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Notes and Comments

Elliot D. Samuelson, Editor

Is the New Law Eliminating the Six-Year Statute of Limitations to Prevent Attack Against Pre- and Post-Nuptial Agreements Constitutional?

The law giveth and the law taketh away . . . as did the New York State legislature when Governor Spitzer signed this legislation into law July 3, 2007.

Unfortunately, the noble goal to protect spouses during marriage by tolling the statute of limitations applies only to one segment of such class, but not to others similarly impacted by such legislation. As such, the new statute has a likely prospect to be declared unconstitutional and set aside.

If one were to make a perfunctory reading of the new legislation without reading it to the very end, the fact that the legislation does not apply to agreements executed on or before the effective date of the new legislation would not be known. Despite the fact that anyone signing a post- or pre-nuptial agreement on or after July 3 will be required to bring an action within only three years after separation occurs to contest the agreement, any litigants who continue in their marriage and have agreements that predate the statute would be simply out of luck. As such, the new legislation simply does not afford equal protection of the law to all of its citizens similarly situated. In essence, there is one class of citizens who will be permitted to attack an unconscionable agreement and another group that will be denied such right simply because their agreements were signed prior to the effective date of the legislation, even if their actions for divorce are instituted on the same date.

Viewed from any aspect, such a result is grossly unfair. This is especially true since such spouses entering into pre- and post-nuptial agreements prior to the effective date of this legislation will not have had a judicial determination concerning their marriage or its financial aspects.

Questions remain as to the impact of this statute in other areas. For example, there has been a dichotomy that exists between the First and the Second Judicial Departments concerning whether or not during marriage the statute of limitations is tolled. In the past, the view in the First Department was that there is such tolling, but in the Second Department the court has ruled otherwise.

Consider the following example when determining the extent of the injustice that will befall future litigants. A couple marry and enter into a pre-nuptial agreement. The husband has $100 million in assets, the wife none.

Inside

The wife after completing college with no work experience enters into a pre-nuptial agreement which provides her $10,000 maintenance for 5 years. Her husband at the time of the making of the agreement earned between $750,000 and $1.5 million annually. Ten years later after the birth of three children and the acquisition of another $25 million in assets, the husband commits adultery and communicates a sexual disease to the wife. There is no provision whatsoever for the wife to obtain equitable distribution unless properties are placed in her sole name or in joint names with her husband during marriage. No such properties exist.

Because the new statute continues to recognize the six-year statute of limitations as a bar to attacking the pre-nuptial agreement, the wife is without remedy since she lives in the Second Department. If she brings an action for divorce seeking maintenance, equitable distribution, or child support, an attack of her pre-nuptial agreement will be barred by the statute of limitations and she will be unable to receive any property award from the court and will be relegated to $10,000 a year support for 5 years. Consider further that the marital residence was constructed for $7 million and the wife actually was in charge of its acquisition, construction and furnishing. Despite the husband's promise to place title in both their names, title rested solely in his name. Under such fact pattern, she could not attack the agreement and would be forced to accept the financial benefits provided, if she asked for a divorce and wanted to move on with her life. Conversely, if she was fortunate enough to live in the First Department, she could bring such action since there was a tolling of the statute, and she could bring an action for divorce and have the issue of whether the agreement was fair and conscionable decided by the court.[1] If she was successful and the agreement was set aside, the court could fix maintenance for her and the children and make a distribution of marital assets, i.e., any property acquired during the marriage. Does that make any sense to you? Is this the result the legislature sought to achieve? Since the legislative intent of the statute was to aid spouses during marriage from an unfair result, why did it exclude another segment of its citizens who are equally affected?

I am certain that in the next case that is litigated in the Second Department counsel will argue that the Appellate Court should reverse its position and adopt the view in the First Department that the statute of limitations should be tolled during marriage because the new legislation is an expression of what the law should be. Because of the tremendous injustice that becomes apparent when considering these concepts, the Second Department should change its view to be consistent with the tolling rule during marriage in the First Department.

Unfortunately, during the time *DeMille v. DeMille*[2] was being litigated, the Court of Appeals denied a motion for leave to appeal because the order of the Appellate Division at such time was not a final determination of the case. Further, the Court of Appeals in *Bloomfield v. Bloomfield*[3] declined to address the tolling issue. As things now exist, the Court of Appeals has an opportunity to hear the next case brought before it because of the split in views in the First and Second Department. Moreover, the Court of Appeals should right the wrong the legislature enacted, by a holding that the statute is tolled during marriage.

Whether the Court of Appeals will do so, or when it will do so, and whether the statute will be attacked for unconstitutionality remain to be seen. But, it remains clear that thousands of prospective litigants will be sentenced to a lifetime of grief and unhappiness because they cannot divorce their spouses due to financial concerns. Whatever indeed will happen we are hopeful that it will happen sooner rather than later. Or perhaps an amendment to the statute will shortly be made to right this wrong.

Endnotes

1. However, the First Department may decline to follow its tolling precedent in light of the new statute.
2. 32 A.D.3d 411 (2d Dep't 2006).
3. 97 N.Y.2d 188 (2004).

Elliot D. Samuelson is the senior partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP and is a past president of the American Academy of Matrimonial Lawyers, New York Chapter and is included in *The Best Lawyers of America* and the *Bar Registry of Preeminent Lawyers in America*. He has appeared on both national and regional television and radio programs, including *Larry King Live*. Mr. Samuelson can be reached at (516) 294-6666 or info@samuelsonhause.net.

Inconsistent Appellate Enforcement of the Recital Requirements in DRL § 240(1-b)(h)

By Elliott Scheinberg

Public Policy and Purpose

In order to comprehend the nature of the discussion regarding the recital requirements set forth in DRL § 240(1-b)(h), it is first important to understand the vigilance that the Legislature exercises over child support, as developed in DRL § 240, the Child Support Standards Act (CSSA). It is settled law that the CSSA is an expression of important public policy.[1] The Executive and Legislative branches of the New York State government joined to enunciate a strong public policy in New York State with respect to a minimum and adequate level of support for children.[2] A court cannot permit an unemancipated child to be without an appropriate level of financial support, regardless of the propriety of the order issued.[3] The CSSA includes a numeric formula for calculating child support[4] and governs the standards and criteria by which child support is determined, whether by agreement or judicial fiat. The Act has among its objectives the assurance that both parents contribute to the support of the children, and that the children not "unfairly bear the economic burden of parental separation" (Governor's Program Bill Memo, Bill Jacket, L 1989, ch. 567).[5]

Mandatory Recitals Where Support Deviates from the CSSA

Agreements which contract away the obligation to support a child according to the statute contravene public policy.[6] Although parties may opt out of the statute, the "opt out" provision was intended to protect the interest of the children who are the intended beneficiaries of the CSSA.[7] Parties desiring to fashion an amount of child support different from what is contemplated under the statute must satisfy the recitals in DRL § 240(1-b)(h):[8]

> (1) the parties have been advised of the substance of the CSSA; (2) the basic child support pursuant to the CSSA would presumptively result in the correct amount of child support; (3) what the CSSA basic child support would have been in the specific circumstances presented; and (4) the reasons why the agreed upon child support deviates from that set forth in the CSSA.

Prior to the 1992 amendment to DRL § 240(1-b)(h) (which had no retroactive effect on prior agreements[9]), the CSSA provided that an agreement containing a child support provision had only to include a statement that the parties were aware of the CSSA. By amending the CSSA to broaden the requirements, the Legislature evinced the intent that children are not adequately protected by the parties' general knowledge of the rights and obligations created by the CSSA alone; parties now need more specific information prior to accepting less child support.[10]

Canons of Statutory Construction: Legislative Intent and Statutory Directive as to Performance of an Act in a Specified Manner

New York Statutes § 92, "Legislative intent as primary consideration," is the bedrock of the canons of statutory construction. This statute directs that "[t]he primary consideration of the courts in the construction of statutes is to ascertain and give effect to the intention of the Legislature." The comment could not possibly express any more vigor in its emphasis that "the duty of courts" in the application of this rule is a fundamental principle of statutory construction:

> . . . in the construction of statutes the basic rule of procedure and the primary consideration of the courts is to ascertain and give effect to the intention of the Legislature. Hence the legislative intent is said to be the "fundamental rule," "the great principle which is to control," "the cardinal rule" and "the grand central light in which all statutes must be read."
>
> The intent of the Legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result. Indeed the Legislature's intent must be ascertained and effectuated whatever may be the opinion of the judiciary as to the wisdom, expediency, or policy of the statute, and whatever excesses or omissions may be found in the statute.

New York Statutes § 173, "Mode of performance of act not material," another canon, directs:

> A statute directing the performance of an act in a specified mode, which mode is not material, will be considered as directory only; but when the mode is prescribed so as to prohibit the perfor-

> mance in any other manner, the statute will be considered mandatory . . . when the Legislature prescribes a certain way in which an act shall be done, it may appear to the court that it was the intention to prohibit the performance in any other manner; and if such is the case the statute will be considered mandatory. . . . A statute requiring an assignment for the benefit of creditors to be acknowledged is mandatory, as it implies that one shall not be made without an acknowledgment. Likewise the requirement that such an assignment shall be accompanied by a schedule is essential to the validity of the assignment.

Kennilwood Owners Ass'n, Inc. v. Spanier[11] requires that where "a statute clearly imposes a procedure governing the validity of an act out of which new jural relations arise, we must read the statute narrowly to give effect to the intent of the Legislature." As noted in the introduction to this section, child support constitutes important public policy for which reason DRL § 240(1-b)(h) can be construed as only acting in furtherance of the legislative purpose. It can hardly be disputed that the recital requirement in DRL § 240(1-b)(h) is quintessential to the validity of the assignment.

Role of the Bright Line Is to Put Parties on Notice; DRL § 240(1-b)(h) Establishes a Bright Line

A bright-line test establishes a demarcation.[12] It is for the Legislature, not the courts, to weigh these policy interests and choose between a flexible or bright-line rule.[13] An invariable statutory rule provides a bright line of reliability and certainty.[14] By way of example, in *Matisoff v. Dobi*,[15] the husband attempted to acknowledge the postnuptial agreement midtrial via his wife's testimony. The Court of Appeals held that based on the plain language of DRL § 236B(3), the Legislature exacted strict adherence with the procedural formalities and that compliance with the statutory language amounted to a bright-line test. *Matisoff* emphasized that a bright line functions beneficially in that it "is easy to apply and places couples and their legal advisors on clear notice of the prerequisites" and avoids speculation as to enforceability.

The procedures in DRL § 240(1-b)(h) display the indicia of a bright line, even though they have never been formally designated as such. They are extremely specific, nonwaivable, and promote an important legislative purpose. There can be no question that this statute is navigated by the canons and principles set forth in Statutes §§ 92 and 173 and in *Kennilwood*.

Inconsistent Enforcement of DRL § 240(1-b)(h) in the Second and Third Departments

Accordingly, mandatory compliance with the statutory directives is an immutable precondition to the right to opt out of the guidelines. It, therefore, follows that agreements in violation of DRL § 240(1-b)(h) are hence void, not merely voidable; after all, child support gyrates about the axis of public policy. Nevertheless, there has been remarkable inconsistency with the enforcement of agreements that have failed to comply with the recital requirement in § 240(1-b)(h). Notwithstanding appellate construction of § 240(1-b)(h) as unyielding, there has been a lack of precision and uniformity in the enforcement of DRL § 240(1-b)(h), even within the Third Department, which has ruled rigidly as to strict compliance with DRL § 236B(3).

The inconsistency in the enforcement of illegal agreements becomes puzzlingly compounded when courts not only direct hearings to determine the subjective knowledge of the parties regarding the elements in § 240(1-b)(h) but also permit substantive relief grounded upon the very agreements that the Legislature and the courts have variously declared illegal, invalid, unenforceable, or void *ab initio*.

The Second Department

Hearings to Determine "Awareness" of the CSSA

In *Lepore v. Lepore*,[16] the Second Department underscored that a party's awareness of the requirements of the CSSA is not the dispositive consideration under the statute; rather, DRL § 240(1-b)(h) requires specific recitals. In *Bill v. Bill*,[17] the parties' stipulation regarding child care contribution failed to comply with DRL § 240(1-b)(h). The hearing presented conflicting testimony regarding the parties' subjective beliefs as to whether the stipulation intentionally excluded a provision requiring child care costs. The Appellate Division concluded that the stipulation did not thus operate as an effective waiver of the wife's statutory entitlement to demand a contribution for her reasonable child care expenses.

Bill quoted from *Sievers v. Estelle*,[18] wherein the Third Department held that "the purpose of the statutory requirements would not be served by permitting the omission to be cured on the basis of a hearing to determine the parties' subjective knowledge and intent." By amending the CSSA in 1992[19] to require the inclusion of additional specific information, the Legislature evinced the intent that the parties' general knowledge of the rights and obligations created by the CSSA was no longer sufficient.[20] That said, *Bill*, nevertheless, cited two decisions—*Sloam v. Sloam*,[21] its own precedent case, and *Gonsalves v. Gonsalves*,[22] a Third Department decision—both of which emanated from the pre-1992 amendment to

§ 240(1-b)(h),[23] wherein both cases were remanded for hearings as to whether the agreements had been executed with full knowledge of the CSSA.

In *Maser v. Maser*[24] and *Appel v. Appel*,[25] both decided after *Bill*, the Second Department contradicted itself by directing hearings to determine awareness of the CSSA at the time the stipulation was executed. It also does not escape notice that *Lepore*, above, which held strict compliance, puzzlingly cited *Sloam*.

In sum, DRL § 240(1-b)(h) follows an undecipherable path in the Second Department (it fares no better in the Third Department, discussed below): *Bill* adopts *Sievers*, a Third Department decision that underscored the Legislature's solidification of the CSSA in 1992, to wit, that the statutory requirements would not be served by permitting the omission of the recitals to be cured on the basis of a hearing to determine the parties' subjective knowledge and intent. *Sievers* retracted the validity of *Gonsalves*, an earlier decision from its own department, following the 1992 "get tough" amendment to § 240(1-b)(h). Nevertheless, *Bill*, a post-1992 amendment case, cites *Gonsalves* in support of a hearing. Although *Lepore* also gave § 240(1-b)(h) a strict reading it, nevertheless, cited *Sloam*. *Appel* decided after *Bill* (which adopted *Sievers,* which rejected *Gonsalves,* and cited *Gonsalves*).

Savini v. Burgaleta

In *Savini v. Burgaleta*,[26] the Second Department recently tackled the problem of how Family Court addressed an application to enforce an illegal agreement, which agreement the court could not vacate because it lacked subject matter jurisdiction. Further complicating this case was the undisclosed fact in the decision (which was made a part of the record on appeal and made available to this writer via the courtesy of Nancy Kellman, Esq., who has fought a valiant battle against a seeming windmill) that neither of the parties' two oral agreements, both spread on the record on April 15, 1996 and October 29, 1996, respectively, and later incorporated, but not merged, in the judgment of divorce, were in compliance with the mandatory recitals in DRL § 240(1-b)(h).

Following their divorce, the parties entered into yet another agreement, dated April 19, 1997, which also failed to comply with the statute, wherein the mother purportedly agreed to: (1) accept the sum of $200 per week as child support and (2) not sue to recover the arrearages arising from the April 15, 1996 and October 29, 1996 stipulations.

On or about August 11, 2004, the mother commenced a proceeding in the Family Court to enforce the child support provisions of the *divorce judgment* dated August 22, 1997, which included the April 1996 and October 1996 oral stipulations. The father sought to transfer the petition to Supreme Court, and to have it dismissed based on the April 19, 1997 agreement. Supreme Court denied the transfer and held that the April 19, 1997 agreement was not a valid modification agreement because it failed to comply with the provisions of DRL § 240(1-b)(h) and remanded the balance of the issues to Family Court.

Thereafter, in Family Court, the Support Magistrate, *sua sponte*, (correctly) observed that "the prior Judgment of Divorce and the stipulations did not comply with the CSSA." The Support Magistrate then considered child support *de novo*, resulting in significantly increased support retroactive to the date of the petition. Citing the New York Constitution, Article 6, § 13(c) and FCA § 466, the Appellate Division upheld the father's contention that the Family Court had been without subject matter jurisdiction to vacate as illegal the child support provisions of the divorce judgment and to, thereafter, determine the *de novo* child support. Unlike an order of the Supreme Court, which can modify the provisions of a divorce judgment, a Family Court order can neither supersede the provisions of a surviving settlement agreement nor divest the supported spouse of the right to sue on the contract in a plenary action to collect the difference between the amount provided for in the settlement agreement and the reduction directed by the court.[27]

The divorce judgment provided that Supreme Court "retained jurisdiction of the matter concurrently with the Family Court for the purpose of specifically *enforcing* such of the provisions as are capable of specific enforcement, to the extent permitted by law." The Appellate Division noted that the mother's petition was to enforce the October 29, 1996 stipulation, not to have it declared illegal: "Had either party questioned the legality of the stipulation, the issue should have been determined by the Supreme Court, which had issued the judgment in which the stipulation was incorporated." But ironically, the Supreme Court declined to do that.

The Appellate Division remitted the matter to the Family Court for a new hearing and a new determination of that branch of the mother's petition, as originally framed, which was to enforce the child support provisions of the divorce judgment. The remand should have been to the Supreme Court, wherein all of the issues could have received a global resolution. Rather, Family Court was directed to conduct hearings and to possibly upward modify the invalid agreements.

It is respectfully submitted that the Supreme Court erred when it had the father's motion in hand and branded only the April 1997 agreement invalid. The Supreme Court could have pronounced the April 1996 and the October 1996 agreements equally dead because they, too, did not comply with § 240(1-b)(h). Child support could have then been determined *de novo* from the date of the divorce judgment, as had been affirmed in *Jefferson v. Jefferson*,[28] below. In sum, the Appellate Division directed Family

Court to enforce two invalid agreements just because that was what the mother had petitioned for, "as originally framed."

Jefferson v. Jefferson Correctly Determined the Method of Calculating Child Support *De Novo* When the Agreement Violates § 240(1-b)(h)

Savini is incongruous with an earlier correctly decided Second Department decision, *Jefferson v. Jefferson*.[29] The agreement in *Jefferson* failed to set forth the presumptively correct amount of support that would have been fixed pursuant to the CSSA, and also failed to articulate the reason the parties chose to deviate from the CSSA guidelines. The Second Department held that the support provisions were invalid and unenforceable and should have been vacated. Critically, the appellate court correctly remanded the matter to the Supreme Court for a *de novo* determination of child support with the directive that the support be calculated as of the time the agreement was executed. In other words, the court did not permit any periods where child support would go unpaid.

Child Support Provisions in the *Savini* Divorce Judgment Were Also Invalid

Furthermore, the words "divorce judgment" are italicized at the beginning of the discussion on *Savini* because the mother was suing to enforce the child support provisions of the divorce judgment, which was also defective, as a matter of law. Specifically, § 240(1-b)(h) concludes with the following provision:

> Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section. *Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation*.

The divorce judgment is invalid because the court did not set forth its reasons for having adopted the deviating child support provisions, a provision that is statutorily unwaivable. How then could the mother have sued on the divorce judgment? This issue did not go unnoticed by the Third Department in *McColl v. McColl*.[30]

Further complicating this spiraling conundrum was that, upon remittitur, Family Court was directed to make a new child support order retroactive only to the date of the mother's most recent motion. This creates an impermissible lacuna of child support because the father will have been judicially aided in escaping his statutory support obligation from the period beginning with the date of the execution of the agreement until the enforcement motion. This is in direct contravention of the Court of Appeals ruling in *Gravlin v. Ruppert*,[31] which held that a climate or circumstances may not exist which "effectively extinguishes [a parent's] support obligation." The saga continues.

Luisi v. Luisi

Luisi v. Luisi[32] is a complex and difficult decision. In an order dated September 24, 2001, the Supreme Court granted the plaintiff's cross-motion to invalidate the child support provisions of the parties' 1992 stipulation of settlement and their 1996 stipulation because they failed to recite the parties' awareness of the CSSA. Based on this claim of invalidity, plaintiff's counsel correctly attempted to have the defendant's child support obligation recalculated retroactive to March 2, 1992, based on the parties' respective incomes in each intervening year through the date of her cross-motion on March 5, 2001. She also sought an upward modification of support due to the children's increased needs retroactive to March 5, 2001.

In its September 24, 2001 order, the Supreme Court indicated that it would recalculate child support based on the parties' income in 1992 and 1996, and granted the plaintiff's request for an upward modification of support only to the extent that an increase would rely on the parties' 1992 and 1996 financial information.

In an order dated September 17, 2002, the Supreme Court directed that child support be recalculated to the extent of awarding the plaintiff arrears retroactive from March 2, 1992 to March 5, 2001. The Supreme Court also granted her an upward modification of support to the extent of determining the defendant's support obligation as of March 5, 2001.

The retroactive award to 1992 was reversed on procedural grounds because she had proceeded by post-judgment motion in the matrimonial action rather than in a plenary action. Citing *Clark v. Liska*,[33] a Third Department decision, the Second Department directed that, based on the determination that the 1992 and 1996 agreements were unenforceable, the Supreme Court should have made a new determination retroactive only to March 5, 2001, the date of the plaintiff's cross-motion and to use the most recent financial information pursuant to DRL § 240(1-b)(b)(5)(i).[34] This decision, too, is contrary to *Gravlin v. Ruppert*. The epilogue to *Luisi* is unavailable because we do not know if, in fact, the mother commenced a plenary action and how child support might have been recalculated.

Schaller v. Schaller

The parties' separation agreement in *Schaller v. Schaller*[35] provided that the father's child support obligation was to be computed in accordance with the CSSA. During a hearing for an upward modification of child support the mother learned that the father's gross income was significantly higher than what he had represented at the time of the agreement. The father had thus not been paying his statutorily required level of support. The deception constituted a *per se* deviation from the guidelines. The support amount, having been procured by fraud, could, therefore, not be said to have been based on the mother's full awareness of her CSSA rights.

The Hearing Examiner concluded that the child support provision of the agreement was unfair, granted the petition, and found that the father's child support obligation under the CSSA guidelines was $465 a week, retroactive to October 20, 1998, the date the mother commenced her proceeding for an upward modification of child support. The Family Court overruled the Hearing Examiner on the ground that the mother's remedy was to move in the Supreme Court to vacate the separation agreement on the ground of fraud. However, the mother's petition sought only an upward modification of support. The Appellate Division ruled that since the child support provision of the parties' agreement violated the CSSA, it was unenforceable, and the Hearing Examiner, therefore, properly granted the mother's petition for an upward modification based on the CSSA guidelines. The thorny question is, How can a void agreement be modified? Modification subsumes the existence of an underlying enforceable order. What is the baseline of support during the modification proceeding?

Victorio v. McBratney

The agreement in *Victorio v. McBratney*[36] did not comply with the opt-out recitals in the CSSA. The father did not make the payments and was held in contempt subject to a purge order which was modified by the Appellate Division. The affirmance of the contempt and reduction of the purge amount are noteworthy in that they evidence the tacit affirmance of the underlying otherwise defective agreement.

Nordgren v. Nordgren

In *Nordgren v. Nordgren*,[37] the Second Department upheld an agreement that failed to specify the amount of basic child support under the CSSA and also did not recite the reason(s) therefor. Significant to its decision was that not only did the plaintiff not assert that the stipulation varied from the guidelines, but also the record amply demonstrated that the plaintiff was aware of the guidelines. This misreads the statutory directive that the recitals be inserted into the agreement. It is not what may be gleaned from the record or what the movant needs to plead; as *Lepore* later stated, awareness of the requirements of the CSSA is not the dispositive consideration under DRL § 240(1-b)(h). Rather, it is the specific recitals.

DRL § 240(1-b)(h): Affirmance by Judicial Estoppel?

Can prior litigation regarding child support create an estoppel barrier in subsequent litigation sufficient to mute any arguments of noncompliance with DRL § 240(1-b)(h)? The Second Department said no.

The Principle of Estoppel

A brief review of the thesis behind equitable estoppel will better help one to grasp the meaning of the principle in this case. Generally, an estoppel rests upon the word or deed of one party upon which another rightfully relies, and, so relying, changes his position to his injury. When this occurs it would be inequitable to permit the first party to enforce what would have been his rights under other circumstances.[38] The doctrine of equitable estoppel is not applicable where there was no reliance or change of position or prejudice of any kind by one party as a result of the other's attempted waiver or consent.[39] An essential element of estoppel is reliance.[40] To support the claim of estoppel, facts should be alleged showing in what manner and to what extent defendant relied on plaintiff's inconsistent conduct and was prejudiced thereby.[41] Estoppel will lie only where an individual has accepted the benefits of an agreement.[42]

"The doctrine of estoppel against inconsistent positions precludes a party from 'framing his * * * pleadings in a manner inconsistent with a position taken in a prior proceeding.' . . . The doctrine rests upon the principle that a litigant 'should not be permitted * * * to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'"[43] In short, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.[44] The rationale underlying this rule is that a party who invokes the jurisdiction of the courts to attain a specific result may not thereafter repudiate the position upon which he or she relied.[45]

In *Warnecke v. Warnecke*,[46] the Second Department, noted for its terse opinions, devoted an entire paragraph to the question of judicial estoppel where the agreement did not satisfy DRL § 240(1-b)(h).[47] It noted that the plaintiff's prior attempt to modify the child support provisions in Family Court was not an implicit acknowledgment of the validity of the judgment of divorce or stipulation of settlement and was not inconsistent with his position in this case that the child support provisions should be set aside. *Warnecke* did not need to reach this issue because the plaintiff's indirect acknowledgment of the agreement is not the standard of compliance; it is the actual recital, as the Second Department held in *Lepore*, *supra*. Since child support is anchored in public policy,[48] a judgment

or an agreement that violates public policy can never be enforced.[49] Judicial estoppel was, therefore, irrelevant. Once § 240(1-b)(h) was violated, there was nothing that the husband could have done to have caused his wife to have changed her position to her detriment; activity that violates public policy is a nullity. As a signatory to an invalid agreement, she could not be deemed to have established any foundation of right. Otherwise stated, there can be no cognizable reliance on or ratification of an action that violates public policy.

Inconsistent Enforcement of Illegal Agreements in the Third Department

As in the Second Department, Third Department decisions are equally inconsistent in their application of the statute. In *Sievers v. Estelle*,[50] the respondent agreed to transfer physical custody of the child to the petitioner and the petitioner agreed to waive child support from the respondent. The agreement was approved by Family Court. Less than a year later, the petitioner sought child support from the respondent, claiming that her agreement to waive child support was void as against public policy. The Third Department held that an agreement that does not specify child support clearly constitutes a deviation from the basic child support obligation. Furthermore, the agreement contained neither the amount of the basic child support obligation nor the reason for the deviation. *Sievers* underscored that since the recital requirement is unwaivable, the petitioner's failure to raise the defect was irrelevant:

- by amending the CSSA to require the inclusion of specific information, the Legislature evinced the intent that the parties' general knowledge of the rights and obligations created by the CSSA is no longer sufficient; and
- the purpose of the statutory requirements would not be served by permitting the omission to be cured on the basis of a hearing to determine the parties' subjective knowledge and intent. In the absence of any written, documentary evidence to demonstrate compliance with the requirements of the CSSA, such as writings executed contemporaneously with the agreement or submitted in support of the petition for court approval of the agreement, the parties' agreement is insufficient to justify deviation from the basic child support obligation.

Although *Sievers* seemed to have construed DRL § 240(1-b)(h) strictly, it nevertheless deflated the statute, and concomitantly the legislative intent, by allowing the referencing of written statements made outside the agreement as long as they were written:

> In the absence of any written, documentary evidence to demonstrate compliance with the requirements of the CSSA, such as writings executed contemporaneously with the agreement or submitted in support of the petition for court approval of the agreement, the parties' agreement is insufficient to justify deviation from the basic child support obligation.

This violates the statute because the Legislature directed that *"the agreement or stipulation must specify* the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount," not an external document. *Sievers* superseded *Gonsalves v. Gonsalves*[51] and *Clark v. Clark*,[52] pre-1992 amendment decisions, which had held that hearings to determine the parties' awareness of the CSSA satisfied the statute.

Young v. Young

Young v. Young[53] is contrary to both earlier and subsequent Third Department authority,[54] which held DRL § 240(1-b)(h) inviolably sacrosanct. Within six months of the judgment of divorce, which included a stipulation of settlement, the petitioner twice petitioned for a downward modification of child support on the ground of a change in circumstances. The first petition was dismissed because he failed in his burden of showing an unanticipated or unreasonable change of circumstances.[55] The second was granted following a hearing and was appealed. The petitioner was represented by counsel and the respondent proceeded *pro se*. "Most significantly," counsel never sought to vacate the stipulation that obligated the petitioner to pay $200 per week in child support (this reasoning is flawed[56]). Rather, the focus of the hearing was on the change in circumstances.

The Hearing Examiner noted, without explanation, analysis or discussion, that the parties' stipulation did not "mention" the requirements of the CSSA or the parties' income, concluding without elaboration that the petitioner's modification should therefore be granted.[57] The Appellate Division faulted the Hearing Examiner for having *de facto* and *sua sponte* vacated the prior stipulation on the ground that the opt-out was insufficient and made a *de novo* determination of child support, reducing it to $50 per month, notwithstanding: (1) a prior Family Court order to pay $200 per week based on the father's significantly greater income capacity[58] and (2) the fact that the petitioner, with the advice of counsel, had agreed in open court to continue to pay this amount in settlement of his matrimonial action. The phrasing leans toward an interpretation that the Appellate Division viewed these events against an estoppel or even *res judicata* backdrop,[59] not that it should have mattered if the stipulation was in violation of the statutory requirements (because an agreement that violates public policy cannot be reaffirmed). Family Court affirmed the Hearing Examiner's *de novo*

calculation of child support. The Appellate Division reversed.

Young's reasoning was anchored in substantive (petitioner's failure to raise any legal challenges to the agreement in the petition or during the hearing) and procedural (his failure to proceed by way of a plenary action) arguments as bases for dismissal. This was erroneous. The agreement was void *per se* irrespective of whether the petitioner previously challenged it or what the forum was in which he chose to attack the agreement.[60]

Young held that the Hearing Examiner erred in *sua sponte* vacating the stipulation and addressing the issue of child support *de novo* based on the limited evidence before him[61] because: (1) the Respondent did not have notice and could not have argued that the opt-out provisions were valid and (2) "*more importantly*" she was denied her the opportunity to present evidence, as she had done in the past, concerning petitioner's actual earning capacity.[62] However, as a matter of law, the question of notice or quantum of evidence can never be reached because the agreement was void *ab initio*. The inquiry should have terminated long before. An irrepressible follow-up question is, What if the Hearing Examiner had made the downward modification based on the merits of the ex-husband's petition (assuming no *Boden-Brescia* concerns) rather than on § 240(1-b)(h)? Would it have been upheld? Is it the nature of the relief requested that governs or are courts free to, or even should they, decline to enforce agreements that are unquestionably void (see below)?

Young's reference to *Clark v. Liska*,[63] below, is quite noteworthy because unlike in *Young*, wherein the Third Department struck the *downward* modification specifically requested by the petitioner, *Clark* converted the motion to vacate the child support provision into one for *upward* modification. Is it the direction of the modification that determines its enforceability?

Harbour v. Harbour

Young refers to *Harbour v. Harbour*,[64] which decision should have dictated a different result in *Young*. *Harbour* devolved about the strict enforcement of the three procedural requirements in DRL § 236B(3).[65] Notwithstanding the Third Department's steadfast precedent authority that interdicts the validity of agreements that do not strictly comply with the procedural formalities in DRL § 236B(3),[66] the Supreme Court ordered the wife to sign an agreement based on an oral stipulation. The Supreme Court reasoned that it would be inequitable to permit her to disavow her earlier in-court representation that she had, in fact, intended to "opt out" of the equitable distribution statute.

The Third Department referred to *Matisoff v. Dobi*,[67] wherein the Court of Appeals "examined the unambiguous language of the statute" and "relevant policy concerns," and held the statute "indispensable to the creation of a valid, enforceable marital contract, without exception," and that "the court [] was bound to enforce what it determined to be the clear intent of the Legislature to establish a bright-line rule." *Harbour* applied "equivalent reasoning" and concluded that it was impermissible to "transform [the] oral representation, which does not comply with the explicit formalities specified in the statute, into a binding act, in direct contravention of the legislative intent."

Notably, this had been Mrs. Harbour's second attempt to vacate the agreement. The appellate court correctly stated that its "resolution of this issue makes it unnecessary to address plaintiff's arguments with respect to the propriety of Supreme Court's first order." Basically, once an agreement fails for failure to comply with the statutory prescribed conditions, it fails and cannot be resurrected irrespective of any substantive merit.

Accordingly, an application of *Harbour* should have spun the result around in *Young*.

Clark v. Liska

Setting the stage for an adverse decision against the defendant in *Clark v. Liska* [68] as the court's undisguised disdain for him attributable to his lengthy history of child support delinquency. The parties' 1992 judgment of divorce incorporated but did not merge a Supreme Court stipulation and a 1991 Family Court order. Physical custody of the oldest son was awarded to the defendant, while the plaintiff received sole legal and physical custody of the remaining three children. The defendant agreed to pay plaintiff weekly child support. The record reflected that defendant's child support obligation was in accordance with the CSSA and that both parties had been apprised of their support guidelines.

In 1997 the defendant moved in Supreme Court for an order vacating the child support provisions of the 1992 divorce judgment for noncompliance with the CSSA and for an order awarding him child support for the child residing with him retroactive to 1992.[69] Although the Supreme Court directed a new computation of child support because the 1992 stipulation ran afoul of the CSSA, it *sua sponte* treated defendant's motion as an application to modify the 1992 divorce judgment because the "vacatur of the judgment would negatively affect the accumulated child support arrears owed by defendant, the cancellation of which is generally prohibited (*Dox v. Tynon*, 90 N.Y.2d 166, 659 N.Y.S.2d 231, 681 N.E.2d 398; see also, DRL § 236[B][9][b]; § 240)." Supreme Court also determined that any child support due the defendant would be retroactive only to the date of his application and not earlier. The obvious question is how any arrears can accrue on an invalid agreement.

The Third Department affirmed both:

- that the stipulation violated the CSSA because it did not specify the plaintiff's child support obligation or the reason(s) for the deviation, and, surprisingly, cited DRL § 240(1-b)(h); *Sievers*; and *Sloam*; and
- the conversion of the defendant's motion to vacate the child support provisions into a modification motion.

While the Appellate Division would have liked to rule on "the novel issue defendant raises regarding how arrears should be treated which accumulate pursuant to an agreement voluntarily entered into but which did not comply with CSSA," it declined to do so because it did not want to disturb the orders appealed from. In simple English, they wanted to give the defendant his just desserts. However, they could have and should have reached the same conclusion as did *Jefferson*,[70] to wit, make a *de novo* calculation retroactive to the date of the initial invalid agreement. The impact on the defendant would have been equally direct.

The Appellate Division rejected the equitable and legal considerations.[71] Aside from the agreement's invalidity, there was no legal foundation, no matter how benevolently intentioned, to convert a motion to vacate child support provisions into one for an upward modification. If the underlying order is defective and invalid it cannot be modified. Also, the defendant's application was procedurally defective because he had commenced a proceeding within the matrimonial action rather than by plenary proceeding. Difficult decision.

McColl v. McColl

McColl v. McColl[72] applies a thoroughly clever approach to a unique circumstance. The parties' judgment of divorce incorporated their separation agreement and a subsequent modification agreement. The original agreement acknowledged their understanding of the CSSA and how it dictates each parent's support obligation. The agreement then deviated due to the respondent's agreement to pay certain marital debt, educational expenses, and $100 per month in child support for two years. In the modification agreement, the respondent reaffirmed his $100 monthly obligation and further agreed to calculate his support obligation using the guidelines, to wit, 17 percent of his gross income, less FICA, but deviated by further excluding the child's school-related expenses. The modification agreement reaffirmed the terms of the original agreement.

The petitioner commenced a proceeding for increased child support based on changed circumstances and that there was no longer any basis for a deviation from the CSSA. She contended that the modification agreement should be set aside because it failed to comply with the provisions of FCA § 413(1)(h) (the recitals of what the support would have been and reason for deviation). The Third Department held that although "this defect can be fatal [citing *Sievers v. Estelle*], we do not find its omission determinative in these circumstances"; the "omission was cured by its incorporation of all terms and provisions of the separation agreement which did, in fact, so specify. With no proffer indicating that the parties' income or support obligations had changed at the time of the modification agreement—an agreement entered in temporal proximity to the separation agreement—we find it sufficient."

The Third Department then found the divorce judgment deficient since it failed to set forth the Supreme Court's reasons for accepting the deviation—a requirement that is "'unbending [and] cannot be waived by either party or counsel.'"[73] Since this defect rendered "the judgment * * * ineffective to the extent that it purports to incorporate the child support provisions of the parties' agreement,"[74] the Appellate Division applied the standards relative to an upward modification of contractual child support and found that the petitioner had not satisfied the threshold, and affirmed Family Court's dismissal on that basis.

Du Bois v. Swisher

In *Du Bois v. Swisher*,[75] the parties' divorce judgment incorporated their separation agreement. Petitioner sought an upward modification of child support. Petitioner urged Family Court to ignore the child support provision of the divorce judgment and set support at the guidelines amount because the agreement did not contain the mandatory recitals. The Hearing Examiner agreed.

While the agreement may have qualified for incorporation into the divorce judgment, despite its lack of the recitations, because it was executed before the statutes were amended in 1992, the divorce judgment, which followed the amendment, failed to set forth the Supreme Court's reasons for accepting the parties' deviation from the CSSA , as required by DRL § 240(1-b)(h). Since the omission was not a mere oversight, the Appellate Division held that the judgment was ineffective to the extent that it incorporated the child support provisions of the agreement.[76]

Dictum in the decision is of concern. The Hearing Examiner had told the respondent that if the agreed-upon amount did not comply with the CSSA guidelines, the petitioner would prevail because the divorce judgment did not appear to contain the statutorily mandated recitals. The Third Department added that if the Hearing Examiner had reached the issue—he did not because the parties reached a consent order as to increased child support—it would have been appropriate to disregard the judgment

and decide child support *de novo*. Can Family Court, a court of limited jurisdiction, disregard and, in essence, effectively treat a Supreme Court order as a nullity? If the divorce judgment is disqualified but the agreement remains viable, it may be enforced in a plenary proceeding.

Costley v. Martin

The agreement in *Costley v. Martin*[77] provided for child support and that any waiver of any provision in the agreement would not be deemed a continuing waiver. The agreement was incorporated into the divorce judgment. The parties amended the child support provision due to defendant's unemployment and lack of financial resources. Denoted as "'temporary relief' until defendant's financial circumstances changed," the modification reaffirmed all other provisions in the original agreement.

Defendant petitioned Family Court for a termination of support due to the children's emancipation. His financial affidavit showed him to be better off financially than he had been representing. Petitioner sought arrearages based upon the original agreement. Family Court dismissed her petition on jurisdictional grounds. Plaintiff commenced an action for breach of contract in Supreme Court seeking arrearages due to defendant's fraudulent assertions regarding his financial situation. Defendant moved to dismiss contending that both agreements failed to comply with the CSSA. Supreme Court held that while noncompliance with the CSSA would be relevant in either a divorce action or a Family Court support proceeding, it was not germane in an action for breach of contract.

Because waivers were not to be deemed continuing, plaintiff's failure to earlier move to enforce its amended terms did not preclude her action. Furthermore, the designation of temporary relief of the amended agreement created a triable issue as to his duty to inform her of changed circumstances.

The modification agreement, executed after the date of the amended CSSA, failed to comply with the CSSA's terms. It was, therefore, invalid only as to the amount of child support, but not as to plaintiff's allegations of fraud. The question of the original agreement's compliance with awareness of the CSSA was unclear and thus remanded for hearing.

Summary of the Second and Third Departments

The Third Department's inconsistent application of the recital requirements in DRL § 240(1-b)(h) is as unsatisfying as is the Second Department's, especially in view of the Third Department's strict absolute reading of the procedural formalities in DRL § 236(3). A parting thought regarding the Third Department's treatment of § 240(1-b)(h) is why it pursues a rock solid enforcement of the procedural formalities in DRL § 236B(3) and such an unpredictably inconsistent approach to DRL § 240(1-b)(h)? There is no apparent reason why DRL § 240(1-b)(h) is treated differently in the Third Department.

Clark's Sua Sponte Affirmative Relief Not Requested by Either Party Violated Due Process and Subject Matter Jurisdiction Rendering Any Relief Void and Unenforceable

CPLR 2215 provides that the party seeking to cross-move for relief must similarly identify the relief sought; that affirmative relief will not be granted to the opposing party absent a notice of cross-motion.[78] In *Clark*, the court *sua sponte* converted the application into one for an upward modification of child support. CPLR 2214(a) provides in pertinent part that the supporting papers accompanying an application for relief must specifically identify "the relief demanded and the grounds therefor." In *Hayes v. Hayes*,[79] the Third Department later held that the Hearing Examiner erred by granting a *sua sponte* downward modification of child support in the absence of a formal demand for such relief.

In *Phoenix Enterprises Limited Partnership v. Insurance Co. of North America*,[80] the First Department reversed a *sua sponte* grant of summary judgment since no cross-motion for that relief had been made.

The Second Department has held that a court may not grant substantive relief that was never requested by either the movant or by way of cross-motion[81] because it violates due process in that the opposing party did not receive written notice of that demand.[82] *McGuire v. McGuire*[83] reversed the lower court because it "clearly went beyond the injunctive relief sought by the plaintiff. In effect, the court, *sua sponte*, declared that the plaintiff held an undivided one-half interest in the subject apartment and thus, in effect, awarded judgment as a matter of law to the plaintiff." In *Klein v. Klein*[84] the Second Department overturned Special Term's limited division of assets and award of such assets to the plaintiff, which relief was granted without the plaintiff's request.

Sua Sponte Relief Goes to Jurisdiction and Competency

A grant of *sua sponte* relief goes to jurisdiction. A failure to provide notice renders the presiding court incompetent to adjudicate the matter. *McGuire* emphasized that "[I]t is well settled that 'a court lacks jurisdiction to grant relief against a defaulting party where that relief is not requested in the moving papers.'" In *NYCTL 1998-1 Trust v. Prol Props. Corp.*,[85] the Appellate Division held that "[I]n the absence of proper notice to the [opposing party] of any relief being requested against it, the Supreme Court was without jurisdiction to grant relief."

In Addition to Being Jurisdictionally Defective, an Illegal Agreement Constitutes a *Per Se* Failed Burden of Proof

Although *Clark* held that the agreement could not be stricken on either procedural or jurisdictional grounds, it nevertheless converted the application *sua sponte* to one for an upward modification from the date of the most recent motion. Upward modification of contractual child support is governed pursuant to decisional authority.[86] *Clark*'s reasoning is difficult to follow because the court gets caught up in semantics and nomenclature. It acknowledges that the agreement is void, *ergo*, unenforceable, but nevertheless permits a prospective calculation formulated on the theory of modification. The problem is similar with *Savini*. The term *modification* subsumes validity and enforceability of a valid agreement or order that can be reshaped or restructured. How can one modify something that is invalid, the functional equivalent of a dead agreement? What does not exist cannot be morphed.

Entitlement to relief is contingent upon meeting and sustaining the movant's burden of proof.[87] It strains jurisprudence to permit a court that is either jurisdictionally or procedurally hamstrung from invalidating an agreement that violates public policy, to, nevertheless, *sotto voce* enforce that very agreement by way of nomenclature, to wit, transmuting it into a modification proceeding. If an agreement is invalid, how does one calculate an upward modification based on an invalid agreement? Stated rhetorically, can any court ever acquire subject matter jurisdiction over a void agreement which *per se* violates public policy? Can the recitation of a specific form of relief talismanically shackle a court to enforce an illegal agreement?

However, there is a clear distinction between declaring an agreement invalid and declining to enforce an invalid agreement. Otherwise stated, that a formal invalidation of a void agreement is beyond the jurisdictional reach of a court, such as Family Court, does not conversely shackle that court to treat such an agreement as though it were valid and blindly grant an alternate form of relief whether *sua sponte* or requested on notice. Submission of an invalid agreement, irrespective of the narrowness of the court's jurisdiction, constitutes the moving party's *per se* failure to meet the requisite burden of proof. That petition must fail. Nevertheless, the parties in *Clark* and *Savini* were remanded to Family Court to adjudicate illegal agreements.

In *Fry v. Village of Tarrytown*,[88] the Court of Appeals held that "a court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may, ex mero motu[89] [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action." So in *Clark*, if the agreement was invalid, it did not exist. *Ergo*, there could be no baseline from which to calculate an upward modification. If there is no baseline from which to calculate an upward modification, then the amount must be determined *de novo* and must relate back to the date of the first agreement, per *Gravlin*.[90] In sum, although Family Court could not vacate the agreement, it should have refused to proceed.

Alternate Methods of Establishing Awareness of the CSSA

Sievers held that DRL § 240(1-b)(h) was satisfied where there was service of a notice of a proposed judgment containing the CSSA-complying child support provisions by opposing counsel, without objection. This seems to parallel this department's ruling in the same part of the decision that the statute requires that the recitals be in writing. Notwithstanding the clear language in the statute, *Sievers* did not specify that the writing must be within the context of the agreement.

Fourth Department Gets It Right

Pursuant to a consent order in a paternity proceeding in *Smith v. Mathis-Smith*,[91] the father, who had joint custody and physical residence of the child, was "responsible for providing for the needs of the child[ ] and [would] not seek support from the mother, for child support or child care expenses. . . ." The agreement notwithstanding, he subsequently commenced a proceeding seeking child support. Following a hearing, the Hearing Examiner issued an order that required the mother to pay child support and contribute to child care costs. The Fourth Department affirmed. A party seeking to invalidate an agreement that does not comply with the recitation provision in DRL § 240(1-b)(h) need not allege anything regarding the merits of the case because the agreement "is void ab initio" requiring *de novo* consideration. Otherwise stated, the court may not, as a matter of law, reach the merits of the case. Since the CSSA is not waivable, a failure to comply, standing alone, is sufficient to invalidate the child support provisions.

In *Weimer v. Weimer*,[92] the Fourth Department invalidated the child support provisions of an agreement for failure to adhere to the requirements of DRL § 240(1-b)(h), and remanded for determination in accordance with the CSSA.

The First Department

The record in *Walton v. Crane*[93] showed that the court questioned the defendant closely as to his understanding of the stipulation's terms, and each time he requested a clarification or change in the terms, he was heard and changes were made to his express satisfaction. The record also evidenced that before the stipulation was read, the plaintiff's attorney advised the defendant that the amount

of child support was in accordance with the CSSA. That this was done orally is of no moment in the First Department because that department upholds marital agreements dictated into the record[94] under the principle that agreements made under judicial aegis, pursuant to CPLR 2104, trump other requirements.

Child Support Provisions in Compliance with CSSA Do Not Require Recitals

The presumptively correct amount under the CSSA need be included only if there is a deviation from the CSSA.[95] In *Pellot v. Pellot*,[96] the Second Department held that an agreement that does not deviate from the CSSA does not require the additional "opt-out" recitals in DRL § 240(1-b)(h). The stipulation should, however, contain the recital that the parties were advised of the provisions of the CSSA, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

The settlement agreement in *Wolf v. Wolf* [97] included the required recitals establishing that the parties had notice of the provisions of the CSSA. The parties also stated their intention to adopt the basic child support obligation, determinable pursuant to the CSSA; there was no deviation from and the parties were thus not obligated to justify the agreed-upon terms. The Third Department held: "Nowhere in the CSSA are the parties to a child support agreement required to articulate the reasons they have chosen to adhere to a formula which applies the correct statutory percentage where the combined parental income is below or above $80,000." In other words, DRL § 240(1-b)(h) complies only when an agreement deviates from the guidelines.

Compliance with § 240(1-b)(h) When the Child Support Deviates Upward from the Guidelines

The First Department opined that it may be necessary to satisfy the procedural formalities of the CSSA even where the agreed-upon child support is higher than the statutory level.[98]

Preserving Arguments of Noncompliance for Appeal

In *Leroy v. Leroy*[99] and *Dudla v. Dudla*,[100] two distinct departments rejected appeals upon grounds of noncompliance with DRL § 240(1-b)(h) because the issue was being raised for the first time on appeal and, therefore, not preserved for appellate review. As discussed above, child support is a matter of public policy and violations of matters of public policy are akin to subject matter jurisdiction which may be challenged at any time,[101] whether *sua sponte*, by the court on its own motion,[102] or even for the first time on appeal.[103] Accordingly, the issue of the invalidity of a child support provision due to noncompliance with DRL § 240(1-b)(h) should be available at any stage of the litigation and not appealable for failure to preserve the argument for appellate consideration.

Formulaic Recitation of DRL § 240(1-b)(h) Is Not Key; It Is the Substance of the Statute That Must Be Captured

Judicial interpretation suggests that the statute does not require catechistic compliance. That the language must be sufficiently close to capture the essence of the statute is, in other words, substantial compliance. Vague language will be rejected. The statutory acknowledgment "that the basic child support obligation provided for therein would presumptively result [in] the *correct* amount of child support to be awarded" was deemed substantially satisfied where the agreement used the term "just and appropriate" instead of "correct." *Blaikie v. Mortner*[104] held that the difference was *de minimis*.

Wolf v. Wolf[105] emphasized that "short cut" phraseology in an agreement is not determinative of validity. A support provision is enforceable as long as the support is consistent with what would be calculated under the CSSA. In *Wolf* the agreement provided for a percentage of the respondent's income rather than his *pro rata* share of the parties' combined income.

In *Mitchell v. Mitchell*,[106] the Third Department invalidated a support provision which stated that because each party was "earning a substantial salary sufficient to take care of the needs of the child when said child is with him or her, neither party is requesting support from the other." The agreement further provided that it was "entered into with the full knowledge of both parties as to the CSSA guidelines and because of the unique character of the custody allocation being 50% with each parent, both parties waive application of said act." The provisions lacked specification as to the amount that the basic child support obligation would have been and the general statement as to the parties' knowledge of the CSSA was "patently insufficient."

There Is No Requirement That the Actual Calculations Be Spelled Out in the Agreement

Bright v. Freeman[107] upheld an agreement notwithstanding the fact that the calculations were not spelled out because it recited the parties' combined net income, their respective net incomes after the CSSA deductions are made, as well as the applicable percentage of income to the first $80,000 in combined income and, in the court's discretion, to the combined income above that amount. The agreement also recited the father's putative support obligation. The parties' specification of the requisite information and amounts as required by the CSSA was satisfactory as "there is no requirement that the actual calculations used to reach the results also be set out in the agreement." Finally, the agreement set forth the parties' reasons for departing from the statutory formula.

An Inaccurate Statement Does Not Disqualify the Child Support Provision

In *Echeverri v. Echeverri*,[108] the First Department found that the child support agreement was fair and reasonable at the time it was entered into (DRL § 236[B][3]), and should not be set aside as noncompliant with DRL § 240(1-b)(h) for having incorrectly stated that, under the CSSA, the basic child support obligation for two children "would have been 20% or 25% of the parties' combined income." No additional information is provided as to whether the agreement was in compliance with the other aspects of the CSSA.

The Add-Ons Fall Under DRL § 240(1-b)(h)

The First and Second Departments hold that child care and medical care are distinct components of the CSSA[109] which also fall under DRL § 240(1-b)(h). The stipulation in *Bill v. Bill*[110] did not state that the parties were aware of the obligation to pay a pro rata share of child care expenses, and made no provision for the division of such costs. The Second Department noted the comprehensive and specific nature of the opt-out provision in DRL § 240(1-b)(h):

> Since DRL §§ 240(1-b)(c)(4) and 240(1-b)(h) are both part of the same subdivision, it is clear that the statutory intent is to ensure that a party be aware of all of the relevant provisions of the CSSA, including his or her right to receive a pro rata share of child care expenses, in order to knowingly and intelligently waive those rights.[111] While an agreement need not expressly state that each potential supplement to the basic support obligation has been considered, compliance with the newly amended paragraph (h) demands, at minimum, that an agreement demonstrate that the parties have been fully informed of the provisions of the statute, and of how the guidelines would operate in their individual circumstances. Compliance with paragraph (h) further mandates that the parties reach an agreement upon what their respective support obligations under CSSA would be, which can be an issue of contention where, as here, the parties' combined income exceeds the $80,000 statutory cap, making application of the statutory formula to excess income discretionary.

Although the Second Department, in *Toussaint v. Toussaint*,[112] held that § 240(1-b)(h) includes educational expenses, only months later, in *Maksimyadis v. Maksimyadis*,[113] it held that the absence of a valid opt-out agreement did not operate to invalidate those support provisions which addressed educational expenses, religious expenses, and extracurricular activities, which remained valid and enforceable. Religious expenses and extracurricular activities are not part of the statute and should remain unaffected. However, educational expenses represent an add-on.[114] Difficult to reconcile this line of case law.

Noncomplying Child Support Provisions Do Not Vitiate the Entire Settlement Agreement

When an agreement fails to comply with DRL § 240(1-b)(h), the invalidity is limited to the support-related provisions only and cannot operate to vacate the balance of the agreement.[115]

An Invalid Add-On Does Not Taint the Entire Child Support Provision

If an add-on does not comply with DRL § 240(1-b)(h), it only taints that individual component[116] and not the entire child support provision, so that a court may parse a child support provision into complying and noncomplying components even without a severability clause.

When the Reason for the Deviation No Longer Exists

In *Mauriello v. Mauriello*,[117] the agreement's departure from the CSSA standards was expressly conditioned upon the relocation of the mother and the child to a foreign jurisdiction, thereby requiring the father to incur greater expenditures in order to exercise his visitation. Once the mother and child returned to New York, that condition no longer existed. Accordingly, pursuant to the express terms of their agreement, in the absence of any other articulated reason for deviating from the CSSA guidelines, once the reason for the deviation no longer existed, the parties were required to resume the use of the guidelines in calculating child support.

Conclusion

At first blush, this issue is painlessly simple. The rules in DRL § 240(1-b)(h) are simple to follow and should not have generated any enthusiasm over its enforcement. It has snowballed into a situation where it is impossible to advise a client on which side of the divide their case will land. Nonetheless, it is not such where it is irreversible. Courts can reverse prior rulings and set their compasses on the precise course. The alternative is to invite a resolution from Eagle Street.

Endnotes

1. *Tompkins County Support Collection Unit ex rel. Chamberlin v. Chamberlin*, 99 N.Y.2d 328, 786 N.E.2d 14, 756 N.Y.S.2d 115 (2003); *Panossian v. Panossian*, 201 A.D.2d 983, 607 N.Y.S.2d 840 (4th Dep't 1994); *Modica v. Thompson*, 300 A.D.2d 662, 755 N.Y.S.2d 86 (2d Dep't 2002).

2. *Rakoszynski v. Rakoszynski*, 174 Misc. 2d 509, 513, 663 N.Y.S.2d 957, 96 (Sup., N.Y. 1997).
3. *Stanley v. Bouzaglou*, 194 Misc. 2d 45, 49, 753 N.Y.S.2d 305, 309 (Fam. Ct., N.Y. 2002).
4. *Cassano v. Cassano*, 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995); *Blaikie v. Mortner*, 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dep't 2000).
5. *Cassano v. Cassano*, 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995).
6. *Strenge v. Bearman*, 228 A.D.2d 664, 645 N.Y.S.2d 315 (1996).
7. *Bill v. Bill*, 214 A.D.2d 84, 631 N.Y.S.2d 699 (2d Dep't 1995); *Schaller v. Schaller*, 279 A.D.2d 525, 719 N.Y.S.2d 278 (2d Dep't 2001).
8. DRL § 240(1-b)(h) provides:

> A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section. Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

Bright v. Freeman, 24 A.D.3d 586, 808 N.Y.S.2d 359 (2d Dep't 2005); *Jefferson v. Jefferson*, 21 A.D.3d 879, 800 N.Y.S.2d 612 (2d Dep't 2005); *Warnecke v. Warnecke*, 12 A.D.3d 502, 784 N.Y.S.2d 631 (2d Dep't 2004); *Toussaint v. Toussaint*, 270 A.D.2d 338, 704 N.Y.S.2d 144 (2d Dep't 2000); *Blaikie v. Mortner*, 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dep't 2000); *Zenz v. Zenz*, 260 A.D.2d 474, 689 N.Y.S.2d 167 (2d Dep't 1999); *Lepore v. Lepore*, 276 A.D.2d 677, 714 N.Y.S.2d 343 (2d Dep't 2000).

9. *Sloam v. Sloam*, 185 A.D.2d 808, 586 N.Y.S.2d 651 (2d Dep't 1992); *see Cefola v. Cefola*, 231 A.D.2d 600, 647 N.Y.S.2d 810 (2d Dep't 1996); *Costley v. Martin*, 309 A.D.2d 1124, 766 N.Y.S.2d 244 (3d Dep't 2003).
10. *Sievers v. Estelle*, 211 A.D.2d 173, 626 N.Y.S.2d 592 (3d Dep't 1995); *Bill v. Bill*, 214 A.D.2d 84, 631 N.Y.S.2d 699 (2d Dep't 1995) (These amendments, which make it more difficult for parties to effectively agree to deviate from CSSA results are intended to "protect the interests of the children who are the intended beneficiaries of the CSSA."); *see also Cassano v. Cassano*, 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995).
11. 42 A.D.2d 571, 344 N.Y.S.2d 194 (2d Dep't 1973).
12. *Orvis Co., Inc. v. Tax Appeals Tribunal of State of N.Y.*, 86 N.Y.2d 165, 654 N.E.2d 954, 630 N.Y.S.2d 680 (1995).
13. *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).
14. *Regatos v. North Fork Bank*, 5 N.Y.3d 395, 838 N.E.2d 629, 804 N.Y.S.2d 713 (2005), *rearg. denied*, 6 N.Y.3d 751, 843 N.E.2d 1159, 810 N.Y.S.2d 419 (2005).
15. 190 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).
16. 276 A.D.2d 677, 714 N.Y.S.2d 343 (2d Dep't 2000).
17. 214 A.D.2d 84, 631 N.Y.S.2d 699 (2d Dep't 1995).
18. 211 A.D.2d 173, 626 N.Y.S.2d 592 (3d Dep't 1995).
19. L. 1992, ch. 41, § 146, eff. April 2, 1992.
20. *Sievers v. Estelle*, 211 A.D.2d 173, 626 N.Y.S.2d 592 (3d Dep't 1995); *Wolf v. Wolf*, 293 A.D.2d 811, 740 N.Y.S.2d 493 (3d Dep't 2002); *Mitchell v. Mitchell*, 264 A.D.2d 535, 693 N.Y.S.2d 351 (3d Dep't 1999), *lv. denied*, 94 N.Y.2d 754, 701 N.Y.S.2d 340 (1999).
21. 185 A.D.2d 808, 586 N.Y.S.2d 651 (2d Dep't 1992).
22. 212 A.D.2d 932, 622 N.Y.S.2d 989 (3d Dep't 1995).
23. *Sloam v. Sloam*, 185 A.D.2d 808, 586 N.Y.S.2d 651 (2d Dep't 1992).
24. 226 A.D.2d 684, 641 N.Y.S.2d 714 (2d Dep't 1996) (The failure to expressly state that the parties knowingly opted out of the CSSA standards, coupled with a party's claim that he was not informed of the CSSA provisions, requires a hearing to determine whether that spouse was aware of the CSSA at the time the stipulation was executed.).
25. 241 A.D.2d 470, 661 N.Y.S.2d 24 (2d Dep't 1997) (The stipulation in *Appel* deviated from the CSSA and did not comply with the recitals and was remanded for a hearing regarding the mother's awareness of the CSSA at the time the stipulation was executed.).
26. 34 A.D.3d 686, 825 N.Y.S.2d 493 (2d Dep't 2006).
27. *Pellot v. Pellot*, 305 A.D.2d 478, 759 N.Y.S.2d 494 (2d Dep't 2003).
28. 21 A.D.3d 879, 800 N.Y.S.2d 612 (2d Dep't 2005).
29. *Id.*
30. 6 A.D.3d 794, 774 N.Y.S.2d 586 (3d Dep't 2004).
31. 98 N.Y.2d 1, 765 N.E.2d 298, 739 N.Y.S.2d 94 (2002).
32. 6 A.D.3d 398, 775 N.Y.S.2d 331 (2d Dep't 2004).
33. 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dep't 1999).
34. The Third Department erred in *Clark*, discussed below, in that, *inter alia*, it converted the defendant's motion to vacate the child support provisions into a modification motion to produce a result that violated governing authority.
35. 279 A.D.2d 525, 719 N.Y.S.2d 278 (2d Dep't 2001).
36. 32 A.D.3d 962, 821 N.Y.S.2d 262 (2d Dep't 2006).
37. 264 A.D.2d 828, 695 N.Y.S.2d 588 (2d Dep't 1999).
38. *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 130 N.E. 295, *rearg. denied*, 231 N.Y. 551, 132 N.E. 885 (1921); *Meaney v. Loew's Hotels, Inc.*, 26 A.D.2d 263, 273 N.Y.S.2d 856 (1st Dep't 1966).
39. *Waldman v. Cohen*, 125 A.D.2d 116, 512 N.Y.S.2d 205 (2d Dep't 1987).
40. *Lynn v. Lynn*, 302 N.Y. 193, 97 N.E.2d 748 (1951); *Central New York Realty Corp. v. Abel*, 28 A.D.2d 50, 281 N.Y.S.2d 115 (4th Dep't 1967). For quasi estoppel, where reliance is not dispositive, see *Festinger v. Edrich*, 32 A.D.3d 412, 820 N.Y.S.2d 302 (2d Dep't 2006); *Zemel v. Horowitz*, 11 Misc. 3d 1058(A), 815 N.Y.S.2d 496 (Sup. Ct., N.Y. Co. 2006); *Mahoney-Buntzman v. Buntzman*, 13 Misc. 3d 1216(A), 824 N.Y.S.2d 755(U) (N.Y. Sup. 2006); *Naghavi v. New York Life Ins. Co.*, 260 A.D.2d 252, 688 N.Y.S.2d 530 (1st Dep't 1999); *Estate of Ginor v. Landsberg*, 1998 WL 514304 (2d Cir. 1998); *Meyer v. Insurance Co. of America*, 1998 WL 709854 (S.D.N.Y. 1998).
41. *Greenberg v. Greenberg*, 43 A.D.2d 422, 352 N.Y.S.2d 453 (1st Dep't 1974).
42. *Chapin v. Chapin*, 12 A.D.3d 550, 786 N.Y.S.2d 65 (2d Dep't 2004).
43. *Piedra v. Vanover*, 174 A.D.2d 191, 579 N.Y.S.2d 675 (2d Dep't 1992); *Environmental Concern, Inc. v. Larchwood Const. Corp.*, 101 A.D.2d 591, 476 N.Y.S.2d 175 (2d Dep't 1984).
44. *Martin v. C.A. Productions Co.*, 8 N.Y.2d 226, 168 N.E.2d 666, 203 N.Y.S.2d 845 (1960); *Karasik v. Bird*, 104 A.D.2d 758, 480 N.Y.S.2d 491 (1st Dep't 1984).
45. *Peterson v. Goldberg*, 180 A.D.2d 260, 585 N.Y.S.2d 439 (2d Dep't 1992), leave to appeal dismissed, 81 N.Y.2d 835, 611 N.E.2d 298, 595 N.Y.S.2d 397 (1993).

46. 12 A.D.3d 502, 784 N.Y.S.2d 631 (2d Dep't 2004).

47. The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed."

48. *See* endnote 1.

49. *In re Rhinelander's Estate*, 290 N.Y. 31, 47 N.E.2d 681 (1943).

50. 211 A.D.2d 173, 626 N.Y.S.2d 592 (3d Dep't 1995); *Fessenden v. Fessenden*, 307 A.D.2d 444, 761 N.Y.S.2d 725 (3d Dep't 2003) (the stipulation was unenforceable because it failed to comply with nonwaivable requirements of the CSSA by omitting the amount of the basic child support obligation pursuant to the CSSA and failing to indicate the reasons for deviating therefrom (DRL § 240(1-b)(h)); *see Clark v. Liska*, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dep't 1999).

51. 212 A.D.2d 932, 622 N.Y.S.2d 989 (3d Dep't 1995).

52. 198 A.D.2d 599, 603 N.Y.S.2d 245 (3d Dep't 1993).

53. 299 A.D.2d 783, 751 N.Y.S.2d 94 (3d Dep't 2002).

54. *Sievers v. Estelle*, 211 A.D.2d 173, 626 N.Y.S.2d 592 (3d Dep't 1995); and *McColl v. McColl*, 6 A.D.3d 794, 774 N.Y.S.2d 586 (3d Dep't 2004).

55. *See Boden v. Boden*, 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 (1977); *Brescia v. Fitts*, 56 N.Y.2d 132, 436 N.E.2d 518, 451 N.Y.S.2d 68 (1982), and their progeny.

56. This is an erroneous phrase because it does not matter what was or was not focused on. Once the agreement had violated the recitation requirement in DRL § 240(1-b)(h), nothing else mattered. The agreement was irretrievably unenforceable.

57. *See Young v. Coccoma*, 291 A.D.2d 767, 738 N.Y.S.2d 128 (3d Dep't 2002), for full history of the case: "It can be gleaned that the Hearing Examiner determined that the stipulation was void because the parties did not enter into a valid opting out agreement (FCA § 413[1][h])."

58. We are not told if the Family Court order was based exclusively on the stipulation or was made after a finding that vacated the stipulation for failure to comply with DRL § 240(1-b)(h).

59. *See* discussion above, "The Principle of Estoppel."

60. The other decisions cited in *Young* relative to this paragraph are analyzed individually in this section: *Harbour v. Harbour*, 243 A.D.2d 947, 664 N.Y.S.2d 135 (3d Dep't 1997); *Clark v. Liska*, 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dep't 1999); and *Blaikie v. Mortner,* 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dep't 2000).

61. *Gaines v. Gaines*, 188 A.D.2d 1048, 592 N.Y.S.2d 204 (4th Dep't 1992), held that the Supreme Court had erroneously entertained an application to set aside a post-divorce agreement brought by motion rather than by plenary action, affirmative defense or, counterclaim, but it nevertheless waived the defect *nunc pro tunc* "because the determination . . . was made after a full hearing tantamount to a plenary trial, [that] we address the merits in the interest of judicial economy."

62. *Young* added in dicta: "To be sure, had petitioner been limited to his arguments before the Hearing Examiner, the petition clearly should have been dismissed as he woefully failed to demonstrate a sufficient change in circumstances warranting a downward modification of child support." This is clearly incorrect.

63. 63 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dep't 1999).

64. 243 A.D.2d 947, 664 N.Y.S.2d 135 (3d Dep't 1997).

65. DRL § 236B(3) provides in pertinent part: "An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."

66. *Lischynsky v. Lischynsky*, 95 A.D.2d 111, 466 N.Y.S.2d 815 (3d Dep't 1983).

67. 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).

68. 263 A.D.2d 640, 692 N.Y.S.2d 825 (3d Dep't 1999).

69. Prior to his application in Supreme Court, Family Court dismissed a motion to overturn the Supreme Court order for support on the grounds that it did not have such jurisdiction. *Clark v. Liska,* 262 A.D.2d 721, 691 N.Y.S.2d 633 (3d Dep't 1999).

70. 21 A.D.3d 879, 800 N.Y.S.2d 612 (2d Dep't 2005).

71. *See*, for example, grievous injustice: *Reynolds v. Oster,* 192 A.D.2d 794, 596 N.Y.S.2d 545 (3d Dep't 1993), *appeal dismissed*, 81 N.Y.2d 1068, 619 N.E.2d 665, 601 N.Y.S.2d 587 (1993); *Commissioner of Social Services v. Grant*, 154 Misc. 2d 571, 585 N.Y.S.2d 961 (Fam. Ct., N.Y. Co. 1992). The review of the various arguments was erroneous because it imparts the incorrect message that a sufficiently strong substantive argument could have defeated the statutorily defective agreement. A court may not inject equitable or legal considerations into a statutorily void agreement from which no rights can accrue *ab initio*.

72. 6 A.D.3d 794, 774 N.Y.S.2d 586 (3d Dep't 2004).

73. *Bast v. Rossoff*, 91 N.Y.2d 723, 728, 675 N.Y.S.2d 19, 697 N.E.2d 1009 [1998] (The CSSA clearly requires the trial court to first calculate the basic child support obligation, using the three-step statutory formula, before resorting to the "paragraph (f)" factors (DRL § 240(1-b)(f), (g)). Indeed, even where the trial court rejects the amount derived from the statutory formula, it still must set forth that amount in its written order—"an unbending requirement that cannot be waived by either party or counsel."); *Cassano v. Cassano*, 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878 (1995) (Whenever the basic child support obligation derived by application of the formula would be "unjust or inappropriate," the court must consider the "paragraph (f)" factors. That is so whether parental income is above or below $80,000 (FCA § 413(1)(b)(1), (c)(2), (3)). If the formula is rejected, the statute directs that the court "set forth, in a written order, the factors it considered" an unbending requirement that cannot be waived by either party or counsel (FCA § 413(1)(g)).

74. *See Du Bois v. Swisher*, 306 A.D.2d 610, 759 N.Y.S.2d 714 (3d Dep't 2003), *leave to appeal dismissed*, 100 N.Y.2d 515, 801 N.E.2d 423, 769 N.Y.S.2d 202 (2003).

75. 306 A.D.2d 610, 759 N.Y.S.2d 714 (3d Dep't 2003), *leave to appeal dismissed*, 100 N.Y.2d 515, 801 N.E.2d 423, 769 N.Y.S.2d 202 (2003).

76. *Du Bois v. Swisher* cited two Fourth Department decisions: (1) *Brown v. Powell*, 278 A.D.2d 846, 718 N.Y.S.2d 674 (4th Dept. 2000) ("both the child support provisions of the separation agreement and that part of the judgment incorporating those provisions fail to satisfy the requirements of DRL § 240(1-b)(h). We therefore modify the judgment by vacating that part incorporating the child support provisions of the separation agreement, and we remit the matter to Supreme Court to determine plaintiff's child support obligation in accordance with the CSSA."), and (2) *Riggie v. Riggie*, 217 A.D.2d 909, 630 N.Y.S.2d 184 (4th Dep't 1995) ("the stipulation fails to establish that the parties were advised of the CSSA, that application of the statute would presumptively result in the correct amount of child support, and the amount that petitioner would be required to pay under the statute. Additionally, the order of the court incorporating the stipulation fails to set forth the court's reasons for approving the opting-out arrangement. Therefore, we reverse the order and remit for further proceedings on the petition.").

77. 309 A.D.2d 1124, 766 N.Y.S.2d 244 (3d Dep't 2003).

78. McKinney's Statutes, CPLR 2215, Practice Commentaries, Prof. David Siegel, C2215:1.

79. 294 A.D.2d 681, 741 N.Y.S.2d 345 (3d Dep't 2002).

80. 130 A.D.2d 406, 515 N.Y.S.2d 443 (1st Dep't 1987).

81. *Harrington v. McManus* 303 A.D.2d 368, 755 N.Y.S.2d 661 (2d Dep't 2003) ("The Court erred in directing the husband, *sua sponte*, to pay all carrying costs on the marital residence pending its sale. The plaintiff never requested the [relief] and the defendant was never given an opportunity to oppose the granting of such relief.");

Tender Care, Inc. v. Selin, 90 A.D.2d 547, 455 N.Y.S.2d 122 (2d Dep't 1982) ("Sua sponte vacatur of judgment of dismissal for failure to prosecute was error where plaintiff never sought such relief by cross motion or otherwise and defendants were never given opportunity to oppose granting of relief.").

82. *Leibowits v. Leibowits*, 93 A.D.2d 535, 462 N.Y.S.2d 469 (2d Dep't 1983); *Novick v. Novick*, 251 A.D.2d 385, 674 N.Y.S.2d 87 (2d Dep't 1998); *Monroe v. Monroe*, 108 A.D.2d 793, 485 N.Y.S.2d 310 (2d Dep't 1985).
83. 29 A.D.3d 963, 816 N.Y.S.2d 158 (2d Dep't 2006).
84. *Klein v. Klein*, 125 A.D.2d 450, 509 N.Y.S.2d 380 (2d Dep't 1986).
85. 18 A.D.3d 525, 527, 795 N.Y.S.2d 96 (2d Dep't 2005).
86. *Boden v. Boden*, 42 N.Y.2d 210, 366 N.E.2d 791, 397 N.Y.S.2d 701 (1977); and *Brescia v. Fitts*, 451 N.Y.S.2d 68, 436 N.E.2d 518, 56 N.Y.2d 132 (1982).
87. *Jones v. Carey*, 55 A.D.2d 260, 389 N.Y.S.2d 921 (3d Dep't 1976); *Papandrea v. Papandrea*, 264 A.D.2d 767 (2d Dep't 1999); *Gagasoulas v. Daneshfar*, 12 Misc. 3d 1199(A), 824 N.Y.S.2d 768 (Sup. Ct., Suffolk Co. 2006): where a party fails to meet his or her statutory burden, the claim asserted must be denied.
88. 89 N.Y.2d 714, 680 N.E.2d 578, 658 N.Y.S.2d 205 (1997).
89. *Black's Law Dictionary*, 8th edition: ex mero motu (eks meer-oh moh-tyoo). (Latin "on his mere motion") Hist. Voluntarily; without suggestion or influence from another person. The phrase was formerly sometimes used in reference to a court, as an equivalent of *sua sponte* or "on its own motion."
90. *Gravlin v. Ruppert*, 98 N.Y.2d 1, 765 N.E.2d 298, 739 N.Y.S.2d 94 (2002).
91. *Smith v. Mathis-Smith*, 17 A.D.3d 1157, 794 N.Y.S.2d 556 (4th Dep't 2005), *citing Sievers v. Estelle*, 211 A.D.2d 173, 626 N.Y.S.2d 592 (3d Dep't 1995).
92. 281 A.D.2d 989, 722 N.Y.S.2d 328 (4th Dep't 2001), *citing Zenz v. Zenz*, 260 A.D.2d 474, 689 N.Y.S.2d 167 (2d Dep't 1999); *Brown v. Powell*, 278 A.D.2d 846, 718 N.Y.S.2d 674 (4th Dep't 2000).
93. 295 A.D.2d 279, 744 N.Y.S.2d 36 (1st Dep't 2002).
94. *Sanders v. Copley*, 151 A.D.2d 350, 543 N.Y.S.2d 67 (1st Dep't 1989).
95. *Broer v. Hellermann*, 2 A.D.3d 1247, 770 N.Y.S.2d 212 (3d Dep't 2003).
96. 305 A.D.2d 478, 759 N.Y.S.2d 494 (2d Dep't 2003); *Huddleston v. Huddleston*, 14 A.D.3d 511, 788 N.Y.S.2d 411 (2d Dep't 2005).
97. 293 A.D.2d 811, 740 N.Y.S.2d 493 (3d Dep't 2002).
98. *Blaikie v. Mortner*, 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dep't 2000) (although the CSSA discourages deviations from the basic statutory child support amounts. In addressing only deviation in general, though, the CSSA is less than clear regarding deviations upward voluntarily agreed to by a parent, although there is some indication that the deviation must be set forth and explained.).
99. 298 A.D.2d 923, 747 N.Y.S.2d 639 (4th Dep't 2002).
100. 304 A.D.2d 1009, 759 N.Y.S.2d 212 (3d Dep't 2003).
101. *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 680 N.E.2d 578, 658 N.Y.S.2d 205 (1997); *Newham v. Chile Exploration Co.*, 232 N.Y. 37, 133 N.E. 120 (1921).
102. *Commonwealth Elec. Inspection Services, Inc. v. Town of Clarence*, 6 A.D.3d 1185, 776 N.Y.S.2d 687 (4th Dep't 2004); *Patrone v. M.P. Howlett, Inc.*, 237 N.Y. 394, 143 N.E. 232 (1924).
103. *Marine Midland Bank, N.A. v. Bowker*, 89 A.D.2d 194, 456 N.Y.S.2d 243 (3d Dep't 1982); *Harris v. Hirsh*, 196 A.D.2d 425, 601 N.Y.S.2d 275 (1st Dep't 1993).
104. 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dep't 2000).
105. 293 A.D.2d 811, 740 N.Y.S.2d 493 (3d Dep't 2002).
106. 264 A.D.2d 535, 693 N.Y.S.2d 351 (3d Dep't 1999), *lv. denied*, 94 N.Y.2d 754, 701 N.Y.S.2d 340 (1999); *see Klein v. Klein*, 246 A.D.2d 195, 676 N.Y.S.2d 69 (1st Dep't 1998) (The child-support provision, in conclusory fashion: "In this agreement the provisions for child support have been set in a fair amount based on many considerations including the parties' respective finances and other financial provisions of this Agreement and the custodial parent hereby waives her right to seek child support under the CSSA." This language does not comply with the statutory requirement to state the amount of the basic child-support obligation or the reason why such amount is not to be paid.).
107. 24 A.D.3d 586, 808 N.Y.S.2d 359 (2d Dep't 2005).
108. 278 A.D.2d 130, 718 N.Y.S.2d 315 (1st Dep't 2000).
109. *See Bill v. Bill*, 214 A.D.2d 84, 631 N.Y.S.2d 699 (2d Dep't 1995) (An examination of the legislative history of the CSSA reveals that child care costs were set out as "a distinct element of the basic child [care] obligation" because such costs "can represent an inordinate proportion of the costs of raising a child" and place an undue financial burden on the custodial parent (L.1989, ch. 567, Memorandum of the State Executive Department). Moreover, supporters of the bill expressed concern that "the burden of child care costs" could be "a real disincentive to the custodial parent's seeking employment" (L.1989, ch. 567, Memorandum of the State Executive Department)); *Vernon v. Vernon*, 239 A.D.2d 108, 656 N.Y.S.2d 634 (1st Dep't 1997) (Child care and medical costs are "distinct element[s]" of basic child support that should be dealt with separately (*Bill v. Bill*, 214 A.D.2d 84, 631 N.Y.S.2d 699; DRL § 240(1-b)(c)(4), (5), (6)). The agreement did not state what the husband's obligation for child care and medical care costs would be under the CSSA, or why such a calculation was not made, or whether the parties were advised of their rights under the CSSA for a separate accounting of such costs. Accordingly, the agreement was not in compliance with DRL § 240(1-b)(h) insofar as it relates to such costs, and was properly held invalid with respect to such costs.).
110. 214 A.D.2d 84, 631 N.Y.S.2d 699 (2d Dep't 1995).
111. *See Schaller v. Schaller*, 279 A.D.2d 525, 719 N.Y.S.2d 278 (2d Dep't 2001); and *D.S. v. T.S.*, 7 Misc. 3d 1024(A), 801 N.Y.S.2d 232 (Sup. Ct. 2005).
112. 270 A.D.2d 338, 704 N.Y.S.2d 144 (2d Dep't 2000); *see Tryon v. Tryon*, 37 A.D.3d 455, 830 N.Y.S.2d 233 (2d Dep't 2007) (tuition is an add-on educational expense which is considered separately from the initial calculation of child support for basic need.).
113. 275 A.D.2d 459, 713 N.Y.S.2d 79 (2d Dep't 2000).
114. *See Blaikie v. Mortner*, 274 A.D.2d 95, 713 N.Y.S.2d 148 (1st Dep't 2000) (Child support generally means the amount of money to be paid for the care, maintenance and education of unemancipated children (DRL § 240(1-b)(b)(2)) . . . The statute defines "basic" child support as the outcome of a mathematical formula set forth in guidelines, subject to increase on the basis of various factors, including health care, child care and educational expenses (DRL § 240(1-b) (b)(1)), the latter commonly referred to as "add-on" expenses.).
115. *Jessup v. LaBonte*, 289 A.D.2d 295, 734 N.Y.S.2d 219 (2d Dep't 2001) (neither the parties' stipulation nor the judgment of divorce complied with the relevant statutory requirements for a valid opt-out agreement, thus, the stipulation and the judgment of divorce, insofar as they concern unreimbursed medical expenses, are invalid and unenforceable); *Toussaint v. Toussaint*, 270 A.D.2d 338, 704 N.Y.S.2d 144 (2d Dep't 2000); *Weimer v. Weimer*, 281 A.D.2d 989, 722 N.Y.S.2d 328 (4th Dep't 2001).
116. *Jessup v. LaBonte*, 289 A.D.2d 295, 734 N.Y.S.2d 219 (2d Dep't 2001); *McColl v. McColl*, 6 A.D.3d 794, 774 N.Y.S.2d 586 (3d Dep't 2004); *Cardinal v. Cardinal*, 275 A.D.2d 756, 713 N.Y.S.2d 370 (2d Dep't 2000); *Toussaint v. Toussaint*, 270 A.D.2d 338, 704 N.Y.S.2d 144 (2d Dep't 2000); *Vernon v. Vernon*, 239 A.D.2d 108, 656 N.Y.S.2d 634 (1st Dep't 1997).
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Elliott Scheinberg is a consultant to the matrimonial bar for appeals, trial briefs and memoranda, and motions.

The Implementation of Civility Coaching in Separation and Divorce Cases: A Missing Piece in the Matrimonial Process

By Roger Pierangelo and George Giuliani

Abstract

The role for a new form of therapeutic intervention is needed to work with the specific and unique dynamics present during the process of separation and divorce. Historically, once parents decide to separate or divorce, the battle begins, and the distance between the two parents usually increases dramatically. The problem here is that the severe emotional state of the parents may at times distort perception and consequently influence judgment and the determination of real priorities regarding their children. What further develop are feelings of anger, revenge and control, rather than logic, common sense and fairness. In order to meet the needs and protect children whose parents are embattled in a hostile divorce, a new, very specific, therapeutically confrontational and involved process must be implemented. This intervention is referred to as Civility Coaching. The focus of this article is to address the need for Civility Coaching, explain how it works, and give the rationale for its purpose. Without this type of intervention, many children will continue to be emotionally scarred as a result of their parents' irrationality and destructive behavior during the legal process of separation and divorce.

"Historically, once parents decide to separate or divorce, the battle begins, and the distance between the two parents usually increases dramatically."

The Implementation of Civility Coaching in Separation and Divorce Cases: A Missing Piece in the Matrimonial Process

Historically, courts have not utilized the therapeutic community of professional psychologists to assist them until a matrimonial case is well under way, and many times not even then. If a referral for psychological intervention should take place, the courts will usually refer the case for a forensic evaluation if custody is an issue or make a referral for court-appointed counseling when the tension, anger, rage levels, lack of communication and outright revenge factors have reached a pitch that creates serious difficulties for negotiation and resolution. However, by this time, the damage to the children and the psychological distance and defensiveness between the two parties are so great that traditional counseling is often useless. Even when a counselor finally sees the parties involved, they are oftentimes doomed to failure by the use of traditional methods, which are often geared toward techniques used in couples or marriage counseling.

The specific emotional factors and dynamics that are present in the cases of separation and divorce have resulted in the need for a very different form of therapeutic intervention. This form of therapeutic intervention has to take into account several facts that may not be present in marriage, couples or relationship therapy where the deprivation of emotional needs creates severe tension which is manifested in fighting, anger, distance, apathy and displacement onto other issues. The goals in marital or couples counseling are to identify the needs, understand the past, find healthier outlets, and label feelings to increase communication, all of which hopefully lead to a more intimate relationship. In the case of two individuals getting divorced, there is no need to increase intimacy, since both parties probably tried that route, failed, and have since decided to part ways. Delving into past deprivation of needs, which probably caused the separation in the first place, is analogous to ripping scabs off wounds.

However, since the emotional well-being of children is involved, it would be tragic if no intervention were quickly initiated. Often, parents involved in matrimonial cases will expound on their virtues when it comes to the welfare of their children. They will speak about how they truly want their children to have a healthy relationship with their spouse, want the children to be happy, are willing to do anything to prevent scars for their children, cooperate with their spouse, etc. However, all too often, their behavior and words never line up, and what occurs is often the complete opposite. The parents' fragile emotional state, brought on by sudden fears involving possible severe changes in finances, safety, sense of protection, environmental living conditions, social connections, emotional and sometimes vocational needs become the new and overwhelming focus in their lives. Since these fears now drain energy like never before, the judgment and perceptions of parents about issues that might be in the best interests of their children now become distorted. What may result are actions and behaviors toward each parent that do not take into account the impact on the well-being of children.

The period when parents are involved in the legal process of separation and divorce can become a very artificial, unnatural and psychologically destructive time for their children. This is a time when logic, common sense and fairness have to be instituted into their lives. What

needs to take place is finding the "eye of the hurricane." While all the turmoil and chaos surround the children, the need exists for some regular and ongoing process to monitor needs and provide some area of civility in their lives.

The reality of our legal system is that courts do not have the time to monitor the behavior of the parents on a weekly, let alone daily basis. If problems occur between the two parents who do not know how to or choose not to be civil, the courts will normally hear motions from each person's lawyer that actually do nothing for the immediate needs of the children. Often, these motions can take weeks and even months before they are heard in court, during which time the children are being destroyed. Furthermore, in general, lawyers also do not have the time, training or objectivity to monitor their own clients' behaviors that may prove destructive for the children. Legal guardians, while well intentioned, may often receive their information only from parents, whose objectivity is often questionable; interviews with children, whose anxiety and fears may mask their true feelings and motives; or lawyers who all too often know only one side of the story. Further, when law guardians meet with children, they may not be specifically trained to detect indoctrination, brainwashing, intimidation factors, and identification with the aggressor fears, which are often present when children speak to court personnel in matrimonial cases.

In most cases, the legal process of separation and divorce attempts to resolve three crucial issues: custody, visitation, and financial equity. According to Tesler and Thompson (2006), both our court system and our culture at large encourage us to take actions in divorce based on how we feel when we are at the bottom of the emotional roller coaster, when we are most gripped by anxiety, fear, grief, guilt, and shame. After all, that's when many people are moved to make the first call to a divorce lawyer. As a result, people are encouraged to make shortsighted choices based on emotional reactions that do not take into account anyone's long-term best interests. The resulting "bad divorces" harm everyone and serve no one well. As a result, what it lacks is the process to provide the consistent ongoing protection and safety of the needs of the children on a daily basis. If there is no intervention provided, and the rage and anger of the parents are allowed to occur without monitoring, many psychological and permanent changes in a child's personality can result. These changes can and will have potentially adverse and destructive influences over the child's future relationships, intimacy, commitment, trust and parenting skills. (Clandos and Kemp et al. 2006; Sherman 2006).

Most parents involved in the legal process of divorce and separation will vehemently deny any involvement with not fostering a relationship with the other parent. However, it is our experience that the behavior of the children will inevitably reflect whether or not such statements are true. If a child struggles with his/her relationship with either parent through avoidance, rejection, negative comments, resistance, etc., it becomes highly probable that one possible factor may be the influence of the other parent. Since we communicate approximately 55 percent nonverbally, these messages need not be overt. Mehrabian (1981) believes verbal cues provide 7 percent of the meaning of the message; vocal cues, 38 percent; and facial expressions, 55 percent. This means that, as the receiver of a message, a child can rely heavily on the facial expressions of the sender because his or her expressions are a better indicator of the meaning behind the message than his words. Unless there has been a reason for the child's hesitation toward a parent (i.e., prior physical, sexual or emotional abuse, neglect, etc.), which would substantiate such resistance or reluctance, then any other resistance can be tied to only the inappropriate behavior, both verbal and nonverbal, of one of the parents. However, in many cases, both parents contribute equally to the confusion and emotional chaos of the child by trying to "win" over the children against the other parent. In these cases, children are often so torn that depression, acting out behavior, withdrawal, or in some cases self-destructive behavior may occur as a means of venting anger or finding an escape from the severe tension.

"Children know when parents hate each other."

Major Forces of Emotional Destruction to Children During the Legal Process of Separation and Divorce

If not addressed, the major forces of emotional destruction on children contributed to by the inappropriate behavior of parents during the legal process of separation and divorce are:

1. **Loyalty Fears and Fears of Betrayal:** Children know when parents hate each other. Since, as previously mentioned, we communicate 55 percent nonverbally, it is not difficult for children, who by nature are very visual, to read the intense disgust that one parent may harbor for the other. In many cases, this is not even kept to a nonverbal level but is consistently reinforced by verbal barrages, innuendos and subtle destructive comments. Here, the child is deathly afraid of having one parent reject him or her for having a relationship with the other. Further, children often fear openly verbalizing any love, caring or need for the other parent. These verbalizations may be interpreted as betrayal or disloyalty to the angry parent. In many cases, these negative reactions or the angry environment may intensify quickly when another

individual is brought into the life of the other parent, i.e., dating, engagement, and remarriage. Often, the loss of hope for any reconciliation, fears of abandonment, and the unequal playing field involving relationships aggravates the already tense situation. The tension and turmoil that arise within the child can be devastating, since he/she is emotionally being blackmailed by one parent to reject the other parent, a process that instills intense fear and guilt within him/her.

2. **Transitional Anxiety:** Transitional anxiety stems from the fears generated when children go from one parent to the other, knowing that both parents hate each other. Many parents will report a long period of adjustment for children after picking them up for visitation. During that adjustment period, parents will report agitation, confrontation, withdrawal, anger, intense criticism, etc. What is actually occurring is the psychological state of transitional positioning on the part of the children who can then, if necessary, report the tension back to the other parent if the environment upon return is hostile or tense. We have witnessed numerous sessions with a parent and his/her children in our offices having a great time until the children are told that only a few minutes are left and they will be getting into the car of the other parent. At this point, in many situations, some criticism, fighting, agitation or withdrawal is directly observed on the part of the children. This occurs because the children have been conditioned to learn that reporting any positive experiences is not acceptable and only makes mommy or daddy unhappy. What the children are then armed with are the agitation and tension created by the impending situation.

3. **Social Embarrassment:** Another major source of tension and draining of energy for children occurs as the result of the embarrassment generated by public confrontation in front of the children by the parents, including issues involving child support payments, other relationships, control over schedules, etc. These dramatic and "theatrical" episodes on the part of one or both parents occur with no regard for the well-being of their children. If these episodes occur during sporting or school activities with peers around, then the level of social embarrassment will have long-lasting negative emotional effects on the children.

4. **Open Denigration by Either Parent:** Denigrating comments about the other parent may force children to be placed in a position of defending the other parent. It is not uncommon for one or both parents to openly denigrate the other parent either within earshot of the child or right in front of the child. The hope here by the parent is to "convince" the child that they are the "good" one and the other parent is bad or should not be trusted. However, this sometimes backfires and forces the child to defend the other parent leading to confrontation and punitive consequences.

5. **Identification with the Aggressor:** This is a concept that can readily be seen in children during hostile stages in separation and divorce. According to Frankel (2002), when we feel overwhelmed by an inescapable threat, we "identify with the aggressor" (Ferenczi 1933). Hoping to survive, we sense and "become" precisely what the attacker expects of us—in our behavior, perceptions, emotions, and thoughts. Identification with the aggressor is closely coordinated with other responses to trauma, including dissociation. Over the long run, it can become habitual and can lead to masochism, chronic hyper-vigilance, and other personality distortions.

   But habitual identification with the aggressor also frequently occurs in people who have not suffered severe trauma, which raises the possibility that certain events not generally considered to constitute trauma are often experienced as traumatic. Emotional abandonment or isolation, and being subject to a greater power, are such events. In addition, identification with the aggressor is a tactic typical of people in a weak position (Frankel 2002). What often happens with children who are in this type of weakened state is that they will side with whom they perceive as the most aggressive and potentially rejecting parent against the other parent in hopes that the aggressor will not turn on them. The children's behavior in this case will too often be to always make excuses for not wanting visitation, feigning illness, wanting to go home early, creating tension to cause shortened visitation and outright refusal to go on visitation.

6. **Hostile Reactive States of Parents:** In our opinion, there are three states of hostile behavior that greatly affect the psychological well-being of children and mold their opinions and feelings for one of their parents. In order of severity, these are: (1) Subtle Passive State; (2) Hostile Indirect State; and (3) Hostile Direct State.

   Subtle Passive State
   In the first case, the parent provides subtle messages to the children, such as looking angry or becoming quiet to the children when they are leaving to see the other parent. Nothing overt is said.

However, this act of emotional removal creates enormous tension within the children because the loss of approval by the parent is interpreted as a loss of love, one of the most frightening fears of children.

Hostile Indirect
In the second case, the parent may argue over the phone with the other parent with the children in close proximity. The arguments can become emotionally turbulent, and many hostile words can be said. However, since the conversation has taken place over the phone, the children will hear only one side. The parent will then get off the phone and be nice to the children. Regardless, the damage is done and the child gets the clear message—don't mess with me or make me unhappy.

Hostile Direct State
The third state, Hostile Direct, is the most serious type. In this case, the parent doesn't care who is around, and exhibits the most out of control behavior possible (e.g., hitting a parent or throwing things in front of the children). The messages here are three-fold: (1) "No one can stop me," (2) "I will do anything I want," and (3) "Do not trust this man or woman." This type of behavior has the most negative effect on children. Not only do such acts constitute a serious issue of emotional instability on the part of the parent, but they indicate a complete disregard for the emotional well-being of the children. In our experience, if Hostile Direct State is occurring, then it is almost certain that the two other levels are also being used.

7. **Parent Dependency Syndrome:** There are times when a parent will not intentionally alienate his or her children from the other parent but will instead create an unhealthy dependency through a series of subtle and/or emotional reactions. The need for this type of dependency often arises out of the parent's own fears of isolation and abandonment, low self-esteem, a lack of adult anchors or meaningful relationships or sometimes unresolved issues from his/her past. While not an alienation process, the secondary effects of Parent Dependency Syndrome result in an unwillingness of the children to leave the dependent parent. The reactions of the dependent parent give the children the message that the parent is a victim, unhappy without them, in turmoil if they are not with him/her, and can only survive if the children stay with him/her. Examples include:

   "It's O.K., I'll find something to do when you are not here."

   "Mommy will miss you so much when you are with Daddy."

   "I get so sad when you leave me."

   "I will be here waiting for you to come home."

   "I will wait for your call."

   Such guilt makes it very hard, if not impossible, for the children to leave the parent's orbit. The effects on children of this dependency syndrome can be seen not only in the unwillingness to leave the parent but may also limit the children from venturing out to new social, educational, recreational, and any other experiences that would leave the parent "alone." What inevitably occurs is an extreme limitation of the children's safety zone, the area in which the children feels safe.

Current Therapeutic Interventions Used by the Legal System

In many cases today, judges often have only two available options if therapeutic intervention, other than a forensic evaluation, is considered as part of the separation and divorce process:

Option One: Short-Term Divorce Workshops: This intervention strategy, called the PEACE Program in Nassau County, N.Y., is a court-mandated workshop designed to inform parents as a group of the problems involved in going through separation and divorce, the influence of their behavior on children and many other pertinent concepts that are crucial to know. It can be an excellent intervention strategy for parents that are rational, logical, and are separating as a result of a mutual understanding. In this scenario the chances for incorporation of the suggestions are high since the anxiety, anger, revenge, and irrationality levels are low. However, for parents who are not logical and rational the suggested recommendations will have very little chance of becoming permanently incorporated through the legal process since high anxiety and tension will greatly reduce their desires to cooperate. Further, there is no ongoing monitoring of the parent behavior after the workshop is over to make sure that the parents stay on track and no harm comes to the children.

Option Two: Short-Term Therapeutic Crisis Intervention: When judges feel that a certain specific issue or issues are preventing parents from moving the case forward, they may order court-appointed therapeutic intervention. Here, the court clearly outlines what the therapist is asked to resolve and is strictly limited to those issues and those issues only. In Nassau County, this program is called the *Parent Coordination Program*. For instance, if a judge feels that certain aspects of a visitation schedule need to be resolved or a holiday schedule needs to be determined, then this type of intervention should be available. This can be very useful when the flow of the legal process and levels of cooperation are high. In these cases the participants should be assigned this process when the unresolved issues identified by the judge are not symptomatic of larger,

more destructive issues. For instance, two well-meaning parents may need a third party to fully understand all of the options and resolution techniques necessary to end a minor dispute. However, all too often what is seen as a minor issue may really be a larger more destructive pattern that will never be resolved using this technique. If one parent needs to control, intimidate, hurt, invalidate, etc., the other, then this will be a problem in all the issues discussed and would require a more intense form of intervention with fewer restrictions. Otherwise, this would be like trying to reduce a fever when the real issue is a serious infection. You may calm down the fever temporarily but the symptoms of the infection will eventually show up in other forms. In many instances, courts mistakenly identify a problem as a specific issue rather than a deeper, more pathological pattern that will have repercussions throughout the process.

"You do not have to like someone in order to be civil, but the motivating factor behind Civility Coaching is that you have to love your children more than you hate each other."

These two intervention strategies are fine in certain cases and can be very effective. However, both have their limitations when it comes to more serious cases where rage, anger, irrationality, and revenge have reached high levels on the part of one or both parents and the psychological well-being of the children is greatly compromised. In these cases, a third option, which is a more involved process, is needed.

Civility Coaching: A New Way of Working with Parents in the Legal Process of Separation and Divorce

From our experience, the role for a new form of therapeutic intervention is needed to work with the specific and unique dynamics present during the process of separation and divorce. This process should be initiated at the very beginning of the separation and divorce process when children are involved, not after years of rage and the psychological destruction of children. Historically, once parents make the decision to separate or divorce, the battle begins and the emotional distance and lack of civility between the two parents increase exponentially. For all intents and purposes, the lawyers lead the battle for the parents, who are confused, frightened, and hurt, and may stay in the background and become observers or informants. The problem here is that the severe emotional state of the parent may at times distort perception and consequently influence judgment and the determination of real priorities. What further develop are feelings of anger, revenge and control, rather than logic, common sense and fairness.

Once the "battle" begins, the parents rarely, if ever, speak with each other in an attempt to resolve issues with the children. This increased emotional and physical distance actually increases anger, misconceptions and distrust. Everyday issues that need to be dealt with for the sake of the children are avoided. What the children see are two individuals whose anger, rage, and resentment are communicated through body language or verbal rage. Any other form of communication is usually done through lawyers' letters and motions, none of which assist the immediate safety and security needs of the children.

What is needed is a therapeutic intervention that would actually force parents to get closer, not emotionally but civilly. You do not have to like someone in order to be civil, but the motivating factor behind Civility Coaching is that you have to *love your children more than you hate each other*. For many parents, this issue is often lost, not because they do not love their children but because there is no one providing a frame of reference with fair, logical and commonsense boundaries and a monitoring environment to work out issues that will help their children and themselves reduce their anxiety on a regular weekly basis. Most parents in the legal process of separation and divorce dread the thought of being in "therapy" with their spouse. That is because they are using the traditional concept where you get out your anger, pull scabs off wounds, fight and hear threat after threat, lie after lie, accusation after accusation and numerous historical negative experiences. That is not what Civility Coaching is all about.

Civility Coaching is a very direct and therapeutically confrontational form of sometimes daily communication and weekly intervention sessions that factor in the psychological, legal, and personality constructs of the individuals involved. While the parents formally attend weekly sessions, issues are resolved in a timely manner, sometimes daily (use of phone conferences with the Civility Coach, e-mail, etc.), in order to calm the situation, reduce feelings of helplessness, make people feel heard, and provide a logical and fair arena for issues to be resolved. In this way, the clients feel more anchored, less frightened and as a result become more willing to listen, delay inappropriate reactions, and more clearly see the implications of their behavior. It is a form of intervention whose main goals are to:

1. Protect the children from serious emotional game playing by the parents.
2. Protect the children from hostile behaviors on the part of parents that may artificially confuse their feelings about a parent.

3. Protect the children from being used as pawns in the court case.
4. Protect the children from their own parents, who quite frequently have lost their ability to reason, maintain perspective and muster enough common sense for resolution.
5. Provide commonsense, logical and fair rules and avenues of civility for the parents.
6. Make the parents accountable for the well-being of their children.
7. Make parents accountable for their behavior and provide healthier outlets for their feelings.
8. Empower children with the tools that will assist them through this turmoil.
9. Teach children how to be neutral during the separation and divorce process by providing practical tools.
10. Provide children with a commonsense and logical anchor during this process that is available to them seven days a week.
11. Provide immediate outlets for tension by having someone to turn to so that it does not build into something destructive.
12. Provide better tools of civility for parents so their voices can be heard. Many times anger is really not the lead emotion but rather the vehicle for the real emotion. For instance, panic may come out as anger; vulnerability, fears of abandonment, feelings of being unprotected and so on are also emotions that may be misread because the person exhibits anger, which is a form of tension release for the real emotion. All too often, it is the anger that is reacted to by those around the person and not the real emotional need (e.g., the need for security and protection). As a result, the person never feels heard since the reactions are to the wrong emotion. Civility Coaching teaches people to read, label and verbalize the primary emotional need and reduce the need for angry outbursts.

In our experience, Civility Coaching will work only if the parents are court ordered to cooperate with the Civility Coach. In traditional therapy, the therapist may take months to get the couple to agree on some compromise, whether it involves having the children call the other parent, getting kids ready for visitation, not denigrating the other parent in front of the children, and so on. In the meantime, these inappropriate and destructive behavior patterns go on and the children begin the process of being scarred, sometimes for life. In Civility Coaching, it is clearly understood from the beginning that there are healthy ways to act if the children are truly the concern of the parents. In Civility Coaching, the parents are not the primary concern; the well-being of the children is the sole focus. Keep in mind that the more civil the two parents are, the easier it is for the children to relax and be less tense and anxious. Reducing the distance between the two parents also makes it easier for children to go back and forth without fears of reprisal or guilt or what we call *fluid interaction*.

Rules of Civility Coaching

At the beginning of Civility Coaching, it is clearly stated, reinforced, and monitored that:

1. No arguments can occur in front of the children (e.g., no theater, no drama, etc.).
2. Full cooperation must exist in the transition process during visitation.
3. No interrogation of the children can occur when they arrive home from a visitation.
4. Conditions that lead to transitional anxiety are reduced.
5. Daily phone calls to either parent for/from young children are reinforced.
6. Children are never allowed to be messengers.
7. *Arena Parenting is established:* This is a crucial part of Civility Coaching for parents remaining in the same house during the legal process, since most arguments between parents in separation and divorce center around parenting issues. Arena Parenting is a process that establishes a set arena time for both parents where the health, welfare, and safety needs of the children are taken care of by one parent without the intrusion of the other. The arena control is followed and monitored by the Civility Coach, and as long as the health, welfare, and safety needs of the children are followed, each parent will have his or her protected arena time. This dramatically reduces control issues, the use of children for displaced anger, and drama in front of the children. Issues that transcend both arenas are discussed and ways of resolving issues in a civil manner are taught and monitored. Children are guided in understanding the rules of Arena Parenting.
8. The parents must follow any court-ordered agreement or signed agreement by the two parties. In this way, the court can be reassured that a daily or weekly monitoring of its orders will take place, since this is not a realistic position for the judge, law guardian or lawyers.

9. The health, welfare, and safety concerns of the children are of primary importance.

10. Civility Coaching is not individual or family coaching—it is strongly suggested that parents be in individual counseling during this process. Individual counseling for children is recommended on a case-by-case basis.

11. There are specific rules of civility that must be followed by both parents which are fully discussed in sessions.

12. There is no discussion of history in Civility Coaching—both individuals have agreed to separate or divorce and any discussion of the past is not allowed. The Civility Coach would have met with each party separately at the beginning to get each person's perception of past events. However, that would be the only time when history would be discussed.

13. In Civility Coaching the parents are not part of the equation—only the children's health, safety and well-being are at issue. The parents are there to provide a civil environment in which the children can flourish to the best of their abilities.

14. When parents live apart, Civility Coaching is based on a separation/divorce mentality, not a married mentality where there is one family and one house. In Civility Coaching there is a 2 home/2 family mentality.

15. Civility Coaching empowers children to be neutral and empowers them with tools to deal with parents' inappropriate behavior.

16. Civility Coaching is based on logic, common sense and fairness.

17. The principles of Civility Coaching and use of civil options (e-mail, phone conferences, delay, etc.) are always in effect, 24 hours a day, 7 days a week, and are monitored by the Civility Coach.

18. Civility Coaching is based on the hope that the more civil the parents, the greater chance for resolution. Civility Coaching allows for continuous interaction between the parties. For many couples, it may mark the first time in years that they have sat down to discuss anything without fighting, arguing, or becoming increasingly hostile toward each other.

Role of the Therapist in Civility Coaching

In Civility Coaching, the therapist takes on a non-traditional, more confrontational and highly involved role. The therapist monitors, challenges, and calls parents on their inappropriate behavior, such as lack of cooperation, psychological game playing, not following rules, ignoring court orders, or destructive behavior before it has a chance to develop and hurt the children. Further, the civility coach teaches parents the rules of civility and the children the rules of neutrality, which removes them from the "battlefield." It is imperative that civility coaching be court ordered to ensure cooperation and monitoring through the legal process. It is also imperative that the courts reinforce the neutrality of the civility coach by not permitting the therapist to testify in court. However, reports to the judge outlining cooperation and progress should be allowed on a regular basis to further validate the process.

"Civility Coaching should be a mandated part of every matrimonial case from the very first day when children are involved. Both the courts and lawyers must be involved to reinforce this process if the health, welfare, safety, and best interests of the children are truly a priority."

In traditional therapy, a therapist may try to get an individual to gain insight into his or her behavior, understand the position of the other parent, and/or link the motive to repressed anger, childhood conditioning, revenge, etc. As a result, traditional therapy may take months to years of time. In Civility Coaching, conflicts of concern are discussed immediately and the motives are secondary to the need for the immediate change of behavior. The intellectual awareness that the behavior of one or both parents is destructive to the mental health of the children should be all that is necessary.

Conclusion

Civility Coaching should be a mandated part of every matrimonial case from the very first day when children are involved. Both the courts and lawyers must be involved to reinforce this process if the health, welfare, safety, and best interests of the children are truly a priority.

When utilized right at the start of the legal process of separation and divorce, Civility Coaching allows for the realistic monitoring on a consistent weekly basis of behaviors that normally tear apart families, destroy the mental health of children, create intense anger, rage, intimidation, etc., on the parts of parents. The courts need to recognize that during this process people feel extremely vulnerable, hurt, rejected, fragile, alone, unprotected, anxious and frightened. These feelings become insulated by extreme anger and account for the rage in many separation and divorce cases. Providing logical and clearly defined boundaries by a trained professional can actually anchor individuals through this process, calm their

fears, protect children and possibly facilitate resolution. Without this third level of intervention, many children will continue to be emotionally scarred as a result of their parents' irrationality and destructive behavior during the legal process of separation and divorce.

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Roger Pierangelo is a doctor of psychology and an associate professor in the graduate school of special education and literacy at Long Island University. He is a N.Y.S. certified school psychologist, a N.Y.S. licensed psychologist, a board certified forensic psychologist and a board certified child and adolescent psychologist.

George Giuliani is an attorney and an associate professor at Hofstra University. He is the Director of the graduate school special education program at Hofstra. He is a doctor of psychology, a N.Y.S. certified school psychologist and a N.Y.S. licensed psychologist. He is a board certified forensic psychologist and a board certified child and adolescent psychologist.

Enhanced Earnings and the Valuation of Closely Held Businesses: The Special Case of Individuals Whose Abilities Are Not Average

By George Palumbo, Ph.D., Richard A. Shick, Ph.D. and James P. Renda, Esq.

Introduction

In 1985, the Court of Appeals issued its landmark decision of *O'Brien v. O'Brien*.[1] In doing so, the court adopted a liberal construction of DRL § 236(B)(5)(e), which refers to the use of distributive awards ". . . in order to achieve equity between the parties. . . ."[2] The liberal construction continues to date and the enhanced earnings doctrine established by the *O'Brien* case has become expansive in its application.[3]

As a result of the enhanced earnings doctrine, the marital bar and bench have called upon forensic experts to apply the principles of their academic disciplines to provide opinions on valuation issues. In an earlier work,[4] we addressed the issue of biases in the computation of enhanced earnings for individuals whose income does not clearly correlate to the "average income" of the profession or employment position. The purpose of this article is to augment that work by addressing the unique problems encountered when the facts of a case require both an enhanced earnings valuation and a business or professional practice valuation.

In this article, we begin by reviewing the enhanced earnings valuation process and the special case of an above-average earner.[5] We then identify the special problems that are encountered when individuals have their own firm or are partial owners of a closely held firm. These problems include:

- The necessity to value both the enhanced earnings and the business interest.
- The use of different valuation techniques for enhanced earnings and businesses and their implications for the values that are computed.
- The different values that the same income stream generates under different employment scenarios.
- The difficulty of determining the extent to which the individual is an above-average earner.
- The difficulties encountered in determining an individual's "reasonable compensation" and separating this from the returns to the individual's ownership interest.
- The biases that can occur if the above average earning power is not factored into the valuations.
- The problems encountered in using salary surveys for valuation work.

Finally, the article concludes by presenting some approaches for dealing with the problems that have been identified in these valuation situations.

A Review of the Enhanced Earnings Valuation Problems for Above-Average Earners

In our earlier article, we presented an illustration in which we assumed that Ms. X was a high school graduate at the time of her marriage. Following the marriage she completed a Bachelor's Degree and an advanced professional degree. At the time of her divorce she was earning $170,000 per year as the employee of a large, international corporation. Using data published by the U.S. Bureau of the Census, the average earnings of an individual of comparable age with an advanced professional degree were $71,700. Since Ms. X earned 2.37 times the average, we concluded that she was an above-average earner. As a result, this gave rise to the valuation problem.

In order to estimate the value of Ms. X's enhanced earnings as a result of the education she obtained during her marriage, it was necessary to make an assumption about her earnings had she not furthered her education beyond that of a high school graduate. This amount, which is not directly observable, is often called the "baseline earnings." If the average earnings of a high school graduate are used for the baseline, we demonstrated that the value of Ms. X's enhanced earnings was $1,419,000 utilizing a 7% discount rate. This calculation is reported in Table 1 on p. 27. The table first lists the remaining years of Ms. X's work life. Then secondly her earnings with the professional degree are projected, followed thirdly by the projected earnings of an average high school graduate. The earnings differences are calculated and then placed on an after-tax basis. Finally the present value of the after-tax earnings differences is computed.

We argued that this frequently utilized approach significantly overvalues the enhanced earnings. Using the findings of "human capital theory," we suggested that if Ms. X was an above-average earner with a professional degree, it was quite likely that she would have been an above-average earner had she not furthered her education during the marriage. That is to say, the characteristics that made her an above-average earner were not solely due to the education she obtained during the marriage, but rather were at least partially due to certain inherent characteristics that she possessed apart from the education. Since these inherent characteristics were not acquired

as part of the educational process, they should not be implicitly valued as a marital asset. We opined that to do so would overvalue the marital asset.

To deal with the overvaluation we proposed that the baseline earnings be adjusted to reflect Ms. X's greater than average earning power. The baseline earnings for Ms. X were increased 2.37 times and the present value of the enhanced earnings was revised downward to $999,000. In this way the total of $1,419,000 was separated into two components: (1) $999,000, which is due to the education obtained during the marriage, and (2) $420,000, which is due to Ms. X's inherent ability that pre-existed the date of marriage.

Below, we will address the problems encountered when Ms. X is no longer an employee but rather owns her own professional practice.

Valuation Problems of a Closely Held Business

When one party to the divorce is an owner of a business as opposed to being an employee, the valuation problems multiply. In *McSparron v. McSparron*,[6] the court rejected the concept of merger and established that a professional license retains its value after the individual has begun a career. When that individual has his or her own business, two valuations are required to determine the value of each asset in a divorce action. While *McSparron* did not give much guidance as to how the valuations were to be done, the court did say that the valuation must guard against duplication of awards. *McSparron* also reaffirmed that where the individual has embarked on a career and has a history of earnings, an individualized approach based on the person's remaining earning potential must be used in the valuation process.

Writing shortly after the *McSparron* decision, Mastracchio and Mastracchio[7] present a methodology to value licenses and practices and avoid duplication. They advance the concept of a "fair salary" for the individual, which becomes the dividing line between the enhanced earnings valuation and the business valuation. The "fair salary" is "the amount that would be paid a non owner doing the same work."

Table 1

Computation of Present Value of Enhanced Earnings

Standard Approach/Actual Earnings

Year	Age	Earnings Professional Degree	Earnings High School Graduate	Earnings Difference	After Tax Earnings Difference	Present Value	Cumulative Present Value
2001	40	$ 170,000	$ 24,530	$ 145,470	$ 90,876	$ 90,876	$ 90,876
2002	41	$ 175,100	$ 25,266	$ 149,834	$ 93,602	$ 87,479	$ 178,355
2003	42	$ 180,353	$ 26,024	$ 154,329	$ 96,410	$ 84,209	$ 262,563
2004	43	$ 185,764	$ 26,805	$ 158,959	$ 99,303	$ 81,061	$ 343,624
2005	44	$ 191,336	$ 27,609	$ 163,728	$ 102,282	$ 78,030	$ 421,654
2006	45	$ 197,077	$ 28,437	$ 168,640	$ 105,350	$ 75,113	$ 496,767
2007	46	$ 202,989	$ 29,290	$ 173,699	$ 108,511	$ 72,305	$ 569,073
2008	47	$ 209,079	$ 30,169	$ 178,910	$ 111,766	$ 69,602	$ 638,675
2009	48	$ 215,351	$ 31,074	$ 184,277	$ 115,119	$ 67,000	$ 705,675
2010	49	$ 221,811	$ 32,006	$ 189,805	$ 118,573	$ 64,496	$ 770,171
2011	50	$ 228,466	$ 32,966	$ 195,500	$ 122,130	$ 62,085	$ 832,255
2012	51	$ 235,320	$ 33,955	$ 201,365	$ 125,794	$ 59,764	$ 892,019
2013	52	$ 242,379	$ 34,974	$ 207,405	$ 129,567	$ 57,529	$ 949,548
2014	53	$ 249,651	$ 36,023	$ 213,628	$ 133,454	$ 55,379	$ 1,004,927
2015	54	$ 257,140	$ 37,104	$ 220,036	$ 137,458	$ 53,309	$ 1,058,236
2016	55	$ 264,854	$ 38,217	$ 226,638	$ 141,582	$ 51,316	$ 1,109,552
2017	56	$ 272,800	$ 39,363	$ 233,437	$ 145,829	$ 49,397	$ 1,158,949
2018	57	$ 280,984	$ 40,544	$ 240,440	$ 150,204	$ 47,551	$ 1,206,500
2019	58	$ 289,414	$ 41,761	$ 247,653	$ 154,710	$ 45,773	$ 1,252,273
2020	59	$ 298,096	$ 43,014	$ 255,083	$ 159,352	$ 44,062	$ 1,296,335
2021	60	$ 307,039	$ 44,304	$ 262,735	$ 164,132	$ 42,415	$ 1,338,750
2022	61	$ 316,250	$ 45,633	$ 270,617	$ 169,056	$ 40,829	$ 1,379,579
2023	62	$ 325,738	$ 47,002	$ 278,736	$ 174,128	$ 39,303	$ 1,418,882

The concept outlined in the Mastracchio article was essentially the approach promulgated in *Grunfeld v. Grunfeld*.[8] Mr. Grunfeld's earnings stream was partitioned by determining an appropriate "replacement compensation" for his services as an attorney. The differential earnings from those of a Bachelor's degree holder[9] in relation to the "replacement compensation" were used to value the enhanced earnings and the earnings above the "replacement compensation," in relation to the actual earnings, were used to value the practice. While this approach avoids the duplication issue, it causes the situation in which the same earnings stream may have two different values depending on whether the individual works for a large corporation or is self-employed. We must ask whether this difference is justified economically or is it only the result of differences in the valuation methods. Moreover, there are further complications when the individual is an above-average earner because the earning ability may be wrongly attributed to either the enhanced earnings or the business. To illustrate these issues, we return to Ms. X's case and modify the facts. Formerly she was an employee, but now she has her own professional practice.

Let us assume that the "replacement compensation" for Ms. X is $140,000.[10] Table 2 computes a new value for Ms. X's enhanced earnings of $695,000 by substituting the $140,000 in "replacement compensation" for her actual earnings of $170,000.[11] The next step is to value her practice.

There are many ways to value a closely held business as discussed in Pratt, Reilly and Schweihs.[12] One of these methodologies, i.e., the "excess earnings" method as outlined in Revenue Ruling 68-609, was used in *Grunfeld*. In its simplest form, this method starts with the earnings of the business after a deduction for "replacement compensation"[13] and then makes a deduction for a return on the business's tangible assets. The resulting "excess earnings" are then capitalized using a discount rate to determine an amount commonly referred to as "goodwill." This "goodwill" is then added to the value of the tangible assets to produce a total value for the business.

Table 2

Computation of Present Value of Enhanced Earnings

Adjusted Baseline Approach

Year	Age	Earnings Professional Degree	Earnings High School Graduate	Earnings Difference	After Tax Earnings Difference	Present Value	Cumulative Present Value
2001	40	$ 140,000	$ 58,136	$ 81,864	$ 44,491	$ 44,491	$ 44,491
2002	41	$ 144,200	$ 59,880	$ 84,320	$ 45,826	$ 42,828	$ 87,319
2003	42	$ 148,526	$ 61,676	$ 86,850	$ 47,201	$ 41,227	$ 128,546
2004	43	$ 152,982	$ 63,527	$ 89,455	$ 48,617	$ 39,686	$ 168,232
2005	44	$ 157,571	$ 65,433	$ 92,139	$ 50,075	$ 38,202	$ 206,434
2006	45	$ 162,298	$ 67,396	$ 94,903	$ 51,577	$ 36,774	$ 243,208
2007	46	$ 167,167	$ 69,417	$ 97,750	$ 53,125	$ 35,399	$ 278,607
2008	47	$ 172,182	$ 71,500	$ 100,682	$ 54,719	$ 34,076	$ 312,683
2009	48	$ 177,348	$ 73,645	$ 103,703	$ 56,360	$ 32,802	$ 345,485
2010	49	$ 182,668	$ 75,854	$ 106,814	$ 58,051	$ 31,576	$ 377,061
2011	50	$ 188,148	$ 78,130	$ 110,018	$ 59,792	$ 30,395	$ 407,457
2012	51	$ 193,793	$ 80,474	$ 113,319	$ 61,586	$ 29,259	$ 436,716
2013	52	$ 199,607	$ 82,888	$ 116,718	$ 63,434	$ 28,165	$ 464,881
2014	53	$ 205,595	$ 85,375	$ 120,220	$ 65,337	$ 27,112	$ 491,994
2015	54	$ 211,763	$ 87,936	$ 123,827	$ 67,297	$ 26,099	$ 518,093
2016	55	$ 218,115	$ 90,574	$ 127,541	$ 69,316	$ 25,123	$ 543,216
2017	56	$ 224,659	$ 93,291	$ 131,368	$ 71,395	$ 24,184	$ 567,400
2018	57	$ 231,339	$ 96,090	$ 135,309	$ 73,537	$ 23,280	$ 590,680
2019	58	$ 238,341	$ 98,973	$ 139,368	$ 75,743	$ 22,410	$ 613,090
2020	59	$ 245,491	$ 101,942	$ 143,549	$ 78,016	$ 21,572	$ 634,662
2021	60	$ 252,856	$ 105,000	$ 147,855	$ 80,356	$ 20,766	$ 655,427
2022	61	$ 260,441	$ 108,150	$ 152,291	$ 82,767	$ 19,989	$ 675,416
2023	62	$ 268,254	$ 111,395	$ 156,860	$ 85,250	$ 19,242	$ 694,658

Table 3	
Valuation of Professional Practice	
"Excess Earnings" Method	
Pre-tax earnings beyond "replacement compensation"	$ 30,000
Less income taxes 35%	$ (10,500)
Earnings after tax	$ 19,500
Return on tangible assets: 15% times $50,000	$ (7,500)
"Excess Earnings"	$ 12,000
Value of goodwill: $12,000 divided by 20%	$ 60,000
Tangible Assets	$ 50,000
Total Practice Value	$110,000

The valuation procedure is illustrated in Table 3. We assume that Ms. X's practice has tangible assets of $50,000,[14] that a reasonable return on these assets is 15%, and a reasonable return for the "excess earnings" is 20%.[15] The calculation of the value of the practice begins with the earnings of $30,000, which is the difference between Ms. X's income of $170,000 and her "replacement compensation" of $140,000. We further assume that Ms. X's practice is an S Corporation. As a result, the corporation is not taxed. Therefore, the methodology requires that an amount be subtracted for taxes.[16] To keep the illustrations comparable, the same tax rate of 35% is used, and the after-tax earnings are calculated. Then a subtraction is made for the return on the practice's tangible assets, which is 15% of $50,000. The amount that is left is "excess earnings" of $12,000. These earnings are then divided by 20% to determine the intangible value for the "goodwill" of the practice. This is $60,000. Finally the value of the practice is computed by adding the tangible and intangible values together for a total of $110,000. The combined value of the enhanced earnings and the practice is $690,000 plus $110,000, or $800,000. When Ms. X was an employee the value of her enhanced earnings was $999,000. Approximately $200,000 of value has "disappeared" in her transition from an employee to an owner.

One reason for the change in the value is the difference in valuation approaches. When Ms. X was an employee, her enhanced earnings were valued by calculating the "present value" of the future enhanced earnings. With a professional practice only part of the earnings is valued using the "present value" approach and the remainder of the earnings is valued by an approach that combines asset values with the present value of an amount representing the "excess returns" on the firm's assets. It is highly unlikely that the two valuation approaches will ever agree under these circumstances.

Changing the method for valuing the practice may mitigate the use of the two different valuation approaches. The "excess earnings" approach is an old technique that has often been used. However, it has some limitations, including the difficulty of determining the two discount rates. As a result, Helewitz[17] points out that a number of financial experts and the courts prefer "discounted cash flow" approaches. There are several variations to the discounted cash flow approach, but the simplest is to take the after-tax income[18] and discount it by a rate that is the difference between the rate of return required by the investor and the expected future growth rate of the earnings. Thus the discounted cash flow approach follows essentially the same methodology as the enhanced earnings calculation.

Applying the discounted cash flow approach to our illustration, the after tax earnings of $19,500 are divided by a discount rate of 30%,[19] yielding a value of $65,000. Now the total value of the enhanced earnings and the practice has declined to $755,000.

Using consistent discounting approaches does not produce the same total value for the earnings stream because of the difference in discount rates and the difference in the number of future years that are being discounted. Ms. X's earnings when she was an employee were discounted at 7%. When she had her own practice, a portion of the earnings was discounted at 7%, but the remainder was discounted at 30%. This high discount rate greatly reduces the present value of the future earnings, and the discussion illustrates the sensitivity of the results to the choice of discount rates. If the discount rate had been 20% rather than 30%, the value of the practice would increase from $65,000 to nearly $97,500. Thus the expert's choice of a discount rate is very critical to the analysis. See, for example, Lippitt and Mastracchio[20] and Pratt[21] for discussions regarding the importance of and the difficulties encountered when setting the discount rate.

No matter what discount rate is chosen, it is most likely that the rate used to value the business will be larger than the rate used to value the enhanced earnings. As a result, the total value of an earnings stream that comes from employment with a publicly held firm will be larger than the value of an earnings stream that comes from a private practice or closely held firm.[22] This begs the question of whether there is any justification for the difference in discount rates.

It is a well-known principle in economics that investors should require increased returns for investments with greater risk.[23] One might argue that as a business owner, Ms. X's earnings are subject to more risk because of the higher failure rate of small businesses and the fact that the earnings may be largely dependent upon her ability to work and generate that high level of income. Empirical studies have shown an inverse relationship between

required rates of return and firm size; and company size is a factor that is used in the "build up" method of computing a discount rate so that smaller firms have higher discount rates.[24] Thus there may be a defensible justification for using a higher discount rate for the earnings derived from a small firm. On the other hand large businesses are not immune to bankruptcy; employees do lose their jobs; and, to the extent that part of Ms. X's compensation is tied to her performance and the success of her employer, she is subject to many of the same risks as an entrepreneur. This suggests that extra consideration should be given when setting the discount rate for the earnings of an employee of a large firm. If the employee's earnings are effectively contractual and not tied directly to the success of the firm, then the lower discount rate is justified. If the employee's earnings consist of a base salary and a bonus that is tied to the success of the firm, then it may be prudent to partition the earnings stream. The base salary, which is presumably more certain, would be discounted at a lower rate and the less certain bonus would be discounted at a higher rate.

Finally, there is the issue of the appropriate number of years to be discounted. As an employee, Mrs. X's enhanced earnings are discounted only over her expected work life.[25] However, for a business owner, the business valuation method discounts an infinite stream of future earnings. From a valuation point of view, this difference may be more conceptual than real. since the larger discount rates give the distant earnings a minimal present value.

Although there is not an easy answer to the differences in values, clearly the trend in case law constructs a situation where the forensic expert and the courts should consider the potential differences in value generated by the different valuation approaches. In addition, the conditions are clearly established for a "gaming" situation. Given the effect of the discount rates when a business valuation is involved in a divorce, the spouse with the enhanced earnings and business has an incentive to move as much of the income as possible into the business valuation component since it will be subject to a higher discount rate and will produce a lower value. For example, if it could be successfully argued that the "replacement compensation" for Ms. X is $100,000, then the value of the enhanced earnings will be $288,700 and the value of the practice using the "discounted cash flow" method and a 30% discount rate will be $151,670 for a total of $440,370 as compared to $755,000. Moreover, changing the values of the enhanced earnings and the business by adjusting the "replacement compensation" gives rise to another issue. Once the values of the enhanced earnings and the business are established the question arises: what percentage of each goes to the non-titled spouse? If different percentages are used for each asset, then there is again an incentive to manipulate the values.

Setting "Replacement Compensation"

The foregoing discussion clearly illustrates the key role "replacement compensation" plays in these valuations. Surprisingly this matter has not received much attention either in the enhanced earnings discussions or in the valuation literature. To illustrate, Desmond and Kelley[26] make almost no mention of the issue in their book. Pratt, Reilly and Schweihs give it more attention, but their discussion does not go into depth. They clearly discuss the importance of deducting a "reasonable compensation" for the owner who works in a business and proceed to point out that in a professional practice most of the earnings are paid out in salary, "perks" and benefits. As to the question of how to set the "replacement compensation," Pratt, Reilly and Schweihs do offer some guidelines as shown in the following quote:

> A practitioner's economic income should be compared, as much as possible, to that of a like practitioner. The comparative practitioner should be in the same specific field, in the same geographic area, of approximately the same level of experience, and so on, as the professional whose practice is being valued.[27]

They also provide references to some commonly used salary surveys. However, their discussion provides only general guidance. For example, in their presentation there is no consideration of the productivity and earning power of the professional. Moreover, there is no guidance concerning the difficulties encountered in the use of some salary surveys. To address these shortcomings we searched for other areas in which owner compensation plays a key role in the issues. One of those is in the determination of "reasonable compensation" for owner/managers of small, closely held corporations in connection with income taxation.

The Concept of "Reasonable Compensation"

From a taxation point of view, a closely held business can be treated as a single proprietorship, a partnership or a corporation depending on its form and its ownership. In the case of a proprietorship or a partnership, the earnings of the business are directly passed through to the owner(s) and there is no issue of owner compensation. In many cases the owner's compensation is not directly identified. This same situation can also exist for a corporation if the business qualifies and elects to be taxed as an "S" corporation. These "pass through entities" treat the income of a corporation as a proprietorship or a partnership and the owner(s) pay the taxes as part of their personal income. However, if the corporation is taxed as a "C" corporation, then the issue of owner compensation becomes a very important one.

Section 162(a)(1) of the Internal Revenue Code of 1954 provides for a tax deduction by a corporation of "a reasonable allowance for salaries or other compensation for personal services actually rendered."[28] If the compensation is deductible, then it reduces the corporation's taxes. If the compensation is not deductible it is deemed a return on investment or dividend and is subject to double taxation—once for the corporation and once for the shareholder(s). On the basis of tax liability, the owner(s) of a closely held corporation have an incentive to maximize the deductible amount of the compensation and minimize the dividends. On the other hand, the Internal Revenue Service has the opposite motivation and where the compensation is deemed excessive, the IRS will hold that it is really dividends.

The issue of the tax deductibility of owner's compensation has given rise to the concept of "reasonable compensation." While this is not strictly "replacement compensation" as discussed above, in practice the two concepts are closely related. The case law and practice of determining "reasonable compensation" can be used as guidelines when one is trying to determine "replacement compensation."

In his comprehensive article on the issue of compensation policy for closely held corporations, Bertozzi[29] traces the concept of "reasonable compensation" back to the Revenue Act of 1918, and he reports that there have been more than 500 cases since 1918 on the issue of "reasonable compensation." Moreover, he points out that Section 162(a)(1) has been applied to privately held corporations rather than publicly held corporations because in the former case there is not a sharp distinction between the officers, directors and shareholders, while in the latter there is. In publicly held corporations, the process of setting compensation is more of an arm's length transaction and is subject to the scrutiny of directors and investors who are generally a different group than the officers of the corporation. Because of this, cases of "reasonable compensation" have relied heavily on comparisons to the compensation paid by public corporations. Unfortunately, this type of comparison is not as helpful for the valuation situations encountered in divorce situations where one is dealing with small, closely held corporations or professional practices. However, the tests of "reasonable compensation" can be used for guidance in these types of valuations.

Over the years a two-pronged test of "reasonable compensation" has emerged that relies on (1) intent and purpose and (2) reasonableness and amount. It is the second prong that is of interest here. How has "reasonable compensation" been set? Bertozzi describes a number of criteria:

1. Qualifications—considerations include educational background, employment history, specialized training, length and quality of work experience, reputation in the industry, and reputation with clients and customers.
2. Duties and responsibilities—factors considered here are what the person actually does, how many different roles the person fulfills, the hours the person works and a record of increasing responsibilities and duties.
3. Business results of the person's efforts—Have sales been increasing? Have new products or services been introduced? Has the firm grown either internally or through acquisition? Have profits increased?
4. Comparison with compensation in similar businesses in the industry.

Clearly Pratt, Reilly and Schweihs talk about comparative industry salaries, but the other factors, especially those dealing with education, experience, duties and productivity, are key considerations that should be considered in setting "replacement compensation."

In determining "replacement compensation," the starting point should be the earnings of individuals engaged in similar activities. An often-used source for this type of data is salary surveys. There are a number of sources for such data including general studies such as those done by the Risk Management Association (RMA) and Dunn and Bradstreet. There are more specific surveys done by various trade and industry groups. For example, *Medical Economics* and the American Medical Association provide quite detailed statistics of compensation for the medical profession. The consulting firm of Altman Weil provides similar data for the legal profession. The more complete surveys break the data down by variables, for example, experience, specialty, geographical area, firm or practice size, and status within the firm (new hire, associate, partner, etc.). Because these factors have a significant influence on compensation, general surveys without detailed breakdowns should be avoided if at all possible.

While surveys can be a good starting point, they are subject to limitations that must be considered in determining the "replacement compensation" for a particular case. If the data come from firms or practices that are taxed as pass-through entities, they will not be useful because there is no sharp distinction between compensation paid to individuals for their work as professionals and the return to the individual as an owner. This situation is especially true for valuing professional practices. Use of such data will produce an upward biased estimate of "replacement compensation," overstating the value of the enhanced earnings and understating the value of the practice. There may be circumstances where the practice is large enough to have non-partner professionals of similar qualifications, but absent this, the choice of "replacement compensation" becomes very difficult. Thus the valuation expert must be careful to understand the nature

of the data when using salary surveys to set "replacement compensation."

"Replacement Compensation": The Example of an Above-average earner

The issue of "replacement compensation" becomes even more difficult if the individual is an above average performer. As we argued in the earlier article, unless the above average performance is factored into the analysis, the value of the enhanced earnings will be overstated.

Turning again to the area of "reasonable compensation," the criteria outlined earlier clearly point to considering the performance of the individual in judging reasonableness. Bertozzi cites the *Van Luit*[30] case in which the court allowed substantial compensation for Mr. Van Luit in light of his exceptional contributions to the success of the firm. More recently, Cenker and Bloom[31] cite a case in which the court set the "reasonable compensation" at the 90th percentile of the RMA salary survey. Since productivity has been a factor in setting "reasonable compensation," there is no compelling reason mitigating against the utilization of these principles in determining "replacement compensation."

One of the problems encountered in factoring in productivity is to identify its extent in a small, closely held firm or professional practice. Because of the commingling of returns for work and returns on investment, we cannot look simply at earnings as we did when the individual was an employee. Consequently, we have to look at indirect measures. Again, the criteria from "reasonable compensation" are helpful. For example we could ask the following questions:

1. How do the individual's billings compare to the average in the profession?
2. How does the number of clients served compare to the average in the profession?
3. How many hours does the individual work on a regular basis compared to the average in the profession?
4. How many different roles does the individual perform?
5. If the individual were to be replaced, how many different people would have to be employed?

If it can be shown by the responses to the foregoing and other appropriate questions that the individual is an above-average performer, then a case can be made to use an above-average "replacement compensation."[32] Without making such an adjustment, the values of the enhanced earnings and the business or practice will be seriously misstated.

Conclusion

We have shown that the degree to which an individual is an above-average earner will introduce a bias into the resulting valuation of enhanced earnings. However, when the individual's earnings are derived from a professional practice or a closely held firm, New York case law ties the valuations of the enhanced earnings and the business together. While one might expect that valuation problems exist in the individual components but not in total, this is not true. Due to differences in valuation approaches and discount rates for enhanced earnings and businesses, the total value of the same stream of income can be different depending on how it is earned. There may be instances in which the same earnings stream should have different values, but this will not always be the case and when different values exist, the expert should be prepared to defend the dissonance on logical grounds.

The pivotal point between the valuations of enhanced earnings and businesses is the "replacement compensation." Unless this amount is set very carefully, there will be biases in the values of the resulting assets. We have discussed the commonly accepted methods of setting "replacement compensation," and we have shown how the methods can be misleading. This situation has been compared to the problems encountered in setting "reasonable compensation" for income tax purposes. The principles that have evolved over the years for dealing with "reasonable compensation" provide a useful framework for setting "replacement compensation."

The problems that exist in determining "replacement compensation" are difficult in and of themselves. But, when these problems are set in the context of individuals who are above-average earners due to a high level of productivity, the issues become even greater. When these individuals have their own business or practice, the first issue is to establish that the person is indeed an above-average earner. If that can be done, then the expert can make adjustments in the analysis. However, failure to recognize the issue and confront it can cause significant misstatements of the values of enhanced earnings and the business or practice.

Endnotes

1. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).
2. Dom. Rel. Law § 236(B)(5)(e).
3. For example, in *Golub v. Golub*, 139 Misc. 2d 440 (Sup. Ct., New York Co. 1988) the Court found that the economic enhancement to the career of the plaintiff, Marisa Berenson, as an actress and model was includable in the total value of the marital estate. In *Elkus v. Elkus*, 182 A.D.2d 45 (lst. Dept. 1992), the Appellate Division, First Department, found that the husband had contributed to the increase in the economic value of the wife's career as an opera singer. The court found that the "appreciation in value" was "marital property" subject to equitable distribution. The court, citing *O'Brien v. O'Brien*, *supra*, also relied on the Court of Appeals holding in *Price v. Price*, 69 N.Y.2d 8 (l986) that stated ". . . relying

on the Equitable Distribution Law, an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property. . . ." The enhanced earnings doctrine of *O'Brien v. O'Brien*, *supra*, and its liberal statutory construction and the expansive application of the enhanced earnings doctrine have been applied to numerous diverse fact patterns. For example, in *Pino v. Pino*, 189 Misc. 2d 331 (Sup. Ct., Nassau Co. 2001), the trial court held that ". . . the husband's Master's license as a sea captain, even though abandoned was both viable and of value. . . ."

4. George Palumbo, Richard A. Shick, and James P. Renda, Biases in the Computation of Enhanced Earnings for Individuals Whose Income Is Not "Average" and a Proposed Solution, NYSBA Family Law Review, Summer 2005, Vol. 37, No. 2.
5. We will limit our discussions to an above-average earner, although the principles also apply to a below average earner.
6. *McSparron v. McSparron*, 87 N.Y.2d 275 (l995).
7. James N. Mastracchio and Nicholas J. Mastracchio, Jr., Professional License Value in a Divorce, CPA Journal 66, Dec. 1996.
8. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 705 (2000).
9. Mr. Grunfeld's level of education at the time of his marriage.
10. Setting the "replacement compensation" is a very important issue that we discuss later in the article. For now a figure is not assumed to further the discussion.
11. Note that in Table 2 we have adjusted the baseline earnings for Ms. X's increased productivity. That adjustment was not made in Table 1.
12. Shannon P. Pratt, Robert F. Reilly and Robert Schweihs, Valuing Small Businesses and Professional Practices, McGraw Hill, 3d ed., 1998. Pratt, Reilly and Schweihs is a recognized valuation reference and has been cited in *Bernstein v. Bernstein*, 2003 WL 1793069 (N.Y. Sup.); *Boyajian v. Boyajian*, 194 Misc. 2d 756, 755 N.Y.S.2d 571; and *Dawson v. White & Case et al.*, 88 N.Y.2d 666, 672 N.E.2d 589, 649 N.Y.S.2d 364.
13. In actual practice, there may be many adjustments to the income of the business to place it on a normalized basis. See Pratt, Reilly and Schweihs, *supra*.
14. The tangible assets should generally be valued at market rather than book value.
15. These rates are taken from Pratt, Reilly and Schweihs, *supra*, for illustrative purposes only. The actual choice of rates must be made by the valuation expert for the business in question.
16. Some valuation experts argue that it is not necessary to make a deduction for taxes. The savings that may result from passing the income of a small corporation directly through to its owners are a legitimate part of its value. Our intent here is not to take sides in this debate, and the tax adjustment is just to keep an additional complication out of the comparisons. For more discussion on this point, see Robert E. Schlegel and Bret Brewer, Marital Interests in S-Corporations May Have Differing Value, The Matrimonial Strategist 22 (2004).
17. Jeffrey J. Helewitz, Valuation of a Closely Held Business, Commercial Law Bulletin 9, Nov.-Dec. 2002.
18. In practice, a distinction must be made between accounting income and cash flow, although they may be the same. Cash flow is the proper concept to use.
19. The discount rate was determined by taking a required return of 33% and subtracting an expected growth rate of 3%. Again, these rates are only for illustration purposes.
20. Jeffrey W. Lippitt and Nicholas J. Mastracchio, Jr., Developing Capitalization Rates for Valuing a Business, The CPA Journal, Nov. 1995.
21. Shannon P. Pratt, Cost of Capital: Estimation and Applications, John Wiley & Sons, Inc. (1998).
22. There appears to be a trend to increase the discount rates used for enhanced earnings calculations. In *O'Brien*, *supra*, the expert used the real risk free rate. Now experts routinely use higher rates, recognizing that this is a risky situation, but the rates are still not as high as the rates commonly used in business valuations.
23. See, for example, Stephen A. Ross, Randolph W. Westerfield and Bradford D. Jordan, Fundamentals of Corporate Finance, 7th ed., McGraw-Hill Irwin (2006), chapter 12.
24. *See* Pratt, *supra*, chapters 8 and 11.
25. An argument could be made that an enhanced earnings analysis should include retirement benefits as well.
26. Glenn M. Desmond and Richard E. Kelley, Business Valuation Handbook, Valuation Press, Inc. (1988).
27. Pratt, Reilly and Schweihs, *supra*, at 601-602.
28. Dan Bertozzi, Jr., Compensation Policy for the Closely-Held Corporation: The Constraint of Reasonableness, American Business Law Journal 16 (1978), 158.
29. *Id.*
30. *Albert Van Luit Co., Inc. v. Commissioner*, 34 T.C.M. 321.
31. William J. Cenker and Robert Bloom, Reasonable Compensation, Journal of Accountancy, Nov. 2003.
32. As an illustration, we worked on the case of a physician who saw five times as many patients as the typical physician in his field. This was a significant factor in the valuation of the physician's enhanced earnings.

Dr. Palumbo is professor of economics and Dr. Shick is professor of finance in the Department of Economics/Finance at Canisius College in Buffalo, New York. Both individuals are active as forensic economists and have prepared an extensive number of enhanced earnings valuations. Mr. Renda is in private practice in Buffalo, New York. He is a Certified Fellow of the American Academy of Matrimonial Lawyers and is listed in the *Best Lawyers in America*.

Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Recent Legislation

DRL § 250(2), amended June 18, 2007:

Statute of limitations to vacate a prenuptial agreement is tolled during marriage

Prior to this new legislation, the different departments of the Appellate Division had conflicting rules regarding the statute of limitations on an action to vacate a prenuptial agreement. Some applied the 6 year statute of limitations, while others tolled the time during the parties' marriage, since as a matter of public policy, a married couple should not be forced to litigate against each other. The new legislation tolls the statute of limitation to 3 years after the commencement of a divorce action.

CPLR 2214, effective July 3, 2007: Service time of motion papers

The rule was amended to remedy the problem of the service of a cross-motion so close to the return date that the other party did not receive the papers in time to have an opportunity to respond.

If the longer time period is chosen, the notice of motion must now be served 16 days before the return date (not 12 days, as the prior statute directed), and answering papers and/or notice of cross-motion must be served 7 days before the return date (so long as it is demanded in the notice of motion). The prior statute did not include the timing of the cross-motion.

The rule regarding the demand for answering papers two days prior to the return date remains unchanged; that is, motions must be made 8 days prior to the return date.

CPLR 2215, effective July 3, 2007: Service of cross-motions

The prior statute mandated that cross-motions be served 3 days before the return date of the original motion. This rule was problematic because if the cross-motion was served by a method other than personal service, the original moving party may not receive the cross-motion before the return date, leaving that party with no time to reply. Therefore, this statute was amended to remedy this problem as follows: If the longer time period is chosen pursuant to CPLR 2214 (the notice of motion is served 16 days before the return date), then the cross-motion (1) must be served 10 days before the return date if served by mail (7 days pursuant to CPLR 2214 + 3 for mailing) or (2) 8 days before the return date if served by overnight mail (7 days pursuant to CPLR 2214 + 1 day for overnight mail).

What remains unchanged is that if the notice of motion is served only 8 days before the return date pursuant to CPLR 2214 (the shorter period), then the cross-motion need only be served 3 days prior to the return date.

CPLR 2303-a, effective January 1, 2008: Service of trial subpoena

If a trial subpoena is served upon a party or a person within that party's control, the subpoena may be served on the party's attorney. Personal service or consent from that party's attorney will no longer be required.

CPLR 2308, effective January 1, 2008: Penalty for failure to comply with a judicial subpoena

Failure to comply with a judicial subpoena will be punishable by no more than $150. The current statute provides a penalty not to exceed $50. The legislative intent is that $50 is not a deterrent, and $150 is at least more onerous.

22 N.Y.C.R.R. 202.48(c)(2), effective September 1, 2007: Counter-orders and judgments must be marked to indicate changes

A new sentence is added to paragraph (2) of Rule 202.48(c), which provides that

> Any proposed counter-order or judgment shall be submitted with a copy clearly marked to delineate each proposed change to the order or judgment to which objection is made.

This new rule alleviates the court's burden of comparing the original order/judgment to the altered one and determining where the changes exist.

Court of Appeals Round-up

Time limitation for orders of protection

In re Sheena D., 8 N.Y.3d 136, 831 N.Y.S.2d 92 (2007)

The Family Court directed findings of neglect by the father as to both sons, and issued orders of protection ordering the father to have no contact with his sons until their respective 18th birthdays (i.e., 14 and 16 years later). The Appellate Division affirmed. The Court of Appeals modified the order by remitting the order to the Family Court to establish appropriate expiration dates with periodic court review. FCA § 1056(1) prohibits the issuance of an order of protection that exceeds the duration of any other dispositional order in the case. A dispositional order that has no expiration date, such as the one in this case placing the children in the custody of the mother

with no requirement of supervision, could not be accompanied by an order of protection with no time limit. To read the statute otherwise would contradict the purpose of limiting the length of orders of protection in child protective proceedings and to provide for periodic court review.

Other Cases of Interest

Grandparent Visitation

***In re Steinhauser v. Haas*, 40 A.D.3d 863, 837 N.Y.S.2d 660, (2d Dep't 2007)**

The Suffolk County Family Court, Suffolk County denied the maternal grandmother's petition for grandparent visitation. The Second Department reversed. Pursuant to DRL § 72, the grandmother had automatic standing since the children's mother was dead. The court found that it was in the children's best interest to have visitation with their grandmother since the evidence established that she enjoyed a meaningful relationship with the children. Animosity between the maternal grandmother and the father was not a proper basis for the denial of visitation.

Custody and Visitation

Same-sex partner (non-biological parent) has standing to seek custody

***Ms. H. v. Ms. L.*, 2007 N.Y. Misc. LEXIS 5077, 2007 NY Slip Op. 27299 (Fam. Ct., Nassau County July 18, 2007) (Bennett, J.)**

The Respondent was artificially inseminated prior to meeting and moving in with the Petitioner. The Petitioner took the Respondent to all of her pre-natal visits, was present during the birth of the child, cut the umbilical cord, slept in the hospital room with the Respondent, fed and diapered the child and would wake up throughout the night to feed and care for the child. Throughout the proceeding, the Petitioner referred to herself as the "second mother" of the child. After the birth of the child (December, 2005), the couple moved from Queens to Massapequa, at which time the Respondent returned to work while the Petitioner continued to care for all of the child's needs, including taking the child to all of his doctor visits.

This arrangement continued until August 2006 (when the child was 8 months old) when the relationship ended. The Respondent moved out of the Petitioner's home and into a shelter, leaving the child with the Petitioner. The parties agreed that Petitioner would care for the child until the Respondent found suitable living quarters. The parties arranged a visitation schedule where the Petitioner would bring the child into Manhattan for visits with the Respondent.

In August 2006, during a visitation exchange, the parties got into an argument, and the Respondent called the police, alleging that the Petitioner refused to return her son. Consequently, ACS of New York County removed the child and placed him in the custody of the Department of Social Services in Columbia County. The child resided with a foster family since August, 2006.

On May 7, 2007, a finding of neglect was entered against the Respondent by the Columbia County Family Court; however the court did not terminate Respondent's parental rights and instead entered a temporary placement of the child and a 12-month supervision order.

Pursuant to 18 N.Y.C.R.R. 422.1, a parent is defined as a biological, step or adoptive parent of a child whose custody and care have been transferred to an authorized agency. The Court of Appeals has found a narrow exception to this definition: a non-biological parent has standing to seek custody in "extraordinary circumstances," such as abandonment and neglect.

In determining whether extraordinary circumstances exist, the court must consider the length of time the child has lived with the non-parent, the quality of the relationship, and the length of time the biological parent has allowed such custody to continue without trying to assume the parental role.

The court held that it is undisputed that during the first eight months of the child's life, until he was removed by ACS, the Petitioner carried out all of the traditional responsibilities of a parent. Therefore, the court found that the Petitioner had standing to request custody, and the matter was transferred to Columbia County Family Court (where the child was residing) for a further determination with respect to custody, including the child's best interests.

Author's note: Neither the legislature nor the Court of Appeals has included in this definition of "parent" a biological or legal stranger who has developed a long-standing, loving and nurturing relationship with a child or had a prior relationship with the child's parent and wishes to continue visitation. See *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586 (1991) This presents a loophole to a same-sex partner who fails to legally adopt the biological child of his/her partner. Note also that if the Petitioner only sought visitation rather than custody, she would have no standing to do so.

Step-parent lacks standing to seek visitation

***Banks v. White*, 40 A.D.3d 790, 837 N.Y.S.2d 181 (2d Dep't 2007)**

The parties were married for six years, during which time the step-father acted as a "father figure" to the wife's two children of a former marriage. The husband sought visitation of his step-children. The lower court properly

found that the husband lacked standing, and that the doctrine of equitable estoppel was not appropriate to apply.

Former boyfriend lacks standing to seek visitation

***Matter of Burgess v. Ash*, 41 A.D.3d 473, 838 N.Y.S.2d 584 (2d Dep't 2007)**

The petitioner, a former boyfriend of the child's biological mother, brought a petition against the child's legal guardian and biological uncle, seeking unsupervised visitation with the child. Pursuant to a consent order, the petitioner had been awarded monthly, supervised visitation with the child at the YWCA. The court held that the petitioner, a biological stranger, did not have standing to seek visitation with the child, and that the consent order alone did not give petitioner such right. The court also mentioned that equitable estoppel did not apply.

Author's note: The doctrine of equitable estoppel is permissible in the context of preventing the mother from claiming that the father is not the biological parent, as in *Jean Maby H. v. Joseph H.*, 246 A.D.2d 282, 676 N.Y.S.2d 677 (2d Dep't 1998). That case does not stand for the proposition that any *de facto* or psychological parent has standing, an erroneous assumption made by many litigants.

Equitable Distribution

Enhanced Earnings

***Ochs v. Ochs*, 20 A.D.3d 1061, 837 N.Y.S.2d 290 (2d Dep't 2007)**

The wife, who supported the husband during his last year and a half of law school, was entitled to a share of the husband's enhanced earning capacity of his law degree and license. The award was reduced from 50% to 25% of such enhanced earnings because there was no evidence that the wife sacrificed any educational or employment opportunities in the husband's attainment of such degree.

Author's note: The facts were not set forth in this opinion, including the length of the marriage, ages of the parties, etc. It appears that the court lowered the percentage of distribution of the enhanced earnings as a way of getting around the problem, in this author's opinion, that such valuation results in an unfair windfall to the non-licensed holder.

***Spreitzer v. Spreitzer*, 40 A.D.3d 840, 837 N.Y.S.2d 658 (2d Dep't 2007)**

The parties were married for 20-plus years. During the marriage, the wife earned a Master's in Science and a nurse practitioner license. Since 1998, the wife worked part-time. The trial court properly calculated the enhanced earning capacity of the wife's degree and license by comparing the expected lifetime earnings of a registered nurse with the expected lifetime earnings of a licensed nurse practitioner, and reducing this sum to its present value. Although the wife had already embarked on her career and acquired a history of actual earnings, the court providently exercised its discretion in rejecting her testimony that she was unable to secure full-time employment. The trial court properly awarded the husband 20% of the value of the degree and license, based upon his substantial economic as well as non-economic contributions.

The court properly imputed an annual income to the wife since the evidence at trial demonstrated that she was capable of earning $78,000/year based on her degree, her nurse practitioner license, and the testimony of the expert who valued her degree and license.

Author's note: This appears to be an unfair result. While it may be fair to impute income for purposes of determining maintenance, since the court may consider the wife's ability to earn a living and expected income stream, the license should be valued based on the wife's actual earnings during the marriage. Otherwise, it sets a precedent for every court to value a license holder's imputed income rather than actual income.

Valuation Date

***Malloy v. Malloy*, 39 A.D.3d 602, 835 N.Y.S.2d 262 (2d Dep't 2007)**

The court properly set the valuation date of the marital assets as of the date of the commencement of the action rather than the date of the parties' physical separation approximately 13 years prior, since DRL § 236(B)(4)(b) requires the trial court to select a valuation date from anytime between the commencement of the action to the date of trial.

Author's note: The court can alter the distributive share of the asset based on the other party's failure to contribute to such asset during the period of physical separation; however, the valuation date cannot be so altered based on the statute. When drafting a prenuptial agreement, the practitioner should be mindful to include a provision that the cut-off date of marital assets includes the date of physical separation.

Pension Benefits

***Lemesis v. Lemesis*, 38 A.D.3d 1331, 834 N.Y.S.2d 597 (4th Dep't 2007)**

Where there was no express provision in the parties' separation agreement requiring the husband to select the self-only distribution plan under his pension (which would provide higher benefits to the wife), the court erred in directing that the wife's share of the pension

benefits be calculated as if the husband had opted for the highest benefit option. The husband was therefore permitted to select the survivorship benefit for his second wife.

The court properly determined that the wife was entitled to an equitable share of the monthly retirement supplement benefits and any cost of living adjustments as part of the pension benefits despite the absence of an express provision to that effect in the separation agreement.

Author's note: Practitioners should be mindful to include all necessary pension language in the divorce or separation agreement, including whether the spouse must select survivorship benefits.

Contempt

Violation of temporary restraining order on assets

***Biggio v. Biggio*, 41 A.D.3d 753, 839 N.Y.S.2d 527 (2d Dep't 2007)**

The order of the Nassau County Supreme Court was upheld, which granted, without a hearing, the husband's motion to hold the wife in civil contempt for her willful violation of the court's order which restrained and enjoined the parties from dissipating marital property except in the ordinary course of business or daily living expenses. The wife mortgaged the marital home and spent at least some of the proceeds on expenses that were not in the ordinary course of business or daily living expenses. (The case does not state how the funds were actually spent.) The order appealed from failed to set forth the required recital that the contemptuous conduct was "calculated to, or actually did defeat, impair, impede or prejudice the [husband's] rights or remedies." Therefore, the Appellate Division modified the order to conform with such technicality.

Violation of charging lien

***Freihofner v. Freihofner*, 39 A.D.3d 465, 835 N.Y.S.2d 234 (2d Dep't 2007)**

The wife, who was awarded a $100,000 advance against her distributive award, gave that money to her current attorney to pay part of her outstanding legal bill, in violation of a court order directing the wife to place any monies that she was given as a distributive award in escrow to satisfy her former attorney's charging lien. Since the wife had knowledge of this mandate, and since her actions prejudiced her former attorney, the Westchester County Supreme Court properly granted her former attorney's motion to hold her in civil contempt under Judiciary Law 753(A).

Money Judgments

Law office failure causes client's $750,000 judgment to be vacated

***Farkas v. Farkas*, 40 A.D.3d 207, 835 N.Y.S.2d 118 (1st Dep't 2007)**

The order granting the wife's application for a money judgment for $750,000 provided that the wife must settle the judgment. It was not until 4½ years later that she finally served the husband with a proposed judgment with notice of settlement, which was signed by the lower court without any reason stated for "good cause" shown for failure to timely comply with the service of the notice of settlement.

The appellate division reversed in a 3-2 decision, vacating the judgment and dismissing the underlying claim as abandoned pursuant to 22 N.Y.C.R.R. 202.48(b), since the wife failed to comply with the 60-day time limit for the submission of a judgment to the court for signature. The appellate court held that "good cause" for failure to abide by the rule is "not justified either by the lack of prejudice to defendant from the late submission of the judgment or by the merit of the claim on which the judgment is based." The court was "reluctant" to stick to the technicality of the rule and even found the result "distasteful," especially in light of this long and bitter divorce litigation, in which the husband, a "bad guy," failed to comply with numerous court-ordered financial obligations. Justices Saxe and Malone submitted a dissenting opinion.

Author's note: This case has an unfortunate result of causing the wife to forfeit a $750,000 judgment. The practitioner should be warned that if the judge issues an order requiring the successful party to "submit" or "settle" the order, it must be done within 60 days.

Wendy B. Samuelson is a partner of the law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature for the Continuing Legal Education programs of the New York State Bar Association and the Nassau County Bar Association. She authored two articles in the New York Family Law American Inn of Court's *Annual Survey of Matrimonial Law*. Ms. Samuelson has also appeared on the local radio program, "The Divorce Law Forum." She was recently selected as one of the Ten Leaders in Matrimonial Law of Long Island for the under age 45 division. Ms. Samuelson may be contacted at (516) 294-6666 or info@samuelsonhause.net. The firm's Web-sites are www.matrimonialattorneys.com and www.newyorkstatedivorce.com.

This article is in honor of my husband, Jeff, in celebration of our fourth wedding anniversary (8/24). Being a matrimonial lawyer for the past 14 years has made me appreciate how fortunate we are to have a loving marriage.

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar.

Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word, (pdfs are NOT acceptable), along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
One Elk Street, Albany, New York 12207-1002

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