NYSBA SUMMER 2008 | VOL. 40 | NO. 2

Family Law Review

A publication of the Family Law Section of the New York State Bar Association

Notes and Comments

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When and Under What Circumstances Should Non-Durational Maintenance Be Awarded

Since the passage of the equitable distribution law on July 19, 1980, which set forth new standards for the award of maintenance, the courts have grappled with the issue of whether to award fixed or lifetime maintenance to a needy spouse. More apt would be the phrase "non-durational maintenance."

No matter what term is used by the court to discuss such award and despite the statute, it is clear that many jurists are having difficulties with articulating the proper basis for deciding whether to fix maintenance for a specified term of years or to award such maintenance until the death or remarriage of a spouse. Whether one method is fairer than the other remains for you to decide.

Two recent cases, one a lower court case in Nassau County, *J.S. v. J.S.* (N.Y.L.J. April 4, 2008 at 29, col. 3), decided by Justice Anthony J. Falanga, and an Appellate Division, Second Department case, *DiBlasi v. DiBlasi*, ___ A.D.3d ___ (2d Dep't 2008), expressed similar, but not identical, views in awarding maintenance for a fixed term. Both decisions were reached after considering varying facts and circumstances of the parties. *DiBlasi* awarded a 43-year-old wife with 5 children and no recent work experience maintenance for 5 years, while in *J.S.*, a 59-year-old wife without minor children and with no recent work experience received maintenance for 11 years. In reading these cases, I recalled once again the classic line in George Orwell's *Animal Farm* that all animals are equal, but some animals are more equal than others.

Accordingly, it will prove fruitful to examine in detail both decisions to determine the impact the award will have, not only to the recipient spouse, but the paying spouse as well . . . and whether a non-durational award would have been a better option.

Both husbands worked in auto dealerships; Mr. DiBlasi was an owner and Mr. J.S., an employee. In *J.S. v. J.S.*, at the time the action for divorce was commenced, the parties had been married for almost 38 years. Both were 59 years old. They had three emancipated children who were all presently self-supporting. The wife argued that she should be awarded non-durational maintenance because she was totally disabled and could not engage in gainful employment because of a deteriorating health condition which included allegations that she was a cancer survivor, was beset with periods of clinical depression, chronic fatigue syndrome, shingles, sciatica, irritable bowel syndrome, colitis, gastroesophageal reflux disease as well as a spinal disc herniation. Unfortunately, the wife offered no medical testimony to substantiate these alleged medical conditions. At the time of trial, she

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was unemployed for the past four years and received Social Security disability benefits of about $700 a month as well as Medicare coverage. By contrast, the husband was a salesman of Jaguar automobiles and in the past had earned income between approximately $280,000 in 2000 to about $100,000 in 2006, having changed jobs on several occasions during the past three years because his prior employer, a Jaguar dealership in Brooklyn, went out of business.

Apart from the marital residence, the other marital assets were already virtually exhausted. The marital residence was worth approximately $800,000. Based on these factual predicates, Justice Falanga, remarking that as a matter of first impression "a court must consider . . . the prospective financial circumstances and work life expectancy of the payor spouse," proceeded to fashion an award he felt to be fair to both litigants. Whether his pronouncement that such issue was one of first impression was accurate appears to be problematic. He went on to reflect that an award of non-durational maintenance may require a paying spouse in his or her nineties and older to continue to support a dependent spouse in his or her nineties and older.

In holding that it would be unfair to the paying spouse to have maintenance fixed without duration, the court may have inadvertently created a burden to the elderly paying spouse, by directing that the 59-year-old husband pay maintenance until his 70th birthday, or 11 years following the date of the divorce judgment. This observation is made because it is felt that when the husband ceases work at a normal retirement age of 65, his application for a modification would be more favorably received than if he makes such application at age 70, where the court already decided that he should work until such age. To be successful on a modification application, new facts must be raised. A court hearing the application might rightfully conclude the issue was already heard and decided in the original divorce action.

In making such an award, Judge Falanga also noted that the receiving spouse, the wife, will have to engage in at least part-time employment through her 70th birthday in order to sustain herself, despite her alleged maladies, the judge finding that she was incapable of being self-supporting and was receiving disability payments. It is reasonable to assume that the marital residence would be shortly sold for perhaps a minimum of $750,000 with each party to obtain $375,000. At 5% interest, that would return approximately $19,000 per year to each spouse.

Under all of these circumstances, we question the court's decision to impute income to the wife of $20,800 a year, especially since she testified and the court found she was a high school graduate with no business skills, her historic earnings were modest, she could not return to work and had no employment income for the past four years. In awarding maintenance of $3,000 a month to the wife for 11 years, she may receive more income than her husband if she returns to work or if the husband's income dramatically drops during the next 10 years. There was no further explanation of how the court imputed these monies to the wife. Imputation of $110,000 a year of income to the husband was at least based upon his past historic employment in the sale of Jaguar automobiles, but did not reflect the trend of his reduced earnings in the most recent years.

The court went on to note that there was a plethora of cases awarding non-durational maintenance but pointed out that these decisions focused on the inability of the dependent spouse to become self-supporting. However, he added, such results did not specifically consider the future financial circumstances and work-life expectancy of the payor spouse. The court held that although the wife was not capable of becoming self-supporting, the husband lacked the ability to pay non-durational maintenance, and instead fixed the period. In his analysis, the court remarked that a non-durational award in the case would be devoid of any consideration of relevant statistics or of a realistic analysis of the payor's future ability to undertake an open-ended obligation. He then concluded, "rather, such award would be the product of flawed speculations and assumptions placing the emphasis on the circumstances and needs of the recipient spouse while ignoring the enumerated factors of DRL § 236(B)(6)(a) as they apply to the payor spouse." It would seem that fixing the payment of maintenance by a 59-year-old man for 11 years would make it far more difficult for him to apply for a modification of such award where the term was not fixed and was simply conditioned upon death or remarriage.

In *DiBlasi*, the parties were married for 19 years. The wife was 43 and the husband 51; the parties had 5 children. A forensic evaluation determined the husband's gross income from all sources to be $320,000. The wife had not worked during the marriage, and last worked prior to marriage as a clerk earning $28,000. Based upon such facts, the Second Department determined that the purpose of maintenance was to enable a spouse not only to become self-supporting, but also to obtain economic independence. The court noted that each trial court has the discretion to make an award for maintenance in both amount and duration, based upon the peculiar and unique circumstance of each family. The court went on to reflect that the factors that must be considered pursuant to DRL § 236(B) form the basis for the award but that great weight must be given to the parties' pre-separation standard of living and each litigant's present earning capacity as well as his or her future prospects to become self-supporting. The husband was a principal in an auto dealership. The parties maintained an upper-middle-class lifestyle. In applying such parameters to the DiBlasis, the court determined that the award of the trial court of maintenance for a two-year period was grossly insuf-

ficient and increased maintenance for an additional five years. Its expressed reason was that at the latter date, with their youngest child off to college, there no longer would be any reason for the wife to remain at home, and this additional period of maintenance would enable the wife ultimately to become self-supporting. These facts were not reported in the decision, but were obtained from the record on appeal, and can be easily retrieved from any Supreme Court library.

DRL § 236(B) requires that the court consider each of the ten enumerated factors and any other factor that is found to be just and proper arriving at an equitable result, while at the same time balancing the needs of both parties. There is a paucity of published decisions that detail the weight to be given to each enumerated factor, so Justice Falanga's decision was a welcome change.

Although the statute does not have a specific direction that non-durational maintenance should be awarded in a marriage of long duration populated with several children, the tendency of the courts to do so seemed to be more prevalent in the earlier decisions following the enactment of the statute. In marriages of shorter duration or childless marriages, there was a great reluctance on the part of judges to award non-durational maintenance. Rather in those instances, specific fixed periods were fashioned. Today, there seems to be a trend away from non-durational support, which, it is felt, is an unwise choice.

Those who argue for a continuation of non-durational support argue that DRL § 236(B) gives to the court greater flexibility and sufficient discretion to make a case-to-case determination rather than to direct fixed periods for such payments. In fact, *DiBlasi* made such a pronunciation, but wrongfully concluded that a fixed, rather than an indefinite, period, was the better result. Those who argue that non-durational maintenance should never be employed proffer that the length of time necessary for a person to become self-supporting can vary vastly, and it is far more equitable to a paying spouse to know the fixed period of time that he or she might be responsible for maintenance payments.

It seems the better view to adopt would be that non-durational maintenance would be the fairest to both parties in all matters since DRL § 239 permits modification based upon a change of circumstances or where financial hardship is incurred. When maintenance is fixed for a specified period of time, the chances of the court modifying the award seem more unlikely than when non-durational payments are directed.

It is hard to believe that twenty-eight years have passed since the statute was enacted, and the courts still seem divided whether to grant non-durational maintenance. Only time will tell what course will be followed during the foreseeable future.

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The Chief Judge Clarifies the Role of Attorneys for Children

By Elliot Wiener

The amendment of the Rules of the Chief Judge, effective October 17, 2007, added Rule 7.2, which describes the role of the "attorney for the child." These rules are intended to clarify the ambiguous office of the "law guardian" under New York law.

To appreciate this new rule, it is worthwhile to compare it with prior descriptions of the role of the law guardian that have been promulgated over the years by various officials and bar groups: "Law Guardian Definition and Standards" promulgated by Justice Jacqueline Silbermann, the Deputy Chief Administrative Judge for Matrimonial Matters and the Administrative Judge of the Supreme Court Civil Branch, New York County;[1] the working definition of "law guardians" adopted by the Statewide Law Guardian Advisory Committee as cited by the Miller Commission;[2] and five versions of "Law Guardian Representation Standards" adopted by the New York State Bar Association between 1992 and 2007.[3]

Nomenclature

Rule 7.2 defines the role of the "attorney for the child," which, it says, "means law guardians." The Rule thus invents a new office that substitutes for and which is the equivalent of, but is not identical with, the statutory role of "law guardian," although, given the existing statutes,[4] the phrase cannot be entirely avoided. This change echoes the language of the working definition of the role of the law guardian that the Statewide Law Guardian Advisory Committee has adopted. Both the Miller Commission and the Administrative Board have recommended the amendment of the statutes "to replace the term 'law guardian' with 'attorney for the child.'"[5] The Rule also reflects the general conclusion that the ambiguous, if not inherently self-contradictory, obligation to act simultaneously as a child's lawyer and guardian no longer meets the still-evolving job description of an attorney representing a child in family law litigation. "Guardians" protect the child's best interests. Lawyers advocate for goals defined by clients. Too often these roles are incompatible. Rule 7.2 implicitly suggests that clarifying the job title will help to clarify the duties of these attorneys.

Ethics

The Rule's discussion of ethics does double duty both by making a substantive point that attorneys for children have legally based ethical obligations to their clients and by emphasizing that they function in the role of attorneys, not guardians.

Underscoring the tip in the balance toward the attorney role, the Rule expressly says that attorneys for children are subject to all the same ethical rules that apply to other lawyers, drawing particular attention to the ethical obligation of the attorney for the child with respect to *ex parte* communications, confidential client communications, attorney work product, and becoming a witness in the litigation.[6]

Beyond this, the Chief Judge's Rule emphasizes the lawyer's role through the explicit requirement that attorneys for children "zealously advocate" the child's position. The Statewide Law Guardian Advisory Committee sets the standard of advocacy at "diligently advocate,"[7] while Justice Silbermann's Rules require the law guardian to "advocate" for the child's position. The 2005 NYSBA Standards require the law guardian to "advocate a position on behalf of the child." This, the Standards say, imposes on the Law Guardian the same duty to advocate as is required of "other attorneys in the case."[8] It is likely that in practice these are differences in semantics rather than substance. All of these expressions share the common requirement that the attorney advocate a position, although they vary in the level of intensity that the advocacy must take. There is an alternative conception of the role of the child's attorney, which has roots in the 2005 NYSBA Standards and in Justice Silbermann's Standards, that does not require the child's attorney to advocate a "position" on behalf of a client in all cases. I will discuss this model further below.

Setting Goals of the Litigation

The Chief Judge's Rules recognize the special problem inherent in representing children and account for this problem by creating two separate rules for setting the litigation goals: (1) following the child's wishes or (2) advocating a position selected by the attorney "that is contrary to the child's wishes." The Rule establishes a two-step test for deciding which method to employ. At both steps, the obligation falls on the attorney to make a substantive judgment. First, the attorney must assess whether the child is "capable of knowing, voluntary and considered judgment." If the answer is yes, the attorney must make the second assessment, whether following the child's wishes is likely to result in a "substantial risk of imminent, serious harm to the child."[9]

If the child "passes" both tests, the attorney must "be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in

the child's best interests." If the child "fails" either test, the attorney "would be justified in advocating a position that is contrary to the child's wishes." The only restriction on this license is the duty of the attorney to "inform the court of the child's articulated wishes if the child wants the attorney to do so." This obligation implicitly obliges the attorney to explain to the child the attorney's assessment of the child's expressed wishes and, presumably, the reason the attorney has decided to go a different route. The Chief Judge's Rules dispense with the formal requirement under Justice Silbermann's Standards that the attorney report to the court his or her conclusion the child is impaired.

There is significant overlap between the Chief Judge's Rules and Justice Silbermann's Standards. Under the latter, whether the attorney was required to advocate "the child's stated position" depended upon whether the attorney concluded that the child was "impaired." However, under Justice Silbermann's Standards, the first portion of the definition of "impairment" focuses on "a child's inability to make knowledgeable, voluntary and considered judgment. . . ." So far, the categories in the Chief Judge's Rules and in Justice Silbermann's Standards are identical. But they do differ. Justice Silbermann's Standards include in the definition of "impairment" a child's inability "to work effectively with his/her attorney." This functional assessment is missing from the the Chief Judge's Rules. On the other hand, the Chief Judge's Rules allow the attorney to substitute his or her judgment for the client's if the attorney believes that following the child's wishes is likely to result in a "substantial risk of imminent, serious harm to the child." Risk assessment is not explicitly part of the attorney's job under Justice Silbermann's Standards, although it surely could inform an assessment of the child's "considered judgment."

The 2005 NYSBA Law Guardian Representation Standards[10] say that the attorney "should develop a position . . . in conjunction with the child. . . ." The standards employ a two-step test. First, the attorney must assess whether the child is "too young." If so, the attorney "must . . . determine the child's interests independently," which presumably means the attorney is free to formulate his or her own position on behalf of the child. The standards do not tell us what "too young" means. Second, if the child is not "too young . . . to articulate his or her desires and to assist counsel, the plan should be developed with the child's cooperation and agreement." These standards leave no room for qualitative assessments of the type contemplated in either the Chief Judge's Rules or in Justice Silbermann's Standards. If the child is not "too young" to articulate his or her desires, the attorney must employ a plan with which the child agrees, even if the articulation of the desires suggests that the child is not making a knowing, voluntary, and considered judgment and even if the articulated desire would put the child at "substantial risk of imminent, serious harm."

The New York State Bar Association's Standards for Attorneys Representing Children in child welfare cases of June 2007[11] include a provision that would improve Rule 7.2. Those standards require the attorney to "be prepared to introduce evidence to support the attorney's position."[12] The Commentary to the standard says that the attorney should substitute his or her judgment "only . . . if the attorney has objective factual evidence to support" his or her conclusion regarding the child's judgment. It is not unheard of for parents to criticize attorneys for children for failing to advocate for a child's stated wishes.[13] Thus, even if this is not required by rule, the attorney for the child would be well served if he or she could point to objective facts to support his or her position.

Options Available to the Attorney

The Chief Judge's Rules give the attorney two options. If the child "passes" the tests, the attorney "should be directed by the wishes of the child."[14] If the child "fails" the tests, the attorney "would be justified in advocating a position that is contrary to the child's wishes." Either way, however, the attorney must "advocate the child's position." The Miller Commission also concluded that the child's attorney "is expected . . . to take a position in the litigation . . . and to use every appropriate means to advance that position."[15] Similarly, the 2005 NYSBA Custody Standards also require the attorney to "advocate a position on behalf of the client."[16] As an alternative to this "advocacy" model, Justice Silbermann's Standards articulate an "informational" model for the attorney to follow. Under those standards, if the child is "impaired," the attorney must "assist the Court in making an informed decision in the best interests of the child by ensuring that relevant evidence is obtained and presented to the Court, including evidence that otherwise might not be presented to the Court. . . ." This model relieves the attorney of the obligation to determine what he or she thinks is in the child's best interests, thereby insuring that that responsibility remains with the court. By allowing the attorney to take whatever position he or she wishes once the child has failed the Rule 7.2 tests, the Rule makes the selection of the law guardian critical to the outcome of the litigation, since his or her position often carries extra weight in custody litigation.[17] This problem is compounded by the failure of the rules to require the law guardian to have objective factual evidence to support the attorney's conclusion that the child has failed the Rules' tests. It should be a goal of these rules to reduce, if not eliminate, the significance of the idiosyncratic opinions of attorneys for children. By excluding the "informational" model that Justice Silbermann's Standards include, the Chief Judge's rules increase the risk that the outcomes in custody cases will be unduly influenced by the particular views of the attorney for the children. This is an unfortunate result that is avoidable by a simple amendment to Rule 7.2 that incorporates the "informational" model.

Conclusion

Rule 7.2 improves the rules governing lawyers for children in family law cases by dispensing with the inherently ambiguous "law guardian" label and by providing clear rules governing when an attorney must advocate a child client's stated position. The Rule could be improved by authorizing these attorneys to take on an informational role when the attorney believes the child is unable to make knowledgeable, voluntary, and considered judgments rather than requiring the attorney to advocate for his or her own subjective view of the child's best interests. The Chief Judge's Rules could also be improved by requiring the attorney for the child to be prepared to introduce objective factual evidence to support the attorney's conclusion that the child's lack of judgment warrants ignoring his or her stated wishes.

Endnotes

1. "Law Guardian Definition and Standards" promulgated by Justice Jacqueline Silbermann, Statewide Administrative Judge for Matrimonial Matters.
2. *Matrimonial Commission Report* at pp. 43-44.
3. See "Law Guardian Representation Standards Volume II: Custody Cases," which was published by the New York State Bar Association in September 1992; January 1994; November 1999; and June 7, 2005, and "Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings," published by the New York State Bar Association in June 2007.
4. FCA § 249, entitled "Appointment of Law Guardian," requires or permits the appointment of a "law guardian" in specified Family Court proceedings.
5. See the Miller Commission Report at p. 44. The Administrative Board of the Judicial Conference approved the recommendation on October 4, 2007.
6. Rule 7.2(b). See *Naomi C. v. Russell A.*, 48 A.D.3d 203 (A.D.1 2008), which cites this provision and criticizes the trial court for making the law guardian, as an unsworn witness, disclose client confidences.
7. See *Law Guardian Program Administrative Handbook* published by the Second Department at p. 2, "Policy Considerations" (June 2007).
8. NYSBA 2005 Standard B-2, Commentary.
9. Rule 7.2 is almost identical to the working definition of the role of the law guardian adopted by the Statewide Law Guardian Advisory Committee, except that the latter refers to a "risk of physical or emotional harm," whereas Rule 7.2 refers to "harm." It is unlikely that the greater economy of expression of Rule 7.2 was intended to restrict the meaning of "harm." The Chief Judge's Rules use the word "serious," suggesting that a child's wishes may not be lightly ignored.
10. Hereinafter "NYSBA June 2005 Custody Standards."
11. Hereinafter "NYSBA June 2007 Child Welfare Standards."
12. "Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings," published by the New York State Bar Association in June 2007, § A-4.
13. *See, e.g.*, *Mars v. Mars*, 19 A.D.3d 195, 797 N.Y.S.2d 49 (A.D.1 2005) (parent was ordered to pay the law guardian's fees; the children were old enough to articulate their wishes, therefore the parent has standing to raise malpractice as an affirmative defense to the law guardian's fee application regarding his advocacy as opposed to guardianship). *But see Bluntt v. O'Connor*, 291 A.D.2d 106, 737 N.Y.S.2d 471 (A.D.4 2002); *Bradt v. White*, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (SC, Greene Co. 2002); *Lewittes v. Lobis*, 2005 US App. Lexis 29232 (CA2 2005), all finding that the law guardian has quasi-judicial immunity against damages claims. For a case raising the issue without asserting a damages claim, see *Whitley v. Leonard*, 5 A.D.3d 825, 772 N.Y.S.2d 620 (A.D.3 2004) (on appeal from custody order, mother contends that law guardian breached obligation by failing to advocate child's stated wishes).
14. The use of the word "should" is curious. It is common to the point of being almost universal to express a mandatory obligation by using the word "shall." Justice Silbermann Standards employ the word "shall" in describing the attorney's duty in the same situation. The word "should" may suggest a lingering ambivalence on the part of the authors of these rules.
15. *Matrimonial Commission Report* at p. 43-44.
16. The prior NYSBA Custody Standards did not include this requirement.
17. *See, e.g*, *Young v. Young*, 212 A.D.2d 114, 628 N.Y.S.2d 957 (A.D.2 1995) (law guardian's "recommendations and findings" are entitled to "some weight"); *Rosenberg v. Rosenberg*, 44 A.D.3d 1022, 845 N.Y.S.2d 371 (A.D.2 2007) ("Recommendations of court-appointed evaluators and the position of the Law Guardian are factors to be considered and are entitled to some weight"). The cases do not similarly elevate the "position" or "findings and recommendations" of other attorneys.

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The Case for Parental Access Guidelines in New York

By Michael P. Friedman

When you talk to matrimonial lawyers in other states, they marvel at our peculiar practices. Fault divorces, let alone jury trials for fault divorces, always raise an eyebrow or two. Then you explain about enhanced earnings,[1] child support to age 21 including college contributions,[2] no recoupment of child support overpayments,[3] double dipping of child support and enhanced earnings[4] and guideline recalculations every two years in spite of agreements to the contrary.[5] No one believes you. So, I was not surprised to learn that other states have more progressive rules about custodial access, known as visitation in the Domestic Relations Law.[6] After all, if there are Child Support Guidelines, why not Parental Access Guidelines?

Our child support guidelines are the product of national child support enforcement regulations, essentially mandating that state legislatures have some standards for the determination of support.[7] There is no such impetus from Congress or the New York Legislature for parental access guidelines. The Melonas Commission and the 2006 Matrimonial Commission[8] did not address this issue among the myriad suggested reforms. However, other states and municipalities have addressed these issues in an effort to set minimum standards of access and to avoid protracted litigation over such trivial issues as times for pickup and drop-off, and standards for telephone access and clothing exchanges. The Third Department determined custodial schedules a few years ago in overruling minimal alternating weekend access in favor of more expanded midweek and full weekend access.[9] However, such cases are few and far between and are often the product of specific circumstances.[10] There are no generally recognized standards for parental access in New York, leaving it to judges to fashion schedules based on their own proclivities, experiences and prejudices. Appellate courts are loath to overturn a parental schedule, leaving such awards to the "sound discretion of the trial judges."[11] At best, visitation schedules are remanded to the trial court to fashion an appropriate schedule.[12] Experts can provide no help as there is little scientific evidence to suggest that trained professionals have the expertise or training to establish parenting schedules.[13]

For the most part, the custodial guidelines of other states grant minimal access to noncustodial parents. In excruciating detail they deal with access for very young children, holidays, telephone calls and clothing exchanges. The Arizona Model Parenting Guidelines[14] break it down into three- to four-year intervals of a child's life, and all require that the parents live within 150 to 200 miles for significant access. However, most guidelines have an alternating weekend schedule from Friday evening to Sunday evening and a midweek dinner visit. Indiana,[15] Arizona, Oklahoma,[16] Utah,[17] South Dakota,[18] Delaware,[19] and some courts in Mississippi,[20] Ohio,[21] and Florida[22] follow such rules. We have come a long way since the Draconian conclusions of *Beyond the Best Interests of the Child*,[23] where Goldstein, Freud and Solnit recommended the identification of the psychological parent and the essential disappearance of the other parent. However, in a country of two-working-parent households, custodial schedules do not mirror the shared parental responsibilities when parents separate. "Traditional" families of working spouse/homemaker spouse are no longer the norm in America. In 1940, 60% of American families had this traditional structure,[24] but the Bureau of Labor Statistics reported that 62% of families with children now have two working parents.[25]

Much judicial energy is spent on litigating access schedules that often have little to do with a child's best interests. Are there any statistics that show a child does significantly better if the drop off time is 6:00 p.m. Sunday versus Monday morning or if a child spends midweek overnight with the nonprimary parent? Of course not. Yet these issues are litigated with a vengeance as parents fight for every minute of parenting time in an effort to obtain favorable child support considerations[26] or just to deny access to the offending spouse. Is it not more sensible to have parenting guidelines that try to mirror the child's contacts with both parents in the intact household, if for no other reason than to limit the needless litigation of these issues that are so important for parents and so insignificant for many children? I am guessing a semester or two of college education expenses are often spent to determine whether there should be a phone call every day at 7:00 p.m. or whether a parent should return a child at 10:00 a.m. or noon on Christmas Day. Any law guardian with more than two weeks' experience will tell you that the child's best interests are served by a settlement of custodial schedules as opposed to a particular date or time for pickup and drop-off. I am therefore proposing the following guidelines in the hopes that someday, some way, children of separating parents can be spared the needless stress associated with parental access litigation. Maybe then we can start eliminating the useless trials over sole versus joint custody, but I leave that for another day.

I realize that these can be only guidelines, and the actual schedule may have to be altered based on working schedules, out-of-town parents or if the children are very young. However, I believe this or some semblance thereof should be the "default" schedule for most families in the throes of custodial litigation. This should be the "presumptive" schedule and a parent who wishes to deviate should have to show good cause in the best interests of the child.

Proposed New York Parental Access Guidelines

1. **WEEKENDS:** Each parent shall have access on alternate weekends from Friday after school or at

3:00 p.m. if there is no school until Monday morning when the child shall be brought to school or to the mother/father at 9:00 a.m. if there is no school. If Monday is a school holiday, then access shall end Tuesday morning when the child shall be brought to school or to the mother/father at 9:00 a.m. if there is no school. Monday school holidays have precedence over the weekday schedule.

2. **WEEKDAY:** If both parents worked full-time prior to separation, the mother/father shall have access from Monday at 9:00 a.m. until Wednesday morning when the child shall be brought to school or to the father/mother 9:00 a.m. if there is no school. Then the father/mother shall have access from Wednesday at 9:00 a.m. until Friday morning when the child shall be brought to school or to the father/mother at 3:00 p.m. if there is no school. If one parent worked part-time or not at all prior to separation, then the full-time working parent shall have access every Wednesday after school or 3:00 p.m. if there is no school until Thursday morning when the child shall be brought to school or 9:00 a.m. if there is no school.

3. **HOLIDAYS:** Holidays shall take precedence over Weekend and Weekday access. The father shall have the holidays in Column 1 in odd-numbered years and the holidays in Column 2 in the even-numbered years. The mother shall have the children on the holidays in Column 1 in the even-numbered years and the holidays in Column 2 in odd-numbered years:

Column 1	**Column 2**
Fourth of July	Thanksgiving
Spring Break	Winter Break
Halloween	Christmas Eve
Christmas Day	

The Fourth of July shall be from 9:00 a.m. on July 4 to 9:00 a.m. on July 5. Halloween shall be October 31 after school or noon if there is no school until November 1 to school or 9:00 a.m. if there is no school. Thanksgiving shall be from the Wednesday after school or noon if there is no school until the Friday after Thanksgiving at 9:00 a.m. Christmas Eve shall be from noon on December 24 until noon on December 25. Christmas Day shall be from noon on December 25 until noon on December 26. Spring and Winter break shall commence when the child ends school immediately prior to the break until the child enters school following the break.

4. **MOTHER'S/FATHER'S DAY:** On Mother's Day and Father's Day, the children shall be with the appropriate parent from 9 a.m. until 6 p.m. This shall take precedence over weekend access.

5. **SUMMER VACATION:** Each parent shall have two weeks of summer access to be communicated to the other parent in writing on or before April 1 of each year. However, summer vacation shall not abut the regular access. Therefore the child shall not have more than 14 days without seeing the other parent.

6. **TELEPHONE/MAIL:** Neither parent shall interfere with telephone or mail contact between the children and the other parent.

Endnotes

1. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).
2. Domestic Relations Law § 240(1-b)(b)(2).
3. *Annette M.R. v. John W.R.*, __ A.D.3d __, 845 N.Y.S.2d 616 (4th Dep't 2007).
4. *Holterman v. Holterman*, 3 N.Y.3d 1 (2004).
5. *Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin*, 99 N.Y.2d 328 (2003).
6. Domestic Relations Law § 240.
7. Collectively known as the Child Support Enforcement Amendments of 1984 (CSEA), Pub. L. 98-378, 98 Stat. 1305, amending 42 U.S.C. §§ 657-662.
8. The full report can be found at http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf.
9. *Somerville v. Somerville*, 307 A.D.2d 481 (3d Dep't 2003); *Valentine v. Valentine*, 3 A.D.3d 646 (3d Dep't 2003).
10. See the recent case of *Vincent v. Anna Tomaino*, 848 N.Y.S.2d 437 (3d Dep't 2007), where the Third Department overturned a schedule of no overnight visitation as inappropriate.
11. *Thompson v. Yu-Thompson*, 41 A.D.3d 487 (2d Dep't 2007).
12. *Hugh H. v. Fhara L.*, 44 A.D.3d 192 (1st Dep't 2007).
13. "Should the Mental Health Evaluator Decide Child Custody?", *Family Court Review*, May 2005; and "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance," *Family Court Review* of the Association of Family and Conciliation Courts by Professor Timothy Tippins and Jeffrey Wittmann, Ph.D.
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24. Economic Policy Foundation, "American Workplace: Labor Day 1997 Report," Bureau of Labor Statistics.
25. "Trends in Labor Force Participation of Married Mothers of Infants," the Bureau of Labor Statistics, February 2007.
26. *Somerville v. Somerville*, 5 A.D.3d 878 (3d Dep't 2004).

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Express Oral Agreements Between Cohabiting Partners

By Elliott Scheinberg

In *Morone v. Morone*,[1] the Court of Appeals acknowledged the changing social tide "where greatly increasing numbers of people were living together without solemnized ceremony and consequently without benefit of the rules of law that govern property and financial matters between married couples." In *Morone* the plaintiff sought recovery for labor across 23 years based on express and implied agreements.

Express oral agreements between cohabiting parties are anchored in principles of equity where equity will intervene to support such an agreement when a relationship of confidence has been established and subsequently abused by one of the contracting parties,[2] provided, however, that the agreement does not run afoul of certain proscriptions.

The notion of oral contracts achieved notoriety during the rage surrounding the celebrated Lee Marvin palimony case. New York courts have long enforced express agreements between unmarried persons living together, provided only that illicit sexual relations were not "part of the consideration of the contract."[3] The theory behind these cases was that "while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law."[4]

Morone v. Morone

The question in *Morone* was whether a contract as to earnings and assets may be implied in law from the relationship of an unmarried couple living together and whether an express contract of such a couple on those subjects is enforceable. The Court of Appeals declined to adopt the notion of "implied contract such as was recognized in *Marvin v. Marvin*,[5] because it found the idea to be conceptually so amorphous as practically to defy equitable enforcement, and inconsistent with the legislative policy enunciated in 1933 when common-law marriages were abolished in New York." However, the court turned to *In re Gorden*,[6] a decision from an earlier bench, where it found an express contract between such a couple enforceable.

In *Morone*, the plaintiff and the defendant lived together and held themselves out as husband and wife with two children. Plaintiff argued that since the inception of the relationship she performed domestic duties and business services at the request of the defendant with the expectation that she would receive full compensation for them, and that the defendant had always accepted her services knowing that she expected compensation for them. The plaintiff suggested that the defendant had recognized that their economic fortunes were united, which included the filing of joint tax returns "over the past several years." This argument, grounded in implied contract, failed.

The plaintiff's key successful allegation was that she and the defendant had entered into a partnership agreement by which they expressly orally agreed that she would furnish domestic services both at home and in his business and the defendant would have full charge of business transactions, "would support, maintain and provide for the plaintiff in accordance with his earning capacity and would take care of her and do right by her,"[7] and that the profits from the partnership were to be used for and applied to their equal benefit. She also alleged that she was not permitted to obtain employment or he would leave her, and that that for 23 years he collected large sums of money and dishonored the agreement, and, *inter alia*, refused her demands for an accounting. She demanded an accounting for moneys received by him during the partnership.

Special Term dismissed the complaint, concluding that no matter how liberally it was construed it sought recovery for "housewifely" duties within a marital-type arrangement for which no recovery could be had (akin to personal services, see below). The Appellate Division affirmed because the first cause of action did not assert an express agreement and the second cause of action, though asserting an express partnership agreement, was based upon the same arrangement which was alleged in the first cause of action and was therefore "contextually inadequate."

The Court of Appeals Reversed

The appeals court turned to *In re Gorden*, wherein an earlier bench held that property and financial rights between unmarried couples were available only under the principles of express contract even though the services rendered be limited to those generally characterized as "housewifely." Furthermore, *Gorden* noted that there was no statutory requirement that such a contract be in writing (*cf.* GOL [General Obligations Law] § 5-701(a)(1) and (3), the Statute of Frauds).

The Court of Appeals presented questions to be explored in cases involving express oral contracts:

- Is the length of time the relationship has continued a factor?
- Do the principles apply only to accumulated personal property or do they encompass earnings as well?
- If earnings are to be included, how are the services of the homemaker to be valued?
- Should services which are generally regarded as amenities of cohabitation be included?

- Is there unfairness in compensating an unmarried renderer of domestic services but failing to accord the same rights to the legally married homemaker? and
- Are the varying types of remedies allowed mutually exclusive or cumulative?

Theory of Implied Contract Is Not Valid

Morone rejected implied contracts between parties who are living together because of the associated impracticalities as well as for opportunities for emotion-driven afterthoughts and fraudulent testimony:

> The major difficulty with implying a contract from the rendition of services for one another by persons living together is that it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.[8] As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do. For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error. Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid.[9]
>
> The notion of an implied contract between an unmarried couple living together is, thus, contrary to both New York decisional law and the implication arising from our Legislature's abolition of common-law marriage. The same conclusion has been reached by a significant number of States other than our own which have refused to allow recovery in implied contract.

No agreement will be inferred based upon the rendition and acceptance of personal services.[10] Similarly, "the implied obligation to compensate arises from those things which, in normal society, we expect to pay for. An obligation to pay for friendship is not ordinarily to be implied—it is too crass. Friendship, like virtue, must be its own reward."[11]

No Interim Support for Nonmarried Parties

No *pendente lite* maintenance is available where the parties were not legally married.[12]

"I Will Always Take Care of You"

There are several scattered decisions involving promises of "perpetual care," all of which have failed. The words to "always take care of you," in form or in substance, are too vague to spell out a meaningful promise.[13]

In *Harrington v. Murray*[14] the plaintiff alleged that, following their divorce, the defendant orally agreed to take care of her for the rest of her life in the style to which she had become accustomed, in exchange for her promise to introduce and otherwise promote him socially in order to aid him in business and politics. The defendant also allegedly agreed to provide her with a home and half of the profits resulting from her efforts. The defendant gave plaintiff a life estate in a cottage in Georgia which she later resold to him. In both transactions the parties consulted independent counsel.

Approximately 13 years after their divorce the defendant also allowed the plaintiff to stay in his apartment for five months while she was awaiting surgery and during her recuperation. He asked her to leave after an incident with another houseguest. The plaintiff brought an action seeking, *inter alia*, a "dissolution and accounting of all partnership assets." The plaintiff was held to have failed to establish evidence of a "partnership" between the parties. Furthermore, the alleged agreement was unenforceable pursuant to GOL § 5-701(a)(1), the Statute of Frauds.[15]

> Plaintiff's argument that her partial performance (providing guidance to defendant's daughters, guiding defendant in cultural situations and charitable activities, introducing defendant in cultural circles, decorating defendant's homes) excepted the agreement from the preclusive effect of the statute of frauds, is unavailing since plaintiff's actions were not "unequivocally referable" to the agreement alleged.[16]

Lawful and Unlawful Objectives

The backdrop against which such agreements are viewed is the general principle that agreements having an immoral object are unenforceable.[17] Nonmarital parties living together may contract for personal services so long as the agreement is express and the consideration is not for illicit sexual relations.[18] In *Gorden*, the Court of Appeals emphasized that "[a] meretricious relationship would not prevent recovery for services rendered in maintaining the

tavern or the household if there were an express agreement that she was to be paid either a stipulated wage or what the services were worth provided that she was not being paid to be his mistress."[19]

Rhodes v. Stone[20] held that evidence of an express contract would render the oral agreement enforceable. However, *Rhodes* continued,

> if the illicit commerce between the parties was any part of the basis of the promise to pay for respondent's labor the agreement was void. The relations of the parties did not necessarily forbid an express contract between them that the intestate would pay respondent for her labor. There is no suggestion in the evidence that the illicit relations were to form any part of the consideration of the contract. Notwithstanding the improper manner of her life with the intestate, she was at liberty to make an agreement with the intestate to perform labor for him for pay.

"Agreements tending to dissolve a marriage or to facilitate adultery are closely scrutinized to determine whether the main objective of the agreement is aimed to produce that result";[21] resolution of this question will depend upon the prevention of unjust enrichment and the legal components of the agreement.[22] No cause of action will be found to exist where the main objective of an agreement is to dissolve a marriage and to facilitate a divorce or to commit adultery.[23]

A cause of action based upon a promise to support a party if she agrees to have a child and give up her career is void as against public policy.[24] The law does not recognize a cause of action for sacrificing career opportunities in order to act as a "wife."[25]

Distilling Lawful from Unlawful

Where an agreement consists in part of an unlawful objective and in part of lawful objectives, the court may sever the illegal aspects and enforce the legal ones, so long as the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement.[26] Domestic services can be considered sufficient consideration for an express agreement, provided "that illicit sexual relations were not 'part of the consideration of the contract.'"[27] Courts will be particularly ready to sever the illegal components and enforce the other components of a contract where the injured party is less culpable and the other party would otherwise be unjustly enriched by using his own misconduct as a shield against otherwise legitimate claims.[28] In *McCall v. Frampton*,[29] the Appellate Division added that: (1) the test is the degree to which the illegality infects and destroys the agreement, and (2) the resolution of the question depends particularly on the effect of performance of the legal components of the agreement and the prevention of unjust enrichment.

Donnell v. Stogel

In *Donnell v. Stogel*,[30] the court found the plaintiff's contributions to the defendant's business so extensive and pervasive to the defendant's success that it applied the principle in *McCall* to uphold the agreement.

Plaintiff's Extensive Contributions

The plaintiff and the defendant met as co-workers and began dating when she and her husband had been separated for almost two years. Seven months later they moved in together. The plaintiff's divorce would not become final until later. The plaintiff was dismissed from her secretarial position because their relationship was interfering with the defendant's work. The plaintiff thereafter devoted her time to household chores and to assist the defendant with his employment as a shoe salesman. Specifically, the plaintiff, a college graduate and former fine arts teacher, prepared shoe sketches, purchased shoes which the defendant wished to buy or copy, attended trade shows and social functions, and accompanied the defendant on business trips.

When the defendant began negotiating for and ultimately engineered the development of a new footwear company, the plaintiff participated extensively in the negotiations, and her assistance and encouragement enabled the defendant to obtain a greater partnership share in the business than he had originally been offered. Upon the company's formation, she assisted the defendant in setting up and decorating the company's offices, hiring employees, negotiating with shoe manufacturers, and contacting potential customers. She also designed the company logo, drew boxtops, sketched shoe designs, and prepared advertisements. Essentially, the plaintiff's contributions amounted to full-time employment. Although she did not receive a salary, the plaintiff was provided with business cards on which she was denominated "Special Account Executive." Additionally, the defendant promised that she would receive a salary and a promotion as soon as the business started to become profitable.

Written Compensation Package

Following an amicable breakup, they consulted with counsel in order to draft a valid compensation agreement that made clear that her compensation was for the services she had performed. Plaintiff alleged that the compensation was determined by the defendant. The consideration in the agreement stated: "for living together under the same roof as man and wife for four years and during that time contributing to the general well being of [the defendant's] business career, providing sound business counsel and working without salary in the development of Marion Footwear." The defendant did not honor the agreement.

Illegality of Consideration Was Small

The Appellate Division rushed to say that *this* agreement was not one to promote divorce or to facilitate adultery, as it was entered into long after the divorce was final and the adultery had ceased. Furthermore, the "main

objective" of the agreement was not compensation for cohabitation. Here is where the Appellate Division did what it could to rescue the agreement for the sake of this plaintiff:

> Even if this had been the "main objective" of the agreement, it would still not render the agreement unenforceable, since this court is not aware of any statutory or common-law authority in this State which considers cohabitation between unmarried parties illegal.

Donnell declined to construe the phrase "in consideration for living together under the same roof as man and wife" to have been illegal and unenforceable, as having been consideration for the adultery prior to the plaintiff's divorce, and sexual relations between the parties subsequent to the her divorce. The Second Department applied the ruling in *Rose* and severed the illegal aspects in order to preserve the legal ones, "so long as the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement."

Donnell held that

> the illegality of the agreement was not at its root and was only a small part of the consideration,[31] and that, for the most part, the agreement is supported by valid consideration. The parties did not engage in sexual relations for at least the last year of their almost four-year relationship, which lends further support to the proposition that the consideration of living together 'as man and wife for four years' did not relate primarily to engaging in sexual relations.

"Under the circumstances of *this* case," *Donnell* concluded, "the agreement involved was not one of serious moral turpitude"[32] and the claimed illegal aspect of the contract was "sever[able], and the remainder of the contract enforce[able] as though that aspect was never a part thereof."

Past Consideration

Pursuant to GOL § 5-1105, a promise regarding past consideration must be expressed in writing.[33]

Burden of Proof

The plaintiff carries the burden of proof to establish the elements of the express agreement.[34] An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses.[35] An agreement will fail for lack of definiteness when it fails to specify what contributions and efforts were required of plaintiff and how much defendant was required to pay her in compensation.[36] It is not necessary for the plaintiff to prove that his efforts generated great profits on behalf of the defendant.[37]

Constructive Trust and Cohabiting Partners

In *Beatty v. Guggenheim Exploration Co.*,[38] the Court of Appeals stated that a constructive trust is the formula through which the conscience of equity finds expression; when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Otherwise stated, the constructive trust doctrine is a "fraud-rectifying" rather than an "intent-enforcing" remedy.[39] Unjust enrichment, however, does not require the performance of any wrongful act by the one enriched.[40]

In *Sharp v. Kosmalski*,[41] the appeals court set forth four criteria prior to the imposition of a constructive trust:

> In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation,[42] (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment. Most frequently, it is the existence of a confidential relationship which triggers the equitable considerations leading to the imposition of a constructive trust.

In *McGrath v. Hilding*[43] the Court of Appeals noted that the powers of a court of equity are not so circumscribed that the inequitable conduct of one who invokes its relief may escape its scrutiny and evaluation. *McGrath*, citing *Sharp*, stressed:

> Enrichment alone will not suffice to invoke the remedial powers of a court of equity. Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust. (Restatement, Restitution § 1, Comments (a), (c); see, generally, 5 Scott, Trusts (3d ed.), § 462.2.) Hence, whether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic determination based on a broad view of the human setting involved.

In *Simonds v. Simonds*,[44] the Court of Appeals emphasized that although the factors in *Sharp* are useful in many cases, constructive trust doctrine is not rigidly limited. *Hornett v. Leather*,[45] citing *Simonds*, held that the four requisite elements are flexible considerations in determining whether to impose a constructive trust; they are guidelines in the pursuit of preventing unjust enrichment.

Constructive Trust Also Applies to Contributions of Time, Effort, and Money

The law of constructive trusts, however, is not confined to reconveyances of property.[46] The "transfer concept extends to instances where funds, time and effort are contributed in reliance on a promise to share in the result"; the fact that a party did not hold any previous interest in the disputed property is not fatal to the claim.[47] Also, a promise can be implied by the court where property has been transferred in reliance upon a confidential relationship.[48] In essence, a constructive trust is an equitable remedy that may be imposed whenever necessary in order to "satisfy the demands of justice."[49]

Furthermore, the Statute of Frauds does not bar an action for a constructive trust because, by its very nature, a constructive trust does not require a writing.[50]

Statute of Frauds: Partnership Agreement, Partial Performance

The statute of frauds cannot be availed of where the complaint is framed upon the theory of an executed contract.[51]

The doctrine of part performance may be invoked only if plaintiff's actions can be characterized as "unequivocally referable" to the agreement alleged. It is not sufficient that the oral agreement gives significance to plaintiff's actions. Rather, the actions alone must be "unintelligible or at least extraordinary," explainable only with reference to the oral agreement. Otherwise stated, an agreement fails this test when a possible motivation for the partial performance is equivocal, because it can be reasonably explained by the possibility of other expectations.[52]

Partnership at Will

In *Williams v. Lynch*[53] the plaintiff alleged, *inter alia*, an oral contract, by which terms the parties were to cohabit and share household expenses. In furtherance of the contract the plaintiff alleged that she sold her house, moved into the defendant's home and paid one-half of the expenses associated with the upkeep of that property, in exchange for, and in reliance upon, his promise that she would, *inter alia*, have the use of that home for the rest of her life. Her cause of action for breach of contract was barred by the Statute of Frauds because the alleged contract could not, by its terms, be fully performed before the end of plaintiff's lifetime (GOL § 5-701[a][1]). Her defense of "partial performance" of the agreement, by selling her home and moving into defendant's home, are activities that cannot reasonably be viewed as "unequivocally referable" to the contract and thus did not obviate the exception to the Statute of Frauds. *Williams* further ruled that

> [a]n oral partnership agreement is not entirely unenforceable merely because it incorporates promises that cannot be fully performed within a year or a lifetime; rather, "the only effect of the [Statute of Frauds], where [such an] agreement has been wholly or partially executed, is to convert it into a partnership at will, wherein a partner may bring an action at equity to call his copartner to account" (Green v. Le Beau, 281 App.Div. 836, 118 N.Y.S.2d 585).[54]

In *Sanger v. French* (cited in *Green v. Le Beau*, is cited in *Williams*),[55] in 1898 the Court of Appeals upheld a verbal partnership agreement. The Court observed that

> [the agreement could not] be attacked for want of consideration, or as lacking in definiteness and certainty. It was carried out by the parties though in the end the defendant . . . excluded the plaintiff from sharing in the benefits. The objection that the agreement was void under the statute of frauds, as one not to be performed within one year, is not well taken. No such defense was pleaded . . . It is, at least, quite doubtful whether the statute of frauds has any application whatever to oral partnership agreements Coleman v. Eyre, 45 N. Y. 39; Wahl v. Barnum, 116 N. Y. 87, 22 N. E. 280[56] . . . Certainly not when the agreement has been wholly or partially executed. But, if it has, the only effect it could have upon the agreement found by the referee was to convert it into a partnership at will. . . . Such a partnership exists until something is done to dissolve it. . . . The plaintiff was not obliged to bring an action for dissolution. A partner in a going concern may bring an action in equity to call his co-partner to account, and to compel him to act in conformity with the agreement; and an accounting may be had without dissolution, to enable him to obtain his share of the partnership profits, from the benefits of which he has been excluded. . . . The action is not for specific performance of a verbal uncertain agreement, but for an accounting concerning the profits of a transaction which has been executed, though it may be that the defendant excluded the plaintiff from participating in the execution.

Gonzalez v. Green: Domestic Partners

The Facts

Although *Gonzalez v. Green*[57] does not involve an express oral agreement but rather a written agreement between the cohabiting partners, it is, nevertheless, extremely noteworthy because it raises significant issues that counsel

should be aware of when either prosecuting or defending cases involving domestic partners.

Plaintiff and defendant had been same-sex domestic partners since in or about 2001, when defendant, a person of considerable assets and income, invited plaintiff to move in with him. Plaintiff was a student with little or no income at the time. During the course of their relationship the defendant gave plaintiff expensive gifts, including two automobiles and a ski house in plaintiff's name. In 2005 the couple, whose primary residence was in New York, took advantage of Massachusetts legislation that permits people of the same sex to marry notwithstanding the fact that, under Massachusetts law, the right did not extend to nonresidents.[58]

The parties continued to reside in New York. Upon their separation, the defendant's attorney drafted a "separation agreement" which both parties executed in the manner in which a deed should be executed. The Agreement recited in relevant part that "the parties desire to confirm their separation and make arrangements in connection therewith, including the settlement of their property rights, and other rights and obligations growing *out of the marriage relation* (emphasis provided). . . . Now, therefore, in consideration of the premises and of the mutual promises hereinafter contained, the parties agree as follows."

The Agreement provided, *inter alia*, for division of the real and personal property accumulated by the parties during their time together; it also provided for a one-time payment by the defendant to the plaintiff of $780,000, described as "the only support, maintenance, or other form of payment by either party hereto to the other."

Following their agreement, the Appellate Division, First Department, reversed the New York County trial court in *Hernandez v. Robles*[59] by holding that New York State's ban of same-sex marriages is constitutional in that it does not violate the due process and equal protection clauses of the New York State Constitution.

The Massachusetts law notwithstanding, Green, nevertheless, commenced an action for divorce. Gonzales moved to dismiss the action in light of *Hernandez* and for a declaration that as a matter of law, since the parties were never married, the agreement was void *ab initio* and all property transferred to the plaintiff thereunder must be returned to the defendant.

Defendant's Theory

Defendant counterclaimed alleging: (1) failure of consideration, because the agreement recited that the consideration was to be the dissolution of the parties' marriage and there was no marriage; (2) the agreement violated public policy and the transfer to the plaintiff of $780,000 as support which arose from the void agreement was thus also void as a matter of public policy; and (3) the Agreement was voidable based upon the doctrine of mutual mistake; that being that both parties mistakenly believed they were married and had the capacity to enter into the Agreement, while under the laws of both of the states of New York and Massachusetts their marriage was null and void from the beginning, making the Agreement null and void from the beginning.

Essentially, defendant argued that since there was no marriage there could be no separation agreement as a ground for divorce; since the marriage was null and void from the beginning, the agreement was void *ab initio*, and it must be rescinded and the parties returned to their respective positions before they performed it.

Ruling

Clearly, since the marriage was void under both New York and Massachusetts law, the plaintiff's divorce action was dismissed. The Court, however, denied the defendant's counterclaims.

Express Agreement

The motion court quoted from *Morone*:[60]

> New York courts have long accepted the concept that an express agreement between unmarried persons living together . . . is as enforceable as though they were not living together . . . provided only that "illicit sexual relations were not part of the consideration of the contract"[61] . . . The theory . . . is that while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law. . . .

Gonzalez observed that *Hernandez* "[did] not negate the existence of same sex relationships, nor the reality that some same sex relationships dissolve, and the courts are called upon to resolve disputes regarding the distribution of assets of such relationships."[62] Accordingly, there is "no impediment to enforcement in a contract action of the provisions of the parties' agreement insofar as it concerns their personal property and . . . monetary obligations."

The defendant's claim of lack of consideration failed because of settled law that "the valid consideration which will support a contract need not be equal on both sides, and if a minimal yielding of a position by one side promotes an agreement, then it will be deemed enforceable. There is no need to measure the relative weight of the consideration provided by each party." The consideration in the *Gonzalez* agreement was "the premises and of the mutual promises hereinafter contained . . ." The Agreement was found to have been a global resolution of all matters which was drafted by the defendant's own attorney. Further valuable consideration was evidenced by the transfer by the plaintiff of title to his ski house as part of the property distribution.

The court also rejected the defendant's argument that the Agreement was voidable under the doctrine of mutual mistake. However, the defendant's own moving papers belied the argument. Moreover, the law of New York at the time the parties returned from Massachusetts was not yet settled on the issue of same-sex marriages even though it had been settled in Massachusetts. Whether or not the parties considered themselves married in nature, defendant, a sophisticated businessman, must have considered the strong possibility of illegality while the law was in such a developing state.

Mutual Mistake

Nor was the Agreement invalid under the doctrine of mutual mistake of law. CPLR 3005 provides:

> When relief against a mistake is sought in an action or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact.

As explained by Professor David D. Siegel in his practice commentary to this statute:[63]

> The point is, that one cannot draw a total parallel between a mistake of law and a mistake of fact and permit undoing of the transaction for a mistake of law merely because a mistake of fact might have justified it. * * * It really leaves the matter to the court to determine whether the particular law mistake is sufficiently analogous to a fact mistake to justify a judicial result to which the fact mistake would lead. It does not permit a mere misreading of the law by any party to cancel an agreement. If it did, the courts would be flooded with applications to get out from under because one party assumed its right to be of a kind and quality greater than it was. As long as the mistake has not been induced by the other party's misrepresentations . . . resort to CPLR 3005 may be misplaced.

This interpretation of the statute has been validated by the Appellate Division, First Department in *Jossel v. Meyers*:[64]

> Where the parties have made an instrument as they intended it should be, and the instrument expresses the transaction as it was understood and designed to be made, then the party who had an opportunity to know the contents of the instrument cannot obtain cancellation or reformation because he misunderstood the legal effect of the whole or of any of its provisions; equity will not grant a rescission although one of the parties and as many cases hold, both of them may have mistaken or misconceived its legal effect (citation omitted). . . . "It is no accident that much of the case law on CPLR 3005 * * * involve[s] examples of its non-application" (Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B CPLR C3005:1, at 620-621).

Green thus held that, like to *Jossel*, the defendant's assertion of mutual mistake of law was insufficient to support a claim of rescission in this case especially since the agreement had been drafted by the defendant's attorney, and its contents expressed the transaction as the defendant desired it to be.

Green summarized that irrespective of whether New York recognizes the validity of same-sex marriage, it does recognize the validity of cohabiting parties' right to settle their affairs by agreement.

Conclusion

The issue of express agreements is rife for an invigorated rebirth. It is incumbent upon counsel to navigate these waters carefully by being attentive to the critical allegations necessary to establish the *prima facie* case while simultaneously not including gratuitous allegations that can result in a summary dismissal of the pleadings.

Endnotes

1. 429 N.Y.S.2d 592, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980).
2. *Colwell v. Zolkosky*, 29 A.D.2d 720, 286 N.Y.S.2d 422 (3d Dep't 1968).
3. *In re Gorden*, 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S.2d 1 (1960); *Rhodes v. Stone*, 63 Hun 624, 17 N.Y.S. 561 (N.Y.Sup. 1892).
4. *In re Gorden*, 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S.2d 1 (1960); *Trombley v. Sorrelle*, 6 Misc. 3d 393, 786 N.Y.S.2d 296 (N.Y. City Ct. 2004).
5. 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106; *Silver v. Starrett*, 176 Misc. 2d 511, 674 N.Y.S.2d 915 (Sup. Ct., N.Y. Co. 1998): "Despite the highly publicized case of *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106, where a California court awarded a nonmarital party, on her claim of "palimony," an amount of money to enable her to get started again after a breakup, New York courts have emphatically rejected that approach."
6. 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S.2d 1 (1960).
7. *Cf.* Although the Court of Appeals, in *Dombrowski v. Somers*, 41 N.Y.2d 858, 362 N.E.2d 257, 393 N.Y.S.2d 706 (1977), had earlier ruled that the words "take care of" were too vague to spell out a meaningful promise, under the circumstances of *Morone* the phrase "do right by her" was deemed "surplusage" in light of the other allegations of an express agreement that the profits of the partnership were to be used and applied for the equal benefit of both plaintiff and defendant.
8. *Robinson v. Munn*, 238 N.Y. 40, 143 N.E. 784 (1924): "The inference of an implied contract to pay the reasonable value of services rendered, which may arise from the mere rendition and acceptance of the service, cannot be drawn, where, because of the relationship of the parties, it is natural that such service should be rendered without expectation of pay"; *In re Adams' Estate*, 1 A.D.2d 259, 149 N.Y.S.2d 849 (4th Dep't 1956), *motion denied*, 1 N.Y.2d 856, 135 N.E.2d 734, 153 N.Y.S.2d 234 (1956), *appeal denied*, 2 N.Y.2d 717, 138 N.E.2d 719, 157 N.Y.S.2d 349 (1956), *aff'd*, 2 N.Y.2d 796, 140 N.E.2d 549, 159 N.Y.S.2d 698 (1957).

9. *Morone*:

> Similar considerations were involved in the Legislature's abolition by chapter 606 of the Laws of 1933 of common-law marriages in our State . . . because attempts to collect funds from decedents' estates were a fruitful source of litigation. Senate Minority Leader Fearon, who had introduced the bill, also informed the Governor that its purpose was to prevent fraudulent claims against estates and recommended its approval. The consensus was that while the doctrine of common-law marriage could work substantial justice in certain cases, there was no built-in method for distinguishing between valid and specious claims and, thus, that the doctrine served the State poorly.

See Buttacavoli v. Killard, 6 Misc. 3d 1018(A), 800 N.Y.S.2d 343(U) (N.Y. Dist. Ct., 2004).

10. *Morone v. Morone*, 429 N.Y.S.2d 592, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980); *Potter v. Davie*, 713 N.Y.S.2d 627, 275 A.D.2d 961 (4th Dep't 2000); *Matos v. Gadman*, 570 N.Y.S.2d 68, 173 A.D.2d 442 (2d Dep't 1991); *Donnell v. Stogel*, 560 N.Y.S.2d 200, 161 A.D.2d 93 (2d Dep't 1990); *Barnes v. Byrnes*, 545 N.Y.S.2d 342, 153 A.D.2d 831 (2d Dep't 1989), *lv. to appeal denied*, 75 N.Y.2d 705, 552 N.E.2d 176, 552 N.Y.S.2d 928 (1990) (Plaintiff did not establish his entitlement to receive the fair market value of his labor in repairing and improving the defendant's properties since he expended this labor as a result of the parties' relationship during the period they lived together rather than pursuant to an express agreement. Absent proof that such an agreement was made by the parties, the plaintiff may not recover for the value of his labor.).

11. *Silver v. Starrett*, 176 Misc. 2d 511, 674 N.Y.S.2d 915 (Sup. Ct., N.Y. Co. 1998).

12. *Tenzer v. Tucker*, 584 N.Y.S.2d 1006, 154 Misc. 2d 468 (N.Y. Sup. 1992).

13. *Dombrowski v. Somers*, 41 N.Y.2d 858, 362 N.E.2d 257, 393 N.Y.S.2d 706 (1977) (Plaintiff sought compensation for housekeeping rendered pursuant to an alleged oral agreement between herself and the decedent that he would "take care of' her."); *Lowinger v. Lowinger*, 287 A.D.2d 39, 733 N.Y.S.2d 33 (1st Dep't 2001), *lv. to appeal denied*, 98 N.Y.2d 605, 773 N.E.2d 1017, 746 N.Y.S.2d 279 (2002); *Cohn v. Levy*, 725 N.Y.S.2d 376, 284 A.D.2d 293 (2d Dep't 2001) (The plaintiff alleged that on several occasions the defendant promised to "take care of [her] in a very comfortable way." The plaintiff's testimony was too vague to substantiate her current claim of lifetime maintenance.); *Yedvarb v. Yedvarb*, 655 N.Y.S.2d 84, 237 A.D.2d 433 (2d Dep't 1997) (Following their divorce and the defendant's full compliance with the support provisions of their settlement agreement, the defendant generously continued to make monthly payments of approximately $5,000 to the plaintiff for an additional seven years. After the defendant ceased making these additional monthly payments, the plaintiff commenced an action alleging that the additional payments were made pursuant to an express oral agreement wherein the defendant promised to "always take care" of the plaintiff. Aside from being violative of the Statute of Frauds, the alleged promise was defective because it contained no specifics as to the form, frequency, and amount of payment, and was too vague to spell out a meaningful promise.).

14. 564 N.Y.S.2d 738, 169 A.D.2d 580 (1st Dep't 1991).

15. GOL § 5-701(a)(1) states, in pertinent part:

> Agreements required to be in writing:
>
> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;

Also, see below, discussion on part performance.

16. *Harrington v. Murray*, 564 N.Y.S.2d 738, 169 A.D.2d 581-82 (1st Dep't 1991).

17. *McCall v. Frampton,* 81 A.D.2d 607, 438 N.Y.S.2d 11 (2d Dep't 1981), *citing* 15 Williston, Contracts [3d ed.; Jaeger], § 1745; *cf. Morone v. Morone*, 429 N.Y.S.2d 592, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980).

18. *Morone v. Morone*, 429 N.Y.S.2d 592, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980); *Paulus v. Kuchler*, 625 N.Y.S.2d 81, 214 A.D.2d 608 (2d Dep't 1995); *Anonymous v. Anonymous*, 740 N.Y.S.2d 341, 293 A.D.2d 406 (1st Dep't 2002) (It is well settled that an agreement for financial support in exchange for illicit sexual relations is violative of public policy and thus unenforceable.); *Pfeiff v. Kelly*, 623 N.Y.S.2d 965, 213 A.D.2d 916 (3d Dep't 1995); *Rose v. Elias*, 576 N.Y.S.2d 257, 177 A.D.2d 415 (1st Dep't 1991); *Potter v. Davie*, 713 N.Y.S.2d 627, 275 A.D.2d 961 (4th Dep't 2000); *Cohn v. Levy*, 284 A.D.2d 293, 725 N.Y.S.2d 376 (2d Dep't 2001) (The plaintiff and the defendant conducted an adulterous affair between 1975 and 1978, and again from 1986 until 1996. In 1989 the plaintiff divorced her husband, and the defendant began paying her weekly sums in cash. The plaintiff alleged that at various times during this period the defendant orally contracted to pay her $1,000 a week for the rest of her life, and to guarantee these payments by taking out a life insurance policy naming her as beneficiary. The alleged oral agreement failed because it was not supported by valid consideration.); *Kastil v. Carro*, 536 N.Y.S.2d 63, 145 A.D.2d 388 (1st Dep't 1988), *lv. to appeal denied*, 74 N.Y.2d 650, 542 N.Y.S.2d 519, 540 N.E.2d 714) (The plaintiff commenced a breach of contract action against the defendant and his law firm, seeking to recover four million dollars in damages alleging that shortly after the defendant firm hired her as a bookkeeper, she began a ten-year personal and sexual relationship with the defendant-partner, who was married, and, that relationship consisted of her primarily acting as his sexual partner, social companion, "surrogate mother" to his mentally disabled daughter, and, as his conduit for information about "office politics." While the sexual part of the relationship ended in 1980, the personal part continued until the plaintiff voluntarily resigned from the firm in April 1982. The Appellate Division focused on two points: (1) that illicit sexual relations do not provide consideration for a contract and (2) past consideration is no consideration unless in writing under GOL § 5-1105 (*see* discussion in this section). The appellate court quoted *Morone*:

> For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and general noncontractual relationship runs too great a risk of error. Absent an express agreement, there is no frame of reference against which to compare the testimony presented and the character of the evidence that can be presented becomes more evanescent. There is, therefore, substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid . . .

19. *In re Gorden,* 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S.2d 1 (1960).

20. 63 Hun 624, 17 N.Y.S. 561 (N.Y.Sup. 1892).

21. *Cohn v. Levy*, 725 N.Y.S.2d 376, 284 A.D.2d 293 (2d Dep't 2001); *McCall v. Frampton*, 81 A.D.2d 607, 438 N.Y.S.2d 11 (2d Dep't 1981), *citing* 15 Williston, Contracts [3d ed.; Jaeger], §§ 1741, 1743; *Paulus v. Kuchler*, 625 N.Y.S.2d 81, 214 A.D.2d 608 (2d Dep't 1995).

22. *Paulus v. Kuchler*, 214 A.D.2d 608, 625 N.Y.S.2d 81 (2d Dep't 1995).

23. *Reid v. McLeary*, 706 N.Y.S.2d 179, 271 A.D.2d 668 (2d Dep't 2000); *Paulus v. Kuchler*, 625 N.Y.S.2d 81, 214 A.D.2d 608 (2d Dep't 1995); *see Donnell v. Stogel*, 560 N.Y.S.2d 200, 161 A.D.2d 93 (2d Dep't 1990); *Rose v. Elias*, 177 A.D.2d 415, 576 N.Y.S.2d 257 (1st Dep't 1991) (Defendant, a married man, promised in writing to purchase an apartment for the plaintiff, his female companion, in return for the "love and affection" that she provided to him *during the prior three*

years. Defendant asserted that his relationship with plaintiff was primarily sexual, and plaintiff did not deny that sexual relations were a part of the relationship. Plaintiff admitted that the proposed purchase of an apartment was intended to facilitate a "comfortable" life with the defendant. Agreements tending to dissolve a marriage or to facilitate adultery are closely scrutinized to determine whether the main objective is aimed to produce that result. The trial court concluded that the words "love and affection" in this case suggested adultery, and thus illegal consideration. Since there was no severable legal component of the consideration for defendant's promise, the contract was deemed void as against public policy. Furthermore, the agreement unambiguously set forth the consideration and plaintiff could not later amend it with factors not viewed by the parties at the time of the agreement.); *McRay v. Citrin*, 270 A.D.2d 191, 270 A.D.2d 191 (1st Dep't 2000), the sole consideration given to support defendant's promise to pay plaintiff a yearly sum of money, plaintiff's promise of "love and affection," did not suffice as a predicate for enforcement of the executory agreement.

24. *Jennings v. Hurt*, 554 N.Y.S.2d 220, 160 A.D.2d 576 (1st Dep't 1990).

25. *Id.*

26. *In re Gorden*, 8 N.Y.2d 71, 168 N.E.2d 239, 202 N.Y.S.2d 1 (1960); *McCall v. Frampton*, 81 A.D.2d 607, 438 N.Y.S.2d 11 (2d Dep't 1981); *Paulus v. Kuchler*, 214 A.D.2d 608, 625 N.Y.S.2d 81 (2d Dep't 1995); *Rose v. Elias*, 177 A.D.2d 415, 576 N.Y.S.2d 257 (1st Dep't 1991); *Pfeiff v. Kelly*, 213 A.D.2d 916, 623 N.Y.S.2d 965 (3d Dep't 1995) (The parties began living together when the plaintiff was married to another woman at the time, although a divorce action was pending. In reliance upon plaintiff's promise of marriage, defendant moved into plaintiff's home and took a position as the office manager of his medical practice. When their relationship ended they signed an agreement designated "a mutual agreement" expressly reached "as the result [ ] of their four year relationship living together," under the terms of which plaintiff gave defendant "her choice of the furnishings purchased for [the parties'] house" and agreed to transfer a number of additional assets to defendant. The agreement required nothing of defendant [*Editor's note*: *no consideration*]. Defendant moved out of plaintiff's house, taking with her a substantial part of the furniture, furnishings and effects, prompting plaintiff to bring an action in conversion. The Appellate Division rejected arguments grounded under Civil Rights Law § 80-b: a cause of action may lie for property given in contemplation of a marriage that did not take place. The agreement was void for lack of consideration. The contract's express recitation that it was the result of the parties' four-year live-in relationship, coupled with the fact of plaintiff's marriage during substantially all of that period, leads to the inescapable conclusion that illicit sexual relations formed the primary consideration (*Rose v. Elias*, 177 A.D.2d 415, 576 N.Y.S.2d 257). The Appellate Division's reading of the contract disclosed no severable valid consideration and, because the contract is based solely upon past consideration, GOL § 5-1105 bars defendant from presenting evidence of consideration not stated therein.). *Artache v. Goldin*, 133 A.D.2d 596, 519 N.Y.S.2d 702 (2d Dep't 1987), citing 6A Corbin, Contracts §§ 1534-1535 (The plaintiff and the defendant entered into an express oral partnership agreement under which they agreed to live together and hold themselves out as husband and wife; that she was to care for their children, perform domestic duties and assist him in the management and administration of his dental practice; and that the defendant would, as soon as possible, obtain a divorce from his wife, from whom he was then separated, and would marry her and support her and their children and would share with her the profits from his dental practice and other business interests. During the 14 years of their relationship, they lived together and had four children. She rendered both domestic services and business services in accordance with the agreement and also contributed in excess of $60,000, including funds derived from the sale of real property that she owned and the proceeds from the settlement of a personal injury action, toward the parties' joint economic needs. Part of these funds were applied to the down payment for the purchase of the family residence. After the defendant received a divorce from his wife, he left the parties' residence and disavowed his paternity of the four children. He served the plaintiff with a 10-day notice to quit the residence in which she and the children were residing and expressed his intention to sell the same. He also unilaterally removed certain furnishings and valuables from the premises. The plaintiff thereupon commenced an action, seeking to recover damages, *inter alia*, for breach of contract, fraud, and unjust enrichment. There was no question but that the alleged express oral partnership agreement contained various illegal aspects, to wit, an agreement to engage in adultery and an agreement to share the profits of the dental practice in violation of Education Law § 6509-a. *See In re Gorden*, 8 N.Y.2d 71, 202 N.Y.S.2d 1). Although the plaintiff received a salary for her services, a question of fact remained as to the amount she was paid, the reasonable value of her services, and whether the salary paid adequately compensated her therefor.

27. *Stephan v. Shulman*, 130 A.D.2d 484, 515 N.Y.S.2d 67 (2d Dep't 1987).

28. *Artache v. Goldin*, 519 N.Y.S.2d 702, 133 A.D.2d 596 (2d Dep't 1987).

29. 81 A.D.2d 607, 438 N.Y.S.2d 11 (2d Dep't 1981); *Stephan v. Shulman*, 130 A.D.2d 484, 515 N.Y.S.2d 67 (2d Dep't 1987).

30. 560 N.Y.S.2d 200, 161 A.D.2d 93 (2d Dep't 1990).

31. Citing 6A Corbin, Contracts § 1525, at 775.

32. Citing 6A Corbin, Contracts § 1534, at 816-817.

33. GOL § 5-1105. Written promise expressing past consideration:

> A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

Clark v. Bank of New York, 185 A.D.2d 138, 585 N.Y.S.2d 749 (1st Dep't 1992); *Kastil v. Carro*, 145 A.D.2d, *supra*, at 389-390, 536 N.Y.S.2d 63); *Anonymous v. Anonymous*, 740 N.Y.S.2d 341, 293 A.D.2d 406 (1st Dep't 2002); *Pfeiff v. Kelly*, 623 N.Y.S.2d 965, 213 A.D.2d 916 (3d Dep't 1995).

34. *Artache v. Goldin*, 519 N.Y.S.2d 702, 133 A.D.2d 596 (2d Dep't 1987).

35. *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, 175 N.Y.S.2d 1 (1958); *Davella v. Nielsen*, 208 A.D.2d 494, 616 N.Y.S.2d 800 (2d Dep't 1994); *Latture v. Smith*, 1 A.D.3d 408, 766 N.Y.S.2d 906 (2d Dep't 2003); *Goodstein Properties, Inc. v. Rego*, 266 A.D.2d 506, 698 N.Y.S.2d 709 (2d Dep't 1999), *lv. to appeal denied*, 95 N.Y.2d 760, 737 N.E.2d 952, 714 N.Y.S.2d 710 (2000); *Potter v. Davie*, 713 N.Y.S.2d 627, 275 A.D.2d 961 (4th Dep't 2000).

36. *Potter v. Davie*, 713 N.Y.S.2d 627, 275 A.D.2d 961 (4th Dep't 2000).

37. *Williams v. Lynch*, 245 A.D.2d 715, 666 N.Y.S.2d 749 (3d Dep't 1997).

38. 225 N.Y. 380, 122 N.E. 378 (1919).

39. *Bankers Sec. Life Insurance. Soc. v. Shakerdge*, 49 N.Y.2d 939, 406 N.E.2d 440, 428 N.Y.S.2d 623 (1980); *Matos v. Gadman*, 173 A.D.2d 442, 570 N.Y.S.2d 68 (2d Dep't 1991) (The parties began living together "in a manner equivalent to husband and wife." The defendant had promised to marry the plaintiff as soon as he obtained a divorce from his current wife. The parties entered into an oral partnership agreement to be "equal economic partners." They jointly formed various corporations for their mutual benefit, and they were to share equally in the assets of the corporations. The plaintiff had acted as both corporate secretary and financial controller for the corporations on a full-time basis and performed all household services for the couple in furtherance of the agreement and with the expectation that she would be compensated for her services. Although the plaintiff received a salary from the corporations, she claimed that her salary did not fully compensate her for all the services she performed. Critically, the defendant had represented that the ownership of the corporations, as well as their success or failure, were to be shared equally by the parties, for which reasons she was the rightful owner of one-half of the assets of the corporations. On a motion for

summary judgment, the Appellate Division held that the plaintiff had asserted sufficient facts to establish a cause of action for the imposition of a constructive trust. Plaintiff was also permitted to assert an implied agreement to recover for services rendered to the corporate defendants.).

40. *Simonds v. Simonds*, 45 N.Y.2d 233, 380 N.E.2d 189, 408 N.Y.S.2d 359 (1978); *In re Wieczorek*, 186 A.D.2d 204, 587 N.Y.S.2d 755 (2d Dep't 1992).

41. 40 N.Y.2d 119, 351 N.E.2d 721, 386 N.Y.S.2d 72 (1976); *cf. Stephan v. Shulman*, 130 A.D.2d 484, 515 N.Y.S.2d 67 (2d Dep't 1987), the third cause of action seeking to impose a constructive trust was properly dismissed. Although the Statute of Frauds is no defense to such a claim, the plaintiff does not allege that she transferred the property in question in reliance on a promise by the defendant, nor did she ever have a prior interest in the property. Thus, the elements necessary for the imposition of a constructive trust have not been set forth.

42. *See Williams v. Lynch*, 245 A.D.2d 715, 666 N.Y.S.2d 749 (3d Dep't 1997), *appeal dismissed*, 91 N.Y.2d 957, 694 N.E.2d 886, 671 N.Y.S.2d 717 (1998), re confidential relationship.

43. 41 N.Y.2d 625, 363 N.E.2d 328, 394 N.Y.S.2d 603 (1977).

44. 45 N.Y.2d 233, 380 N.E.2d 189, 408 N.Y.S.2d 359 (1978).

45. 145 A.D.2d 814, 535 N.Y.S.2d 799 (3d Dep't 1988), *appeal denied*, 74 N.Y.2d 603, 541 N.E.2d 425, 543 N.Y.S.2d 396 (1989); *Mendel v. Hewitt*, 161 A.D.2d 849, 555 N.Y.S.2d 899 (3d Dep't 1990); *In re Wieczorek*, 186 A.D.2d 204, 587 N.Y.S.2d 755 (2d Dep't 1992), *lv. to appeal dismissed*, 81 N.Y.2d 990, 616 N.E.2d 153, 599 N.Y.S.2d 798 (1993), *rearg. denied*, 82 N.Y.2d 707, 619 N.E.2d 665, 601 N.Y.S.2d 587 (1993).

46. *Lester v. Zimmer*, 147 A.D.2d 340, 542 N.Y.S.2d 855 (3d Dep't 1989) (A parties' contribution of money and work toward construction of the house satisfied the "transfer in reliance" element cited in *Sharp*. The law of constructive trusts, however, is not confined to reconveyance situations. The transfer concept extends to instances where funds, time and effort are contributed in reliance on a promise to share in the result.).

47. *Lester v. Zimmer*, 147 A.D.2d 340, 542 N.Y.S.2d 855 (3d Dep't 1989) (Plaintiff and the defendant cohabited in an apartment in New York City for almost 10 years during which period each contributed time, money and work toward construction of a dwelling on land in Woodstock owned by the defendant's mother. The plaintiff contended that the mother promised to give title to the house and six acres of land to her and the defendant. After the couple ended their personal relationship they continued to alternatively utilize the house. They also shared the cost of taxes and maintenance. After the defendant married, the plaintiff was locked out of the house. She commenced an action to impose a constructive trust upon the real property and a judgment ordering partition, to wit, to compel defendants to convey to her an undivided one-half interest in certain property. The transfer concept extends to instances where funds, time and effort are contributed in reliance on a promise to share in the result. This court has recognized that a constructive trust may be imposed in the marital context where the proponent has extended funds or effort in reliance on a promise (cites omitted). Although the parties were not married, given the asserted nature of their relationship, a similar analysis may be made. Instructive in this regard is the decision in *McGrath v. Hilding*, 41 N.Y.2d 625, 394 N.Y.S.2d 603 (1977), where the plaintiff tendered funds for the improvement of the defendant's property in reliance on his premarital promise that a joint interest in the property would be created. While the Court of Appeals directed a new trial to fully explore the nature of the parties' relationship, implicit in the court's decision is that a premarital transfer of funds for the improvement of realty can form a predicate for the imposition of a constructive trust.); *Williams v. Lynch*, 245 A.D.2d 715, 666 N.Y.S.2d 749 (3d Dep't 1997) plaintiff avers that she made substantial contributions, in money and labor, to the upkeep and improvement of defendant's house and grounds (including, among other things, a renovation of the garage, a new furnace and substantial landscaping work), in reliance on his promises that she would have life use of that home and other financial benefits. This evidence, viewed in the light most favorable to plaintiff, might warrant a finding that the value of defendant's property was enhanced by plaintiff's contributions, which plainly exceeded mere day-to-day maintenance, and that he has been unjustly enriched as a result. . . . Thus, if a confidential relationship existed, this use by plaintiff of her money and effort to improve defendant's property could justify the imposition of a constructive trust (internal cites omitted.) .

48. *Tordai v. Tordai*, 109 A.D.2d 996, 486 N.Y.S.2d 802 (3d Dep't 1985); *Henness v. Hunt*, 272 A.D.2d 756, 708 N.Y.S.2d 180 (3d Dep't 2000); *Lester v. Zimmer*, 542 N.Y.S.2d 855, 147 A.D.2d 340 (3d Dep't 1989).

49. *Booth v. Booth*, 576 N.Y.S.2d 686, 178 A.D.2d 712 (3d Dep't 1991).

50. *Crown Realty Co. v. Crown Heights Jewish Community Council,* 175 A.D.2d 151, 572 N.Y.S.2d 38 (2d Dep't 1991); *see Spodek v. Riskin,* 150 A.D.2d 358, 540 N.Y.S.2d 879 (2d Dep't 1989); *Stephan v. Shulman*, 130 A.D.2d 484, 515 N.Y.S.2d 67 (2d Dep't 1987); *Vanasco v. Angiolelli*, 97 A.D.2d 462, 467 N.Y.S.2d 434 (2d Dep't 1983).

51. *Buechler v. Pickrell*, 230 A.D. 706, 243 N.Y.S. 873 (2d Dep't 1930); *Zuckerman v. Linden*, 207 Misc. 702, 139 N.Y.S.2d 737 (Sup. Ct., Bronx Co. 1955).

52. *Anostario v. Vicinanzo*, 463 N.Y.S.2d 409, 59 N.Y.2d 662, 450 N.E.2d 215 (1983); *Rose v. Spa Realty Assoc*., 42 N.Y.2d 338, 397 N.Y.S.2d 922, 366 N.E.2d 1279 (1977); *Klein v. Klein,* 79 N.Y.2d 876, 589 N.E.2d 382, 581 N.Y.S.2d 159 (1992); *Spodek v. Riskin*, 150 A.D.2d 358, 540 N.Y.S.2d 879 (2d Dep't 1989) (The doctrine of part performance of an oral agreement also applies to the conveyance of an interest in real property subject to the Statute of Frauds. The partial performance will be deemed sufficient to take that contract out of the Statute of Frauds if it is demonstrated that the acts constituting partial performance are "unequivocally referable" to the contract.).

53. *Williams v. Lynch*, 245 A.D.2d 715, 666 N.Y.S.2d 749 (3d Dep't 1997).

54. *Zuckerman v. Linden*, 207 Misc. 702, 139 N.Y.S.2d 737 (Sup. Ct., Bronx Co. 1955): "While the partnership agreement may have been unenforceable in an action for breach of contract or for specific performance, Wahl v. Barnum, 116 N.Y. 87, 97, 22 N.E. 280, an accounting is nevertheless proper as to partnership affairs already undertaken. Sanger v. French, 157 N.Y. 213, 235, 51 N.E. 979, 985; Green v. Le Beau, 281 App.Div. 836, 118 N.Y.S.2d 585; see Boxill v. Boxill, 201 Misc. 386, 391, 111 N.Y.S.2d 33, 37."

55. *Sanger v. French,* 157 N.Y. 213, 51 N.E. 979 (1898); *Sange*r was cited by the U.S. Court of Appeals, Second Circuit, in *Cutlass Productions, Inc. v. Bregman*, 682 F.2d 323, 34 Fed.R.Serv.2d 504 (2d Cir., 1982). In *Cutlass*, plaintiff and defendant competed in a bidding for an option contract on the motion picture rights to an unpublished novel. Shortly after defendant outbid plaintiff, plaintiff called defendant about the possibility of their working together on the film's production. The Second Circuit cited *Sanger* and *Green* in support of the proposition that plaintiff might have proved his partial performance of an oral partnership agreement thereby defeating defendants' Statute of Frauds defense.

56. *Coleman v. Eyre*, 45 N.Y. 38 (1871):

> The plaintiff [had a one-fourth interest] in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the

defendant, and the defendant had not done or contributed anything to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defendant could not have enforced payment of half the profits, if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be implied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits, which the plaintiff might make out of the adventure, in case it should prove successful. . . . The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties.

The agreement was not within the statute of frauds. It was not an agreement for the sale of any personal property or chose in action, but an executory agreement, whereby one party undertook to bear one part of a possible loss, in consideration of a share of an expected profit.

57. *Gonzalez v. Green*, __ N.Y.S.2d __, 14 Misc. 3d 641 (Sup. Ct., N.Y. Co. 2006).

58. Massachusetts General Laws § 11. Non-residents, marriages contrary to laws of domiciled state:

> No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.

59. *Hernandez v. Robles*, 26 A.D.3d 98, 805 N.Y.S.2d 354 (1st Dep't 2005).

60. *Morone v. Morone*, 429 N.Y.S.2d 592, 50 N.Y.2d 481, 413 N.E.2d 1154 (1980).

61. Gonzalez stated: "The obvious crux of the agreement at bar was the division of tangible property between separating parties, not illicit sexual relations" which salvaged it from failure.

62. *Anonymous v. Anonymous*, 2 Misc. 3d 1002(A), 784 N.Y.S.2d 918(U) (Sup. Ct., N.Y. Co. 2004): "unmarried cohabitants may lawfully contract concerning their property, financial, and other matters relevant to their relationship, subject to the rules of contract law, except where sexual services constitute the only consideration for the agreement."; *Silver v. Starrett*, 176 Misc. 2d 511, 674 N.Y.S.2d 915 (N.Y. Sup., N.Y. Co. 1998); *Cannisi v. Walsh*, 13 Misc. 3d 1231(A), __ N.Y.S.2d __ (U) (Sup. Ct., Kings Co. 2006) "It is also clear that had the parties entered into an express separation agreement that dealt with the assets of their relationship, such agreement would be enforceable even though it was a same-sex domestic partnership."

63. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3005:1, at 620.

64. 212 A.D.2d 55, 57, 629 N.Y.S.2d 9 (1st Dep't 1995).

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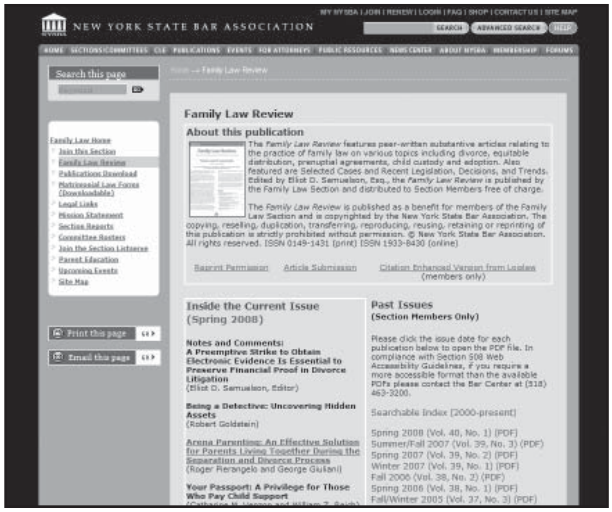

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The Extraordinary Case of *Julia BB.*: Why the Third Department Reversed a Finding of Severe Abuse and Sent a Child Home Three Years After Her Removal

By Cynthia Feathers

The case of *Julia BB.*, a tragic tale with a joyful ending, provides valuable insights as to the rights of natural parents versus foster parents, the nature of Family Court termination of parental rights proceedings involving medical proof, and the power of the appellate process to right wrongs. The case ended late last year. By denying a motion for permission to appeal, the Court of Appeals ended a four-year battle that had pitted an upstate Social Services agency, which charged that parental abuse explained baby Julia's fractures, against the parents, who contended that their daughter had a medical condition.

The case had begun when the parents, who had two thriving young children, had the misfortune of having a baby with multiple medical symptoms that defied easy diagnosis. The character of the parents was as unlike that of abusers as one could possibly imagine, and under their nurturing care, their older children, John and Emily, enjoyed robust emotional and physical health. Over and over, the parents went to the family pediatrician seeking answers for Julia's strange skin discolorations, swelling of her extremities, and spells of excessive sweating. Renowned experts in osteogenesis imperfecta from New York City opined that such condition, also known as brittle bone disease, explained multiple subtle fractures eventually detected in Julia—without any pain or sign of trauma.

All such evidence was rejected by Social Services attorneys and the Family Court judge, who were persuaded by two local doctors with little expertise in osteogenesis imperfecta. After spending considerable time with the parents and examining Julia, one doctor initially authored a report stating that he did not believe there had been any abuse. The next day, however, he testified against the parents at a removal hearing. Further, in the ensuing months, he aggressively sought to have Julia removed from her parents' care and to have them prosecuted criminally for child abuse, writing letters to both the Social Services agency and the local district attorney. Such actions far exceeded those of a mandated reporter and raised questions about the doctor's objectivity and whether he was influenced by a fellow physician, the foster father, who had labeled the parents "sociopaths" and had declared his desire to adopt Julia.

Social Services' initial attempts to remove Julia failed, and she remained at home, without incident, in the care of her parents and grandmother until several months later, when she choked, apparently on mucus, cereal and/or amoxicillin. At the time, her parents, grandparents, and siblings were all at home. Despite such proof of a benign event, a second doctor saw something sinister. He concluded that Julia had been smothered, explaining that he sought to find a unifying diagnosis for both the fractures and the choking. Thus, his notion that the choking resulted from abuse was merely a default diagnosis. Illuminating testimony by a more qualified expert, the chief of neonatology at a local hospital, exposed the deep flaws in such default diagnosis.

Well before all such evidence was received, Social Services and Family Court seemed to have irrevocably decided that Julia was abused. From the outset, they referred to the foster parents as the "adoptive parents" and treated them almost tenderly, while subjecting the natural parents to hostility from caseworkers supervising weekly visitation in a cramped room. Rather than protecting the primacy of the natural parents' rights, Social Services and Family Court had thus turned the statutory scheme upside down and elevated the foster parents' rights. Moreover, in contravention of a statutory command that Julia be placed with suitable relatives, she remained with the foster parents. An aunt and uncle who were exemplary parents were deemed unfit because they would not accept the unproven theory that one or both of the parents had hurt the child. Only after sustained, valiant efforts did the relatives eventually win the right to alternate weeks of custodial care of Julia.

The predetermination of the case also seemed to explain Family Court's response to a motion to reopen. When the parents moved immediately after fact-finding summations to present highly probative proof regarding their child's medical condition, Family Court rejected their application. Indeed, on the day arguments on the motion were to be heard, the court issued its fact-finding decision. Drawing heavily upon Social Services' slanted summary of testimony, the court concluded that severe abuse of Julia had been shown by clear and convincing evidence and that derivative neglect of John and Emily had been proven by a preponderance of the evidence. In a procedural anomaly that worked to the parents' advantage upon appeal, Family Court allowed the opinions of the parents' medical experts for dispositional purposes. Thus, upon reversal of the denial of the motion to reopen, the appellate court was able to consider such proof for fact-finding purposes.

After the finding of severe abuse, Family Court had only two dispositional options as to Julia: termination of parental rights or suspended judgment. The proof so overwhelmingly preponderated in favor of suspended judgment that the decision to sever parental rights was stunning. The most cogent and salient proof was a comprehensive report from the court-appointed psychologist urging that terminating parental rights would do grievous harm to all three children. Although Social Services required the parents to *take* a parenting class, they had the skills to *teach* such a class, according to the neutral expert. The children's law guardian also advocated urgently for a disposition of suspended judgment.

In addition to severing parental rights as to Julia, Family Court ordered ongoing Social Services intervention and intrusion into the lives of John and Emily, who had remained at home in their parents' care, without any services, throughout the litigation. The Court embraced the attitude of the Social Services agency, whose conviction that the parents were abusers fueled an intransigent insistence that the other children were derivatively neglected—in the face of uncontroverted proof that they were exceptionally happy and well-adjusted.

Rather than realizing that the parents' superb care of John and Emily supported a benign interpretation of their sister's ambiguous condition, Social Services struggled to find sinister theories to explain the alleged dichotomy in the care of the children. While Social Services and the foster parents had floated as a theory Munchausen's Syndrome by Proxy, they could not garner one scintilla of expert support for so branding either parent. On the contrary, the only credible evidence on that topic, provided by the court-appointed expert and a therapist who extensively counseled the family during the litigation, was that such experts had considered and completely rejected the diagnosis.

Throughout the parents' legal struggles in Family Court, they fortunately had superb trial counsel: Eleanor DeCoursey of Gordon, Tepper and DeCoursey (a member of the Executive Committee of the NYSBA Family Law Section) and Laurie Shanks, a clinical professor of law at Albany Law School. As middle-class professionals, the parents would not have qualified for assigned counsel, yet the exorbitant cost of protracted proceedings would have been devastating, and trial counsel thus generously agreed to represent the parents at a discounted rate. The parents' trial counsel sought appellate counsel with a fresh perspective and contacted me to handle the appeal. In agreeing to do the appeal pro bono, I reflected on NYSBA's expansion of its definition of pro bono to encompass representation to litigants in the "gap group"—persons who are not indigent and do not qualify for pro bono under the core definition, but who need free or low-cost services to achieve justice.

In *Julia BB.*, achieving justice took a startlingly long time. The timetable of the case is chilling when measured against Julia's life and highlights the problems of the Family Court practice of scheduling only a day or two of testimony a month in a case that requires dozens of days of testimony. Julia was born in October 2003 and removed from her parents in March 2004, when she was six months old. Not until April 2006, when Julia was 2½ years old, did Family Court render its decision to terminate parental rights. Fortunately, the Third Department immediately granted a stay of that decision, allowing ongoing family contact throughout the pendency of the appellate proceedings.

The case was orally argued in September 2006. Given the size of the record—7,000 pages—the Third Department did not render its extraordinary decision until May 2007, when Julia was 3½ years old. In a powerful, unanimous, 23-page decision, the reviewing court deplored the decision to terminate parental rights, ordered Julia to be returned forthwith to her parents, and directed that the Family Court Judge have no further role in this case.[1] Perhaps most striking was the reviewing court's probing discussion of medical proof and the scathing criticism of doctors whose objectivity appeared severely compromised.

The doctors' testimony invited such attack. However, given the conservative nature of appeals and the reviewing court's traditional deference to the trial court's credibility determinations, the in-depth dissection of the prosecution's proof was remarkable. As with any appeal, while the trial court had the advantage of observing the witnesses' demeanor to make credibility determinations, the appellate court had the advantage of the objectivity of multiple judges. Such dispassion was critical in a case like *Julia BB.*, in which, in a seeming domino effect, a premature belief that Julia was abused, colored the views and drove the actions of person after person aligned against the natural parents.

The day the Third Department's decision was handed down, Julia's mother waited anxiously for the promised delivery of the child who had been removed from her care three years, three months earlier. Rather than receiving the child that day, the stunned mother received Social Services' affidavit of intention to appeal and an invocation of the agency's right, as a governmental body, to an automatic statutory stay. The delay of the long-awaited joyful homecoming was short-lived. One week later, the Court of Appeals lifted the stay, and Julia went home. Social Services delayed by several more months the parents' ultimate vindication by filing futile motions for reargument in the Third Department and for leave to appeal in the Court of Appeals, with the support of *amici curiae* who had not read the record and briefs.

The agency relied on the case of *In re Philip M. (Commissioner of Social Services of City of NY)*[2] to support its motion. But that case did not deal with the central standard at issue in *Julia BB.*—the clear and convincing standard governing termination of parental rights proceedings. Further, *Philip M.* was about young children who had contracted a sexually transmitted disease while in their parents' care, and there was no possible innocent explanation for their injuries. In *Julia BB.*, the symptoms were explained by a medical condition. The agency also cited *In re Sidney FF. (Ulster County Dept. of Social Services—Ralph FF.)*,[3] a case involving a father who offered incredible explanations about how his child's fractures accidentally occurred. In *Julia BB.*, the parents did not offer false excuses. Instead, they repeatedly sought medical diagnosis and treatment for their child's skin discolorations, swelling, sweating, and fractures.

In the motion for permission to appeal, the agency also implicitly contended that the opinions which allegedly supported the abuse claim, which were narrowly based on X-rays and other tests, were inherently more reliable than the opinions that there was no abuse, which were broadly based on a global view of the evidence. The latter group of views included those of the children's pediatrician, the parents' experts, the court-appointed psychological expert, and the Third Department. This case dramatizes that medical science sometimes offers no clear-cut answers about the cause of physical conditions and that, for the truth to emerge, an open mind and an understanding of all relevant circumstances can be critical for doctors and Social Services agencies, as well as for lawyers and judges.

An *amicus curiae* brief, submitted in support of the Social Services' leave application by a Harvard professor on behalf of a children's legal advocacy group, complained that the Third Department had erroneously failed to find that the fractures detected in Julia constituted a serious physical injury. The court had placed other children at grave risk, since the bar for removal was now too high, according to the *amicus*. However, under Social Services Law § 384-b(8), the Penal Law § 10.00(10) definition applies, so that serious physical injury means a physical injury which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. Cases finding no physical injury demonstrate the propriety of the Third Department's holding in *Julia BB*.[4]

In cautioning that the finding of no serious physical injury would impact removals of at-risk children, the *amicus* brief conflated two disparate standards—the one for a finding that a child should be temporarily removed pending proceedings against the parent (*see generally Nicholson v. Scoppetta*[5]) and the one for justifying permanent and irrevocable severance of parental rights (*see generally Santosky v. Kramer*[6]). The *amicus* also claimed that a "virtual certainty" standard had been improperly imposed, when in actuality the Third Department correctly applied the clear and convincing evidence standard. Such elevated standard is constitutionally mandated because of the fundamental liberty interest of natural parents in the care and custody of their children.

Aptly and tellingly, the *amicus* brief was supported by the National Council for Adoption, underscoring the fact that the case had been improperly treated by Family Court and the Social Services agency as dealing with the rights of the foster parents, rather than the rights of the natural parents. A number of local services agencies, perhaps alarmed by the notion that an appellate court could question and undo the efforts of a sister agency, also joined in support of the motion for leave to appeal. Fortunately, the motion for permission and support of *amici curiae* were all to no avail. When the final agency application was denied, bringing closure to the family's long, anguished legal journey, Julia was four years, two months old. Haunted by the ongoing suspicions of the local agency even after dismissal of the petitions, the parents moved out of state to start a new life with their three children. The family is thriving there.

Endnotes

1. *See In re Julia BB*. (*Saratoga County Dept. of Social Services—Diana BB.*), 42 A.D.3d 208, *lv. denied*, 9 N.Y.3d 815 (2007).
2. 82 N.Y.2d 238 (1993).
3. 44 A.D.3d 1121 (3d Dep't 2007).
4. *See, e.g., People v. Gray*, 30 A.D.3d 771 (3d Dep't 2006), *lv. denied*, 7 N.Y.3d 848 (2006) (defendant shot victim with shotgun from 20 feet away, causing 32 pellets to become lodged in arm, shoulder, chest; victim spent 12 days in hospital, missed 10 days of work, suffered numbness, restrictions of use for four months; no serious physical injury found); *People v. Parrotte*, 267 A.D.2d 884 (3d Dep't 1999), *lv. denied*, 95 N.Y.2d 801 (2000) (infant suffered trauma to chest and abdomen, resulting in 20 fractured ribs, elevated enzyme levels in liver and pancreas, and blood in kidney; though severe, injuries were not life threatening; no serious physical injury found).
5. 3 N.Y.3d 357 (2004).
6. 455 U.S. 745 (1982).

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Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Currently, Massachusetts is the only state in the nation that permits same-sex marriage. Civil unions are available to same-sex couples in Vermont, Connecticut and New Jersey. Proponents of same-sex marriage rights argue that civil unions are not "separate but equal" rights. In fact, in *In re Langan v. State Farm Fire & Cas.*, 48 A.D.3d 76, 849 N.Y.S.2d 105 (3d Dep't 2007), the court found that the surviving member of a Vermont civil union did not have standing as "legal spouse" of the deceased employee so as to entitle him to spousal survivor death benefits under the New York Workers' Compensation Act since parties to civil unions are not spouses.

In 2006, the New York Court of Appeals[1] ruled that same-sex couples do not have a constitutional right to marry, but the issue (http://365gay.com/Newscon06/07/070606nymarr.htm) could be taken up by the Legislature. Last year, then-governor, Eliot Spitzer became the first governor in the country to introduce same-sex marriage legislation (http://www.365gay.com/Newscon07/04/042707spitzer.htm) The bill passed the Democrat-controlled Assembly in June 2007 (http://www.365gay.com/Newscon07/06/062007yorkmar.htm) but Republicans, who control the Senate, have refused to consider the legislation.

Massachusetts has a law (virtually unknown until enforced by then-Governor Mitt Romney) that provides that unless you live in Massachusetts, you can't go there and get married. However, based on the most recent same-sex marriage cases, gay couples can go to most of Canada, Spain, the Low Countries, or Scandinavia, and return to New York to have those marriages recognized.

Canadian same-sex marriage is recognized in New York by the Second and Fourth Departments

Martinez v. County of Monroe, 850 N.Y.S.2d 740 (4th Dep't 2008)

In a unanimous decision, the Fourth Department ruled that marriages of same-sex couples entered into outside of New York must be recognized in New York. This is the first appellate court decision in the state and the first known decision in the country to hold that a valid same-sex marriage must be recognized here.

A lesbian couple was married in Canada, but the plaintiff's employer, a community college, refused to recognize the marriage and would not extend health care benefits to her spouse. Later, the college extended benefits through a domestic partnership benefit plan. The plaintiff sued, claiming that failure to recognize her marriage violated the New York State Constitution's equal protection requirement and the state Human Rights Law's prohibition of sexual orientation discrimination in employment. The court below dismissed the case on summary judgment. The appellate court reversed, reasoning as follows:

> For well over a century, New York has recognized marriages solemnized outside of New York unless they fall into two categories of exception: (1) marriage, the recognition of which is prohibited by the "positive law" of New York and (2) marriages involving incest or polygamy, both of which fall within the prohibitions of "natural law." . . . Thus, if a marriage is valid in the place where it was entered, 'it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law or the express prohibitions of a statute. *Id* at 742.

The court concluded that plaintiff's marriage does not fall within either of the two exceptions to the marriage recognition rule. The New York legislature has not enacted any statute specifically forbidding the recognition of same-sex marriages performed elsewhere (i.e., pursuant to the federal Defense of Marriage Act), and thus the "positive law" exception does not apply. Also, the natural rule exception does not apply because "[t]hat exception has generally been limited to marriages involving polygamy or incest or marriages 'offensive to the public sense of morality to a degree regarded generally with abhorrence,' and that cannot be said here." *Id.* at 743.

The court distinguished the Court of Appeals' *Hernandez* case, stating that the case stands only for the proposition that the New York Constitution does not compel state recognition of same-sex marriages solemnized in New York. The court noted that New York has not chosen to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state pursuant to the federal Defense of Marriage Act, and therefore it is not against New York's public policy to recognize valid same-sex marriages entered into in another jurisdiction.

Author's note: The court's matter-of-fact assertion that same-sex marriage does not offend the public's sense of morality "to a degree regarded generally with abhorrence" is a victory for supporters of same-sex marriage, but may be astonishing to those who argue against it on grounds of traditional religiously based morality.

***Funderburke v. New York State Department of Civil Service*, 2008 N.Y. Slip Op. 2789, 2008 N.Y. App. Div. LEXIS 2753 (2d Dep't March 25, 2008)**

In my previous column, the case *Funderburke v. New York State Department of Civil Service*, 13 Misc. 3d 284, 822 N.Y.S.2d 393 (Sup. Ct., Nassau Co. 2006) was discussed. In that case, a schoolteacher was denied health insurance benefits to his same-sex spouse despite his Canadian same-sex marriage. While the plaintiff's appeal was pending, the Department of Civil Service changed its policy, and effective May 1, 2007, it will respect out-of-state marriages of same-sex couples for the purposes of extending spousal medical insurance benefits to current and retired state and local government employees.

The department's agreement resolved the issue itself, and therefore the appeal was moot. However, Lambda Legal argued that the lower court's decision still technically stood and created confusion about the status of the couple's marriage and of state law. The appellate court agreed, and therefore vacated the lower court's decision.

New York's first gay divorce

***Beth R. v. Donna M.*, 853 N.Y.S2d 501 (Sup. Ct., N.Y. Co. 2008) (Drager, J.)**

A lesbian couple was married in Canada. The defendant gave birth to two children by artificial insemination, both before and after the parties married. The plaintiff did not adopt the children, but she was named on the children's birth certificates as the parent. Defendant held out plaintiff to the world, and to the children, as their parent. The children were given plaintiff's last name. The older child was encouraged to call plaintiff "mom" and plaintiff's relatives by familial titles. (The other child was an infant.) The extended families of each party were encouraged to treat plaintiff as a parent. Defendant held out plaintiff as a parent to the children's nanny, doctor, teachers, and school administrators. Defendant accepted health insurance and financial contributions from plaintiff for the benefit of the children.

Plaintiff brought a divorce action against defendant. Defendant moved to dismiss the action on the grounds that the same-sex marriage was void under New York Law, and that plaintiff had no standing to continue a relationship with the children. In her cross-motion, plaintiff requested that the court determine whether plaintiff had continuing custodial rights and support obligations for the children.

Defendant's motion to dismiss was denied and plaintiff's cross-motion was granted to the extent that the parties were directed to appear for a court conference to address the custodial issues of this action. The court relied on *In re Shondel*,[2] 7 N.Y.3d 320, 820 N.Y.S.2d 199 (2006) and *Jean Maby H v. Joseph H*,[3] 246 A.D.2d 282, 676 N.Y.S.2d 677 (1996), both equitable estoppel cases: "If the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate." *Id.* at 518. The court reasoned as follows:

> A child by the age of three (the age of defendant's child) clearly identifies with parental figures. The abrupt exclusion of a parental figure may be damaging to the emotional well being of that child. Although only an infant, it is conceivable that S.R. might suffer emotional consequences as well and she may well be considered the legitimate child of both parents having been born during the marriage. Certainly both children might suffer financial consequences due to the loss of support that would be available to them from Plaintiff. The best interests of the children require exploration of their custodial and support needs as between the parties to this action. DRL 70. *Id.* at 521-522.

Other Cases of Interest

Agreements

Clause in separation agreement barring conversion divorce for five years found unconscionable and void as against public policy

***P.B. v. L.B.*, 19 Misc. 3d 186 (Sup. Ct., Richmond Co. 2008) (Silber, J.)**

The parties entered into a separation agreement which provided, *inter alia*, that the husband could not seek a divorce until five years after the execution of the agreement without the wife's prior written consent. Without the wife's consent, the husband filed for a conversion divorce one year after the execution of the agreement. The wife moved to dismiss the case. The court denied the motion, finding the provision at issue unconscionable and against public policy. Unlike other provisions in the agreement, the provision at issue was not reciprocal as the wife was not barred from pursuing a divorce within the five-year period. Pursuant to DRL § 170(5), (6), the right to divorce is absolute after a separation of a at least one year following the execution of the separation agreement, and the statute does not specify that a separation agreement can contain waivers of a party's fundamental right to seek a divorce after one year.

Child Support

Where child support order expires in issuing state, mother lacks subject matter jurisdiction to bring new child support application in New York

***Spencer v. Spencer*, 10 N.Y.3d 60 (2008)**

As part of the parties' Connecticut divorce, the court entered a child support order, which obligation terminated upon the child reaching the age of majority, 18. The mother moved to New York and filed a motion for child support after the son turned 18. The appellate court found that since the Connecticut child support order had expired, there was no existing order to modify and thus no jurisdictional obstacle to entertain the mother's motion for a new child support order. The Court of Appeals reversed. Under both the Uniform Interstate Family Support Act, FCA § 580-101 and the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B, since the father continued to reside in the issuing state, Connecticut retained continuing, exclusive jurisdiction of its support order and New York had no subject matter jurisdiction to modify it. The New York order changed the amount, scope, and duration of the Connecticut order, which was therefore a "modification" of that order. Even if New York had jurisdiction to modify the initial order, Connecticut law still controlled the duration of the father's support obligation.

Father mandated to support child born by artificial insemination despite parties' agreement absolving him of such responsibility

***Laura WW v. Peter WW*, 2008 N.Y. Slip Op. 3266, 2008 N.Y. App. Div. LEXIS 3173 (3d Dep't April 11, 2008)**

During the parties' marriage, after the parties had two children, the husband had a vasectomy. Thereafter, the wife became pregnant through artificial insemination without the husband's written consent, and the parties separated a few months into the pregnancy. Their separation agreement included a provision that the husband would not be financially responsible for the third child. The trial court found that provision to be against public policy and held that the husband was the child's legal father. The appellate court affirmed, reasoning that it is not in the child's best interest to leave the child fatherless and without financial support and the father expressed his implied consent to the procedure.

The husband argued that DRL § 73 is a defense to his responsibility since he did not sign a doctor's authorization. DRL § 73 provides as follows:

> Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes. . . . The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he [or she] had rendered the service.

The court found that the statute is inapplicable to this situation as follows:

> It is clear that the overriding purpose of the statute is to give certainty to the legitimacy of those children conceived via AID whose parents complied with all of the statutory prerequisites, rather than to create a means of absolving individuals of any responsibility toward a child, even if the proof could otherwise establish that the individual participated in and consented to the decision to create the child. *Id* at 3.

The court found that the husband expressed his implied consent because he signed a frozen donor semen specimen agreement, the husband made arrangements for the wife to go to her doctor's appointment, the husband did not tell the wife that he would refuse to acknowledge the child if she went through with the procedure, the parties' separation agreement stated that the child was born by artificial insemination by mutual consent, and the husband acknowledged that he would have accepted the child had the parties stayed together.

The husband's assertion that his wife forced him to sign the donor agreement by threatening to leave him did not sway the court because such situation is no different from a husband who creates a child by natural methods in an attempt to salvage a troubled marriage.

Custody

Relocation granted

***Bruno v. Bruno*, 47 A.D.3d 606, 849 N.Y.S.2d 598 (2d Dep't 2008)**

The court below's grant to the mother to relocate with the child to Florida was upheld on appeal because she proved by a preponderance of the evidence that the move would enhance the child's life economically, socially, and educationally. (The court does not state the facts that led to this conclusion.) This conclusion was reached despite that the forensic psychologist found the move would affect the child emotionally and recommended against relocation. The court was not required to accept the psychologist's conclusions or recommendations. It found that the psychologist was "woefully under-informed" in conclud-

ing that the father had benefited from his psychotherapy and anger management courses and was no longer a threat to the mother, especially since the court observed the father's demeanor and noted "numerous occasions the court had to admonish Defendant for his gestures, glaring and facial expressions and utterances directed at Plaintiff during her testimony." *Id.* at 600.

***Smith v. Bonvicino*, 2008 N.Y. Slip Op. 3226, 2008 N.Y. App. Div. LEXIS 3106 (2d Dep't April 8, 2008)**

The mother was granted leave to relocate with the child to Oklahoma. The court found it was in the child's best interest because the move would allow the child to benefit from an enhanced relationship with her half-brother and the improved economic opportunities for the mother.

Author's note: These relocation cases are troubling because not enough facts were stated to use them as precedents. Moreover, the court seems to imply that daily e-mailing and/or extended visitation somehow makes up for the loss of a daily interactive relationship.

Legal Fees

Counsel's retainer is secured by jointly owned marital residence

***Iriarte v. Iriarte*, 2008 N.Y. Slip Op. 28087, 2008 N.Y. Misc. LEXIS 1182 (Orange Co., March 13, 2008) (Giacomo, J.)**

The husband was a stockbroker, earning approximately $300,000/year and claimed that he had been laid off, and has been unable to secure new employment. The wife was a hair colorist, earning less than $10,000/year. The wife sought to change counsel shortly before the case was to go to trial. Her new counsel requested a $40,000 retainer, anticipating that this would pay for the cost of the litigation. The wife had only $15,000 to pay toward the retainer, and therefore counsel made the retainer agreement contingent upon his securing the balance ($25,000) by court approval pursuant to 22 N.Y.C.R.R. § 1400.5 to file a lien against the marital residence.

The husband opposed, claiming that the proposed mortgage lacks consideration since the wife's counsel has not performed any legal services. The court considered such argument irrelevant, and granted the application, since the N.Y.C.R.R. does not specifically prohibit a retainer application. The court considered that the wife had no other resources from which to pay her counsel and that the large equity in the marital residence will most likely be shared by both parties, particularly in light of the 26-year marriage.

The court's approval of security was based, in part, on protecting the wife's ability to secure counsel and level the proverbial playing field:

> despite DRL 237 and its provision for interim fees, both judges and lawyers recognize that in most cases a matrimonial lawyer who undertakes to represent a "non-monied" spouse, may never be compensated. Thus it can be difficult for the non-monied spouse to obtain counsel without a very substantial retainer and, in some cases, this can only be obtained via a lien on the marital assets. *Id.* at 1182.

Author's note: Kudos to the court for protecting non-monied spouses and ensuring that their attorneys are paid.

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Endnotes

1. *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (2006) was fully discussed in my column in the Spring 2006 and Fall 2007 issues of the *Family Law Review*.
2. This case was reviewed by this author in the Fall 2006 issue of the *Family Law Review* (Vol. 38, No. 2 at p. 40).
3. This author's firm represented the non-biological father who successfully invoked the equitable estoppel doctrine.

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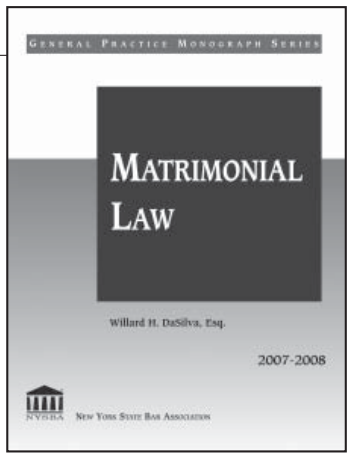

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The Family Law Review is published for members of the Family Law Section of the New York State Bar Association. The opinions expressed herein are those of the authors only, and not those of the Section Officers or Directors.

Copyright 2008 by the New York State Bar Association.
ISSN 0149-1431 (print) ISSN 1933-8430 (online)

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