.3: What do these four decisions mean and can they be linked together?

A careful review of the case law suggests that the answer to question one is yes. The answers to the other questions become obvious thereafter.

A subcutaneous examination of the cases reveals that "adequacy" is the Court of Appeal's evolutionary form of *Boden*. This is the result of an understated legal presumption that is implicit and pervasive in *Brescia* and *Michaels*, but that is only first apparent in *Michaels*.

In essence the Court says that if a parent is soliciting its aid to help provide a child's living needs because of the petitioning parent's proved inability to provide such needs due to adverse events since the signing of the agreement, then there is a presumption, as a matter of law, that the first part of the *Boden* test has been met, to wit, that an unforseen change of circumstances has occurred, as a matter of law. This newly created presumption, which is to be applied in cases of need, strikes at the heart of the (previously referred to) *Boden* presumptions of forseeability.

The *Michaels* court achieves this result by saying that (sentence one) *if* a mother asserts and proves "the child's right to receive adequate support", *i.e.*, that she cannot provide the child with either the support in the agreement or even with basic necessary support, *then* she will not have to satisfy the unanticipated and unreasonable change in circumstances standard conjunctively (as set forth in *Boden*), and under such circumstances, (sentence two), the Court, by operation of law, will infer a legal presumption on her behalf, *i.e.*, that the mother has satisfied the first part of the *Boden* test and that there has occurred a change in circumstances.

The reasoning is plain and logical: presumably, no custodial parent would ever enter into an agreement knowing *ab initio* that its terms would leave the child seriously wanting. So that if a parent could have provided the child with the contemplated support at the time of the signing, there must have been a change of circumstances, as a matter of law and fact, if the parent cannot do so at the time of the petition for an upward modification.

In other words, *Boden's* potential draconian effects have been weakened by the imposition of a more relaxed standard. There is no doubt that the Court of Appeals, champion of "the best interests of the child", will not allow terminology to turn away the pleas of a parent supplicating its help in a case of need. And if what it takes to save the child is a legal presumption, then so be it.

The Court's one paragraph decision in *Michaels* not only gives rise to the existence of another presumption where "a child's right to receive adequate support" is at issue, but also allows us to retroactively understand what the Court did and meant in *Brescia* and how the four cases are linked together.

It may, therefore, be argued that as a result of the *Michaels* presumption the issue of need has become the new fulcrum upon which any upward modification proceeding rests, rendering the issue of unforseeability obsolete. This is so because if the child is in danger of not receiving a proper measure of support (either as contemplated in an agreement or as his daily needs may require) due to the mother's financial inability to provide it, then the *Michaels* presumption will be applied to satisfy the unforseeability test and all the mother will have to do is allege and prove need.

If however, the mother cannot demonstrate need and

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Boden
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is able to provide the adequate needs of the child by combining her resources with the father's contributions, then she is unable to satisfy both prongs of the *Boden* test and her petition will be treated as one that asserts her own financial interest thereby resulting in a denial. So that the need of the providing parent is now the linchpin of all proceedings for increased support.

That this conclusion is not without foundation and merit is evidenced by a grouping of the four cases as *Boden-Rubin v. Brescia-Michaels*.

In each case, the holding was predicated upon the financial turn of events in the lives of the custodial parents. In *Boden-Rubin* the mothers prospered as did the fathers, which is what led the Court of Appeals to dub their applications as those centered about their own interests, whereas in *Brescia-Michaels* the mothers suffered reversals sufficient to jeopardize the quantity and quality of support for the children, thereby resulting in judicial alterations to the original support terms.

Now that we have concluded that need is the new standard, we can indulge ourselves and go off on a tangent and ponder whether the issue of unforseeability continues to have any vitality. In fact, even more basic is whose circumstances does the Court refer to when it talks about an unforseeable change of circumstances?

It has always been presumed that when *Boden* first addressed the issues of "an unanticipated and unreasonable change of circumstances" and "[U]nless there has been an unforseen change of circumstances and a concommittant showing of need", it was referring to unforseen changes in the life of the child. But *Boden* does not define in whose life these changes must occur. It is this writer's opinion that there is room, however small, for an argument to be lodged that the Court of Appeals may have been referring to the unforseen changes in the lives of the parents (which may no longer make it possible for them to provide the child's needs).

Life experience has taught us that during a child's maturation process he will be exposed to a myriad of eventualities as he passes from one developmental stage to another. Some of the experiences will be positive, others not. And it is a most rare instance, indeed, where it is possible to project all of the permutations with any remote degree of accuracy.

When both parents enter into a separation agreement, each assumes an element of risk which is factored into the agreement during the negotiations. Obligations to later confront various contingencies may be bargained for now by a more generous support provision or by a superior property settlement either in lieu of or as an advance against some eventuality. (Additionally, each parent hopes that his financial fate will show formidable growth.)

What the Court wanted to do with separation agreements is to accord them the same sense of finality that is given to any other contract involving non-domestic transactions, thereby curbing the floodgates of endless spousal litigation.

Were it not so, every custodial parent could file a petition for increased support every few years claiming a newly alleged "unforseeable change" each time that a child matured into a new phase of life and there would never be any conclusion to these matters.

Evidence that the Court of Appeals was concerned with finality can be drawn from the Court's brief reminder at the very outset of the opinion of *Boden*: that the ordinary rules governing contract law are applicable to the terms of a separation agreement and are equally binding on the parties.

Also, remember that a fundamental principle of contract law is that absent fraud, duress or overreaching, which serve as grounds for recession, a court will not otherwise renegotiate the terms of an agreement for a later disgruntled party. And the Court is implicitly saying that this rule also applies with respect to separation agreements (with the singular exception of where a child's adequate support is at risk).

The only vehicle by which the Court could achieve this end is by restricting relitigation to cases where the custodial parent's financial situation has changed unforseeably, thereby resulting in need and wherein a strict adherence to the original agreement would only serve to claim an innocent victim: the child.

Accordingly, it seems that there is a substantial basis to urge that a mere unforseen financial setback, standing alone, will not entitle a parent to an increase where there is no evidence that adequate support can no longer be provided.

But irrespective of whether or not the unforseeable change in circumstances refers to the parent or not, once the parent demonstrates need and the imminent consequences to the child, a court will not look any further and will redistribute the support formula between the parents.

With this in mind, *Boden-Brescia-Michaels-Rubin* now fall very neatly into place beside one another and jointly espouse a common goal.

Knights v. Knights

Recently the Court of Appeals addressed a petition for a downward modification of child support from a prior support *order* (not agreement). The petitioner was incarcerated following a felony conviction. The Family Court "denied petitioner's application, concluding that it would be unfair for an individual who had freely chosen to commit a crime to be relieved from the accrual of a support obligation." The court deferred entry of judgment until his release. The Appellate Division affirmed. In affirming the court below, the Court of Appeals, citing prior case law, concluded that the petitioner's changed financial circumstances were the result of his own doing. *In the Matter of Robert Wesley Knights v. Joan Knights.*[20]

Although this decision might not otherwise have stirred much excitement, there is one observation that merits analysis. Citing *Brescia v. Fitts*, the Court of Appeals held:

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> In exercising its discretion whether to modify a child support order, Family Court may consider various factors, including a "loss of income or assets by a parent or a substantial improvement in the financial condition of a parent" (Matter of *Brescia v. Fitts*, 56 N.Y.2d 132, 141 [citations omitted]; see Family Court Act 451; Besharov, Practice Commentaries, McKinney's Cons. Laws of NY, Book 29A, Family Court Act, at 341).

Although the aformentioned statement by the Court of Appeals was not necessary to reach the conclusion that it did, it will unfortunately engender additional litigation which will continue to murk the already clouded waters. The new argument will be that the Court of Appeals blanketly said that a substantial improvement of the financial condition of a parent is sufficient grounds to warrant an upward modification of child support. Period. But such is not the case. The Court of Appeals limited this holding to a modification of child support arising from a prior *order*.

Nowhere does the *Knights* court even remotely suggest that child support based on terms of an agreement are no longer to be accorded the presumptions in *Boden*. The holding in *Boden* that the terms of a separation agreement are binding like other contract clauses is still valid. The *Knights* holding must therefore be limited to instances of modification of prior orders only and not to situations involving agreements. This view is reenforced by the Court of Appeal's ruling in *Rubin*, which was based on a separation agreement, where the highest court vigorously endorsed the First Department's analysis of *Boden* and *Brescia*. *Knights* is therefore not to be deemed a deviation from prior holdings relating to modifications of terms of support contained in separation agreements.

The Second Department and the Court of Appeals

The "hot bench" of the Second Department has been, and continues to be, in the forefront of legal interpretation, with many premier landmark precedents to its credit. Its deft adherence to the principles of jurisprudential analysis has demonstrated an extraordinary commitment to judicial excellence. At times, however, the overwhelming volume of appellate vigilance hampered by a paucity of settled doctrine will result in conflicting inconsistent decisions.

The inconsistencies may either be the product of a difficult area of law which has received little navigational guidance from the Court of Appeals or from other scholarly sources, or of the Second Department's desire to avoid practical injustice where the record reveals that strict legal adherence would result in a real life injustice. Such decisions are troublesome nonetheless and offer no predictable stability to the legal community. A review of some of the decisions is instructive.

Rough v. Kandell

Rough v. Kandell[21] represents a particularly disturbing analytic pattern. In a case where the mother sought an upward modification of child support provisions contained in a separation agreement, the Second Department, in reliance on *Brescia*, reminded us that although parties to an agreement are bound by its child support provisions, a modification may be had when it is determined that the agreement was either not fair and equitable when entered into, or that unanticipated and unreasonable circumstances has occured, resulting in a concomitant need.

Rough's facts relate that "the plaintiff demonstrated a sharp increase in the needs of each child from 1977 to 1984, as well as the defendant's increased ability to meet the burden of support." Noting that the plaintiff's income had more than quadrupled to over $40,000.00 and that her assets had increased to $89,000.00, the Appellate Division reduced Special Term's upward modification from $150.00 a week per child to $75.00 a week per child.

The surprise arises from the allowance of *any* increase in view of the affirmance of the denial of counsel fees based on the fact that "both parties are similarly situated financially." *Rough* bears a striking identity to *Boden*, where the parties were on economic parity and which led the *Brescia* court to conclude that a petitioner in a *Boden*-like case is merely asserting her/his own interests, rather than those of the child, and is really seeking to reallocate the financial burdens. Accordingly, Mrs. Rough's application should have been denied since she was asserting her interests and not those of her children. This opinion inescapably flies in the face of *Boden-Brescia-Rubin*. It is this writer's opinion that were this case presented before the Court of Appeals it would suffer a reversal.

McNeela v. McNeela

In *McNeela v. McNeela*,[22] the Second Department affirmed the Supreme Court's modification of child support "on the ground of inadequacy."

> The Supreme Court, Kings County, properly granted the plaintiff's application for a modification of the child support provisions of a stipulation. In view of the substantial increase in both the income of the defendant and the needs of the children, including unforseen dental expenses for orthodonture, an upward modification of the child support award was warranted in order to insure adequate support (see, *Matter of Rubinstein v. Bates*, 128 A.D.2d 536). In considering the responsibility for child support, the court considered the relative earnings of the parties. Here the defendant had risen from a Lieutenant to a Captain in the Police Department, with a significant salary increase. The responsibility for the children was left to the plaintiff. She also main-

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tains the jointly-owned house wherein she and the children reside.

There is nothing in the opinion that reveals that the mother was unable to meet the various expenses attributable to the children. We are told that she is the custodial parent who has exclusive occupancy of the marital residence. It is also disclosed that the mother has income and that the father's income has risen significantly as a result of his promotion from Lieutenant to Captain in the Police Department.

It appears that the Appellate Court applies the term "adequate" in the generic sense of general parlance rather than as a legal term of art as developed within the context of the Court of Appeals' decisions. Evidence of the court's misunderstanding of "adequate" is amply demonstrated by its reliance on *Rubinstein v. Bates*,[23] another Second Department decision relied upon by the Appellate Court to support its decision in *McNeela*.

Rubinstein clearly evinces yet another example of the Second Department's (mis)conception of the Court of Appeals' rulings on the subject. Erroneously citing *Michaels* and *Brescia* in support of its conclusion it held:

> "...that in view of the substantial increase in both the income of the father and the needs and activities of the child, an upward modification of the child support award was warranted in order to insure adequate support for the child."

Again, there is no discussion of the mother's income and/or assets, which the Court of Appeals held, in *Boden*, were proper factors for consideration in entertaining modification applications. All the Appellate Court seemed to do was to consider some of the enumerated factors (at the conclusion of *Brescia*), in a vacuum, as the sole predicate for the modification.

In a December, 1986 decision, *Katz v. Katz*,[24] the Second Department reached the correct conclusion via the wrong method. What it did was to make a "legal stew" by throwing a little bit of everything into the pot.

The reasoning in that opinion bounces all over the place starting from the best interests of the child (now, who can ever dispute that as a general concept?) to the substantial improvement of the father's financial circumstances test, to the adequacy test (however the Second Department may apply it), to the "was the agreement fair and equitable when entered into" test, still without having exhausted all of its thoughts on the matter.

Incidentally, *Katz* affirmed the lower court's denial of an upward modification of child support.

Specificity of Allegations in Moving Papers

Finally, it is now clear that moving papers in support of an upward modification of child support must evidence a showing of "inadequacy" by submitted evidence. Vague conclusory language unsupported by little more than the assertion that there are triable issues of fact will no longer withstand a motion to dismiss, thereby obviating the necessity of a hearing. *Senzer v. Senzer*[25]

> "The gravamen of the plaintiff's claim is that the child support which she receives is inadequate to meet her children's needs.
> Therefore, the standard enunciated in *Matter of Brescia*, the plaintiff must show that a change in circumstances has occurred. The plaintiff contends that there exist issues of fact regarding an increase in the defendant husband's income and additional expenses for her children which require a hearing to determine whether an upward modification is necessary.
> We conclude, however, upon a review of the papers and documents annexed, that the plaintiff failed to raise any triable issues of fact with regard to her burden to establish a change in circumstances (*Matter of Brescia v. Fitts, supra*). Her allegations as to such a change in circumstances are conclusory and unsubstantiated by the submitted evidence."

(Also, the Court found that the relief sought by Mrs. Senzer had in fact been contemplated and addressed in the separation agreement.)

In a very recent decision, *Barravecchio v. Barravecchio*,[26] the Appellate Division, Second Department, reversed an order which granted the wife an upward modification of the child support provision of the parties' separation agreement, *pendente lite*. The record revealed that the wife had "failed to demonstrate the requisite change of circumstances" to warrant the desired modification. The court highlighted the deficiency as follows:

> "In the course of a four page affidavit, the wife merely recounted, in one brief paragraph, that it should be "obvious" to the court that the child support provisions of the separation agreement were inadequate. The wife, however, made no attempt to apprise the court of the specific "changed circumstances" on which her contentions of inadequacy were premised. Accordingly, ...there are absent the requisite allegations of new or changed circumstances which must accompany a request for an upward modification of support in this case."

The opinion's lack of detail, nevertheless, leaves sufficient room for speculation as to the wife's tactical error in preparing her motion. It would appear that the wife had been aware of the Court of Appeals' and other decisions' use of the term "adequacy" and attempted to use it as a talisman to get her to the hearing stage. The appellate court disapproved, holding that there was no formulaic power inherent in that term and that a petitioner in quest of an upward modification must make sufficient allega-

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tions that are not simply conclusory before a hearing may be proper.

Nordhauser v. Nordhauser[27] best captures the essence of the general rule to be followed by petitioners:

> "It is settled that in order to obtain a reduction of support or other financial provisions of a judgment of divorce, the party seeking the reduction bears the burden of establishing a substantial change of circumstances. (cites omitted)
> Such a showing, however, must be made initially by affidavit before the hearing processes of the court can be invoked (see, *Hickland v. Hickland, supra; cf. Howard v. Howard*, 120 A.D.2d 567, 568, 501 N.Y.S.2d 903). At bar, the plaintiff's conclusory allegations fall far short of creating issues of material fact necessitating a hearing with respect to the contentions of changed circumstances."[28]

An alternate interpretation of the aggressive posture in *Barravecchio, Senzer and Nordhauser* is that every motion for an upward modification of child support becomes susceptible to a *sua sponte* determination of summary judgment when a court, upon initial review, finds insufficient factual allegations.

Footnotes

1. 42 N.Y.2d 210, 366 N.E.2d 791 (1977), 397 N.Y.S.2d 701.
2. 21 A.D.2d 858, 251 N.Y.S.2d 170 (1964).
3. 5 A.D.2d 674, 168 N.Y.S.2d 473, *motion for reargument denied*, 5 A.D.2d 777, 169 N.Y.S.2d 1014, *appeal dismissed*, 4 N.Y.2d 872, 150 N.E.2d 710, 174 N.Y.S.2d 241 (1958).
4. 277 A.D. 1123, 100 N.Y.S.2d 981, *mot. for rearg. and mot. for lv. to app. den.*, 278 A.D. 571, 102 N.Y.S.2d 454, *app. dsmd.*, 302 N.Y. 767, 98 N.E.2d 888 (1951).
5. 42 N.Y.2d 210, 213, 397 N.Y.S.2d 701, 703 (1977).
6. 53 A.D.2d 596-597, 384 N.Y.S.2d 1007 (1976).
7. 52 A.D.2d 557, 382 N.Y.S.2d 318 (1976).
8. 52 A.D.2d 532, 381 N.Y.S.2d 885 (1976).
9. 42 N.Y.2d 210, 212 397 N.Y.S.2d 701, 703 (1977).
10. 56 N.Y.2d 132, 436 N.E.2d 518, 451 N.Y.S.2d 68 (1982).
11. *Ibid.* 138 451 N.Y.S.2d 68, 70.
12. *Ibid.* 139 451 N.Y.S.2d 68, 71.
13. 451 N.Y.S.2d 68, 72.
14. 56 N.Y.2d 924.
15. 83 A.D.2d 841, 441 N.Y.S.2d 1006 (1981).
16. 453 N.Y.S.2d 605.
17. 19 A.D.2d 152, 506 N.Y.S.2d 44, *aff'd*, 69 N.Y.2d 702, 512 A.D.2d 364 (1986).
18. 506 N.Y.S.2d 44, 46.
19. *Ibid.*
20. N.Y.L.J. April 1, 1988, p. 19, col. 5.
21. ___ A.D.2d ___, 522 N.Y.S.2d 599.
22. ___ A.D.2d ___, 522 N.Y.S.2d 161.
23. 128 A.D.2d 536, 512 N.Y.S.2d 467 (1987).
24. 125 A.D.2d 549, 509 N.Y.S.2d 625 (1986).
25. 132 A.D.2d 694, 518 N.Y.S.2d 173 (1987).
26. N.Y.L.J. April 1, 1988, p. 15, col. 1.
27. 130 A.D.2d 561, 515 N.Y.S.2d 501 (1987).
28. Cf: *Wirth v. Wirth*, 126 A.D.2d 636, 511 N.Y.S.2d 73 (1987).

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