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Notes and Comments

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DeMille v. DeMille: The Case of the Missing Rule of Law

As an avid fan of Nelson DeMille's novels, I was particularly attracted to his recent litigation which again raises the question whether the six-year statute of limitations is tolled during marriage so as to permit an action to set aside a pre- or post-nuptial agreement six years after its execution. Alas, the enlightening decision that the bar was anxiously awaiting from the second judicial department in *DeMille v. DeMille*[1] was never written, and we all shall continue to remain in the dark until the Court Of Appeals revisits this issue. Instead we remain relegated to the confusing application of CPLR 203(d).

The answer to this knotty question may depend upon the judicial department where you reside. After two lower and two appellate court decisions, and one by the Court of Appeals[2] in another case, it appears that if DeMille himself had crafted this plot, he could not have done a better job at creating mystery, intrigue and suspense.[3]

Following is the only language contained in the second appellate *DeMille* decision that was just decided:

> The issue of the timeliness of the plaintiff's challenges to the enforceability of the parties' prenuptial agreement, including the ground raised in her motion for leave to renew, was argued and determined on a prior appeal (see *DeMille v DeMille* 5 AD3rd 428 [2004]). Thus, upon renewal, the Supreme Court should not have granted the plaintiff's prior motion for summary judgment dismissing the defendant's second counterclaim to enforce the agreement and should not have set aside the agreement based on such challenges.[4]

The two prior lower court decisions in *DeMille* were written by Justice Falanga in the Nassau County Supreme Court. When they are carefully scrutinized, it is clear that he believed a wrong was perpetrated against Mrs. Demille in the negotiation and execution of the pre-nuptial agreement and that the statute of limitations should not bar her relief. He felt that the proper remedy was to award her summary judgment to set it aside, and not be forced to await her husband's action for divorce before doing so.

It is to be remembered that in *DeMille*,[5] issue was not joined in the lower court when the motions and cross motions were heard, which is a clear statutory violation. The motions should have been dismissed with leave to renew upon joinder. In *DeMille* 2, Justice Falanga believed that the first decision of the appellate division was a nullity because of the joinder problem, but then permitted issue

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to be joined, and once again found that summary judgment should be granted to the wife and that, under CPLR 203(d), she was not barred by the statute because she was a "defendant" making a counterclaim, and not a plaintiff. The decisions are quite lengthy and should be read in their entirety to grasp all the nuances of this case.

In considering this lingering conundrum, a short review of prior law and the dichotomy that exists between the first and second departments will prove helpful. The second department has taken the path which compels the statute of limitations to be strictly enforced, regardless of the circumstances, where the wife is the plaintiff, and seeks to set aside the agreement. However, it does permit a defendant to challenge the pre-nuptial agreement after the statute of limitations has run, where a plaintiff commences an action for divorce and relies upon the agreement to preclude a division of marital assets. The genesis of these holdings is based upon the *Pacchiana*[6] decision in the second department, and more recently followed in the first *DeMille* appellate decision. It explained that only a defendant could rely upon CPLR 203(d),[7] which would permit him or her to assert an otherwise untimely claim arising out of the same transaction alleged in the complaint. The court cryptically added that such procedure would be limited ". . . only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief."[8] Finally it concluded that there is no legal support for a tolling of the statute during marriage, totally ignoring *Lieberman*, *infra*, in the first department decided in 1992, twelve years earlier, as well as the Uniform Premarital Agreement Act, and the 18 states that all held to the contrary. There was not one word in either of the *DeMille* appellate decisions to discuss this existing dichotomy of views.[9]

The rule in the first department first propounded in the *Lieberman*[10] case reasoned that the statute first begins to run after spouses separate, i.e., one party removes from the marital residence, dies, or commences an action for a divorce or separation. The court correctly concluded that

> . . . it would be anomalous to say that, irrespective of whether the marriage . . . is viable and continuing, the husband and wife must review their premarital agreement and assume adversarial positions within the first six years (sic. following the execution of the agreement) or forever lose their right to challenge the agreement.

The efficacy of the holding in *Lieberman* to suspend the statute of limitations during marriage, which as noted above has been adopted in at least 18 other states, and finds support in Section 8 of the Uniform Premarital Agreement Act, was never reversed. It postulates that, "Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement." In fact, the Appellate Division in *Bloomfield* approved this result.[11]

The disparate view in the second department was briefed by counsel and, believe it or not, was ignored by the Court of Appeals when it decided *Bloomfield v. Bloomfield*[12] and reviewed the first department's decision. Despite this conflict, the high court chose to demur and decided the case based upon CPLR 203(d). It explained that the claims and defenses that arise from the same transaction asserted in the complaint are not barred by the statute of limitations. It inexplicably refused to comment on the points raised in appellant's brief, arguing that there should be an express tolling of the statute during marriage. Why the Court of Appeals sidestepped this issue, especially where a sharp conflict exists between two judicial departments, is most mystifying. It creates further difficulties since it failed to say whether the tolling principle was incorrect, leaving two methods for a Supreme Court justice to utilize if he wished to ignore the statute of limitations in the first department. In any event, the bottom line in *Bloomfield* appears to be that where the statute of limitations has run and it is raised to defeat an attack on the agreement by a plaintiff, the defense will be unavailable. Simply put, at least under *DeMille* only a defendant can attack an unconscionable or unfair agreement by way of counterclaim, and never by commencing an action for divorce, once the statute has tolled.

Think about it for a moment. This result prevents a spouse from obtaining a divorce, no matter how horrific the other's spouse's conduct was, where there is a pre- or post-nuptial agreement that waives all property and inheritance rights, and the statute of limitations has run. These very circumstances are what compelled Justice Falanga to conclude that to so prevent a wife from obtaining a divorce would be unthinkable, under all of the circumstances of the case.[13]

Put another way, should a plaintiff wife be able to attack the agreement in the same way she could if her husband sues her for divorce and she, as a defendant, attacks the agreement as being unconscionable and the product of fraud, duress, or overreaching? To adopt a rule that would make the statute go away only if the wife is the defendant, makes no rational sense.

For example, if the wife sought to attack the agreement after the statute had run and commenced an action for a divorce with a cause of action to set aside the agreement, she would be precluded from doing so by the statute of limitations. Nonetheless, if the husband commenced the action and sought to uphold the agreement, the wife, as defendant, would not be barred from seeking to set it aside, despite the running of the statute. Does such a result protect a spouse from leaving a marriage of long duration with absolutely nothing if her husband never sues her for divorce?

When I went to law school I learned a principle that stayed with me during 45 years of practice, and that is, for every wrong there is a remedy. And I remember a Supreme Court judge long ago telling me during a settlement conference in a contested matrimonial case that neither the husband nor his spouse would leave his courtroom empty-handed. It is no wonder that with these principles in mind, it is impossible to reconcile the existing dichotomy that exists between the judicial departments, let alone the decision of the Court of Appeals to sidestep this issue.

If you are confused and disappointed at this lack of clarity by the courts, you are not alone. George Orwell's famous line that all animals are equal but some animals are more equal than others, has resurfaced once again, and has never been more appropriate to apply to a litigant. All we can hope for at this juncture is that leave to appeal will be granted after the final chapter in *DeMille v. DeMille* is written.

Endnotes

1. 32 A.D.3d 411 (2d Dep't 2006).
2. *Bloomfield v. Bloomfield*, 97 N.Y.2d 188 (2004).
3. We have just learned that the wife's motion to appeal to the Court of Appeals was denied because the order appealed from was not a final judgment...further leaving the issue unresolved. 2004 N.Y. Slip. Op. 80094 (Nov. 20, 2006).
4. *See supra* note 1.
5. 5 A.D.3d 428 (2d Dep't 2004).
6. 94 A.D.2d 721 (2d Dep't 1983).
7. Section 203(d) Defense or counterclaim. A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.
8. Whether the reference to recoupment in a matrimonial action is proper, is quite questionable, since it appears only in commercial matters and is a doctrine limited in scope.
9. However *Abbate v. Abbate*, 82 A.D.2d 368 (2d Dep't 1981), seems to carve out an exception in the second department when the fraud alleged is actual rather than constructive, where the latter can be brought upon the discovery of the fraud rather than the execution of the agreement.
10. 154 Misc. 2d 749 (Sup. Ct., N.Y. Co., 1992).
11. 281 A.D.2d 301 (1st Dep't 2001).
12. *See supra* note 2.
13. 5 Misc. 3d 355 (Sup. Ct., Nassau Co., 2004).

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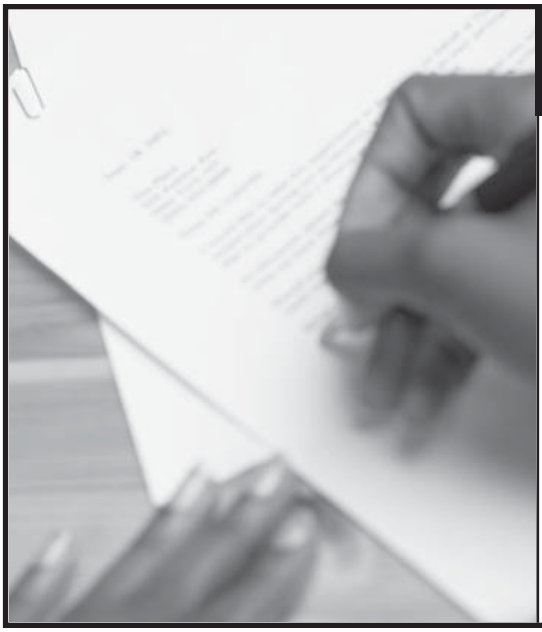

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Equitable Estoppel and the Nonbiological or Nonadoptive Parent

By Elliott Scheinberg

The latter quarter of the past century observed a major resculpting of the complexion of the traditional family once mirrored by the Ozzie and Harriet Nelson and June and Ward Cleaver households. The contemporary family loom now interweaves untraditional fibers and patterns into its fabric, such as couples unrelated by marriage, whether gay or heterosexual, where: (1) a party joins a single parent household, or (2) during the course of an existing relationship one party alone either adopts or gives birth by way of artificial insemination from a third-party sperm donor. In each instance, a loving bond is galvanized between the legally unrelated party, "the legal stranger," and the child, where the child considers and loves that party as a parent in every sense.

Heartbreak occurs when that nurturing parent-child bond constructed across many years between the unrelated party and the child is severed upon the dissolution of the relationship between the legal parent and the legal stranger. Governing law states that, "no matter how close and loving [the] relationship with [the] child" may have developed,[1] the legal stranger does not have standing to seek visitation with the child notwithstanding the biological/adoptive parent's former encouragement to foster a nurturing parent-child relationship with the legal stranger, and further notwithstanding the role of the unrelated party as an equal parent:

> . . . under controlling law, the petitioner, who is neither an adoptive nor a biological parent, lacks standing to seek visitation . . . and cannot rely on the doctrine of equitable estoppel to establish her status as a de facto or psychological parent. Respondent's having fostered the development of a psychological bond between the petitioner and the child was deemed insufficient, standing alone, to establish extraordinary circumstances that would overcome the established right of a legal parent to choose with whom her child may associate. . . . [Absent adoption] the petitioner [became] a legal stranger to the child.
>
> Equitable considerations that arise when a man has been held out by a child's biological mother as the child's biological father in birth and baptismal certificates or in judicial proceedings . . . are not present when a boyfriend, stepfather, or same-sex partner of an adoptive or biological mother seeks visitation or custody of the legal mother's child[2] (cites omitted).

Equitable Estoppel

The doctrine of equitable estoppel has universally, albeit unsuccessfully, been asserted by every nonbiological or nonadoptive parent seeking visitation with a child following a failed relationship with the biological/adoptive parent.

Equitable estoppel precludes the assertion of a right by a party once that party has led another to form "the reasonable belief" that the right would not be asserted, provided there is a simultaneous showing of loss or prejudice to the misled party if the right were asserted. Otherwise stated, the law imposes this doctrine as a matter of fairness *to preclude a party from speaking against his own acts, commitments, or representations* which induced another, who reasonably relied on such words or conduct and who would suffer injury if such conduct or representations were allowed to stand.[3] It prevents the enforcement of rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position[4] to either act or forbear.[5] The doctrine examines whether the person to be estopped has through false language or conduct induced another to act in a certain way, with the result that the other person has been injured in some way."[6]

Equitable estoppel can be used offensively to enforce rights created by words or conduct, or defensively to cut off rights; an estoppel defense is applicable where the failure to promptly assert a right has given rise to circumstances rendering it inequitable to permit the exercise of the right after a lapse of time.[7] In the context of paternity and custody, equitable estoppel is applied only where it furthers the best interests of the child who is the subject of the controversy.[8]

The heart of the estoppel argument urges that the legal parent's once-active efforts to forge a parent-child relationship with the legal stranger equitably estops the legal parent from acting inconsistently with that prior conduct.

However, pursuant to the *Bennett v. Jeffreys*[9] rule, New York law establishes "primacy in parental rights": "the right of the parent [is] superior to all others, to the

care and custody of the child. This right [can] be dissolved only by abandonment, surrender, or unfitness." The Court of Appeals stressed that "visitation rights may not be granted on the authority of the *Bennett v. Jeffreys* extraordinary circumstances rule, to a biological stranger where the child, born out of wedlock, is properly in the custody of his mother."[10]

The appeals court has declined to extend parental status by estoppel because a biological or adoptive parent has the right to choose with whom the child may associate,[11] a right, over three-quarters of a century old, firmly anchored in the United States Supreme Court,[12] which has "repeatedly recognized [that the] right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party.' . . . The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."[13] New York's high court holds firm that any expansion of rights must occur via legislative fiat.[14]

Accordingly, [where] "no one questions the mother's fitness to raise her child and no one seeks to change custody . . . [the] inquiry is directed solely to the State's power to interfere with the mother's [right] to choose those with whom her child associates. The State may not interfere with that fundamental right unless it shows some compelling State purpose which furthers the child's best interests (*Stanley v. Illinois,* 405 U.S. 645 (1972))."[15] However, a child's heart and mind are not programmed to fathom nuanced legal distinctions; the reciprocal love between a child and a lifelong parent figure is identical irrespective of whether or which legal entity offers its imprimatur. Can it, therefore, not be posited that the emotional devastation brought to bear upon a child arising from the de facto parent's having suddenly been wrenched from the child's life constitutes a compelling state interest? Chief Judge Judith Kaye's analysis in her dissent in *Alison D. v. Virginia M.*[16] is simply brilliant in every way and gives pause for rethinking current law; it should be the cornerstone of any progressive laws on this issue.

Bank v. White

In *Bank v. White*,[17] the respondent had a daughter and was pregnant with another child, both from a prior marriage. She and the petitioner married and lived together with the children for approximately eight years. The petitioner played a role in their daily upbringing and served as their "father figure." Under governing law, his application for visitation with the children was correctly denied because of lack of standing. However, the opinion incorrectly cited *Herbert PP. v. Chenango County Dept. of Social Services*[18] in support of the argument that the petitioner might have prevailed had he demonstrated that "he had the requisite contacts or undertook any effort to maintain a relationship with the subject children since he left the marital residence" rather than simply bringing his motion "only in response to the wife's request for interim maintenance." The aforementioned argument is exclusively relevant to grandparental visitation cases because those statutes specifically authorize the consideration of equitable factors.[19]

Bank further erred by stating that "the doctrine of equitable estoppel was not warranted in this case . . . although [it] has been applied by this court to visitation disputes under compelling circumstances . . . we decline to apply it under the facts of this case. . . . (*Multari v. Sorrell*, 287 A.D.2d 764 [2005]; *Anonymous v. Anonymous*, 20 A.D.3d 333 [2005])." Significantly, neither *Multari v. Sorrell* nor *Anonymous v. Anonymous* stands for that proposition; they stand for the exact opposite. *Bank* does not accurately reflect controlling law and should not be relied upon by de facto parents contemplating an application for visitation.

Conclusion

The trauma to a child occasioned by the sudden disappearance of a parent figure is tragic, especially when that parent figure is within reach. The time for either direct legislative action or the application of the doctrine of equitable estoppel is long overdue. Occasional sympathetic courts and dissenting jurists have expressed their frustrations. One Family Court justice creatively and cogently argued that a child has an independent constitutional right to maintain contact with "the legal stranger"[20]:

> The historical development of family law in America, and the expansion of individual constitutional rights by the Supreme Court of the United States and the Court of Appeals of the State of New York, give foundation to a holding that a child has a constitutional right to maintain contact with a person with whom the child has developed a parent-like relationship. Accompanying that right, is also a right to the equal protection of the laws. This requires that the child have the due process necessary to claim his right. This claim can be given constitutional protection, while at the same time giving due recognition, respect and protection to a parent's constitutional right to the custody, care and control of his or her child.

The unfortunate results emanating from these situations can be easily obviated by permitting judicial review on an individual basis so as to avoid abusive practice and any possible extant rights of a biological parent.

Endnotes

1. *Multari v. Sorrell*, 287 A.D.2d 764 (3d Dep't 2001).
2. *Behrens v. Rimland*, 2006 WL 2691610, *1 (2d Dep't 2006), the Court also rejected constitutional arguments raised on behalf of the child that the decision disadvantaged him on the basis of the petitioner's and the respondent's sexual orientation; *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991); *Anonymous v. Anonymous*, 20 A.D.3d 333 (1st Dep't 2005).
3. *Commissioner of Social Services ex rel. R.B. v. W.L.*, 9 Misc. 3d 973 (N.Y. Fam. Ct., 2005); *Sandra S. v. Larry W.*, 175 Misc. 2d 122 (N.Y. Fam. Ct., 1997).
4. *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175 (1982).
5. *Charles v. Charles*, 296 A.D.2d 547 (2d Dep't 2002).
6. *Shondel J. v. Mark D.*, 7 N.Y.3d 320 (2006) (in dissent).
7. *Charles,* 296 A.D.2d 547.
8. *John Robert P. v. Vito C.*, 23 A.D.3d 659 (2d Dep't 2005).
9. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).
10. *Ronald FF v. Cindy GG*, 70 N.Y.2d 141 (1987).
11. *Ronald FF*, 70 N.Y.2d 141; *Multari v. Sorrell*, 287 A.D.2d 764 (3d Dep't 2001); *Bessette v. Saratoga County Com'r of Social Services*, 209 A.D.2d 838 (3d Dep't 1994); *Amy M. v. Leland C.*, 8 Misc. 3d 1011(A), 801 N.Y.S.2d 776 (U) (N.Y. Fam. Ct., 2005).
12. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
13. *Troxel v. Granville*, 530 U.S. 57 (2000).
14. *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).
15. *Ronald FF v. Cindy GG*, 70 N.Y.2d 141 (1987); *David M v. Lisa M*, 207 A.D.2d 623 (3d Dep't 1994).
16. *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991).
17. *Bank v. White*, 30 A.D.3d 453 (2d Dep't 2006).
18. *Herbert PP. v. Chenango County Dept. of Social Services*, 299 A.D.2d 780 (3d Dep't 2002).
19. Domestic Relations Law § 72; Family Court Act § 651.
20. *Webster v. Ryan*, 189 Misc. 2d 86 (N.Y. Fam. Ct., 2001), this theory is not dissimilar from the one in *Weiss v. Weiss*, 52 N.Y.2d 170 (1981), which held that "visitation is a joint right of the noncustodial parent and of the child," that a child enjoys a concomitant right of visitation with the other parent. In this extremely lengthy decision, Justice W. Dennis Duggan provides a profound historical review of thinking and law.

Do We Bring Out the Scales or Don't We? An Overview and Critique of Parental Evaluation and Competitive Adoption Under Current New York Family Law

By Justin Braun

> It is the spirit and not the form of the law
> that keeps justice alive.
>
> —Earl Warren[1]

Introduction

Perhaps no other issue in the law pulls as forcefully at the emotions of the parties, practitioners and society as a whole as that of the placement of a child by judicial design. In the context of both adoptions and custody/visitation determinations, a poor placement, regardless of the intentions, routinely condemns society's most vulnerable, its children, to all manner of suffering at the hands of an unfit parent or custodial guardian. It goes without saying that such placement can distort a child's growth during important and impressionable periods of development in his or her young life. And even when the parental figure is deemed "fit," questions of the child's best interests[2] for the ultimate purposes of placement may nonetheless present themselves. The aspiration and legislative mandate of a court having jurisdiction over these matters is to provide a process that affords judicial protection against poor and improper outcomes. Of course, there are imperfections inherent in any manufactured system. And, when discretion is called for as the basis of judgment, judicial attempts to tackle the infinite range of possible scenarios reveal a system at times replete with incomplete application, competing policy concerns, built-in procedural malfunction and general human error.

In New York State, the issues of parental evaluation in the context of child placement are governed largely by three broad provisions of statutory code[3] as applied by the Family Court.[4] This article will utilize a multi-party adoption scenario set in New York City in which questions arise as to whether evaluation of parental fitness is conducted appropriately towards serving a child's best interests in placement proceedings.

In the first part of this article, I will examine an inconsistency in the New York code with respect to the determination of adoptive placement within the framework of consent requirements. The requirements establish a paradigm whereby a court's jurisdiction to determine what placement is in a child's best interests is generally constrained by a lawful children's agency's determination.[5] Coupled with both competing provisions of code[6] and policy concerns when more than one set of prospective parents petition the court for permanent custody, the paradigm begs the question that, as a threshold matter, when is it appropriate to conduct parental evaluations? In other words, when do we, or do we not, bring out the scales that are to weigh a parent's fitness? I will argue that as a matter of statutory construction, policy and practical due-process, it is required that the Family Court maintain high levels of oversight in parental evaluations in adoptive proceedings involving more than one set of qualified prospective parents.

The second part of the article will move beyond the threshold question to examine what sort of parental evaluation is appropriate given the hypothetical posed. (i.e., now that the scales have been brought out, how are they used, and how should they be used?). By viewing the evaluative factor of bloodline through a critical lens, I will argue that a case-sensitive best interests analysis is required in order to address the concerns of adoptive placement. In other words, the scales themselves must be carefully tailored to the context of the circumstances surrounding the prospective adoption (e.g., the parties involved in the proceedings), and a one-size-fits-all approach to selecting the factors used in such evaluation will not adequately serve the best interests of the child.

The final part of the article will touch on issues of reliability in parental evaluation. Specifically, I will argue that both improper expert testimony and misguided advocacy can sabotage successful determinations. Such possibilities call into question assumptions employed in the design of parental evaluations. To draw on the titular analogy once more, even if we know whether to bring out the scales and how to use them, can they be trusted in a particular application? Drawing on scholarship, I will argue that greater adherence to the core mandates of professionalism is necessary. Further, a flexible best interests approach in formulating orders based on recommendations must be available to the judge if optimal resolution is ever to be universal.

I. Part One: An Initial Look at Jurisdiction

Scenario:[7] Cindy was born in St. Luke's Hospital in Brooklyn with a positive toxicology for cocaine to an unwed mother and an absentee father. Pursuant to its powers under the Family Court Act,[8] the Administration for Children Services (ACS) successfully sought a court finding of abuse and neglect which further found that a removal of Cindy to the commissioner would be in the

best interests of the child. Two weeks after her birth, ACS placed Cindy in the foster home of Ms. Bailey-Luis, a biological mother and former foster mother of two well-adjusted adult women. Ms. Bailey-Luis lives alone in a modest two bedroom apartment in the Bedford-Stuyvescent area of Brooklyn.

Within a year, Cindy's biological mother and father surrendered their parental rights to ACS, and the court accepted their surrenders extra-judicially.[9] A year or so after that, Mr. Pestancias, a close family friend of the biological father, became aware of Cindy's living situation and successfully petitioned the court with Ms. Bailey-Luis' assent for visitation privileges. Though not a blood relative of Cindy's biological father, Mr. Pestancias' mother and aunt were raised in the same household as Cindy's paternal grandmother, and the three considered themselves siblings in fact if not in law. Mr. Pestancias has a wife and two young children. Together, the family (including children from each of the parents' first marriages and their current marriage) resides as an upper middle class household in an upscale Long Island community. Cindy has visited extensively with the Pestancias', spending every other weekend in their company. According to agency reports, though she considers herself a part of the family (referring to Mr. and Mrs. Pestancias as "mommy" and "daddy," respectively), she is also significantly attached to Ms. Bailey-Luis (whom she also addresses as "mommy"). With the help of ACS and "Good Guardian Stork" (a private agency under contract with ACS to handle the particulars of the case), Ms. Bailey-Luis has successfully cared and provided for Cindy's emotional and physical needs since placement. Cindy, at age 7, continues to test well for signs of normal development despite initially stunted growth stemming from her birth toxicology.

As required by law,[10] the Family Court scheduled a hearing such that the relevant parties could petition for Cindy's permanency. Both Ms. Bailey-Luis and Mr. Pestancias have filed for adoption. GGS initially supported Mr. Pestancias' petition, but was compelled to switch endorsements to Ms. Bailey-Luis after an independent ACS determination. ACS concluded that, though both prospective parents were qualified and eligible to adopt, Ms. Bailey-Luis offered a more secure and stable environment for Cindy given the child's continuous upbringing in the Bailey-Luis household. Mr. Pestancias has filed a judicial reasonableness review of the agency determination in New York Supreme Court under C.P.L.R. art. 78.[11] The Supreme Court has stayed those proceedings pending a Family Court determination as to whether Mr. Pestancias' petition must be dismissed in the absence of agency consent.

Cindy's story is not one of hopeless despair stemming from a broken system unable to adequately provide for the children under its care.[12] Wonderfully, two sets of caring and qualified prospective parents have come forward in an attempt to permanently provide this child with the tools she needs for success in the future. The scenario does, however, raise important issues regarding parental evaluation amidst an inconsistency in the New York code. The inconsistency could award custody to Ms. Bailey-Luis, on the one hand, or to Mr. Pestancias, on the other, depending on how the law is read. And while it is true that, in a technical sense, Cindy might be adequately provided for if placed in either home, there can be only one set of primary parents that is best for her upbringing. The legal mechanics of the best interest analysis, then, will drastically affect her childhood, indeed further influencing all that is to follow for the rest of her life. But under one reading of state law, the Family Court is ostensibly precluded from engaging in the typical multi-factored parental evaluation in order to determine placement in Cindy's best interests.

New York Domestic Relations Law § 111(1)(f) requires that if "any person or authorized agency having lawful custody of the adoptive child" gives its consent to any adoptive placement, such consent is to be authorized by the court.[13] In instances where only one petition has been filed, the requirement serves as either an initial stamp of approval or an administrative check limiting the court's purview in placing children with presumptively unfit prospective parents. Though DRL § 111(2) outlines instances where consent would not be a pre-requisite to a successful adoption, these exceptions are narrowly tailored fact patterns that call into question either the legitimacy of the consent itself or the consenter.[14] Thus, for practical purposes where consent has been withheld, a petitioner's sole remedy lies in an article 78 reasonableness review by the Supreme Court.[15] When applied to Cindy's adoption, then, Mr. Pestancias' petition is facially not viable, and the Family Court has no choice but to dismiss it. The court is forced to approve placement with Ms. Bailey-Luis (pending the article 78 review and a best interests analysis of her fitness) without conducting a comparative judicial evaluation of Mr. Pestancias' petition.[16]

This result directly conflicts with both the letter and the spirit of another important section of the New York code. Written into the Social Services Law § 383-c(10)(a) is a requirement that upon judicial acceptance of a surrender, the court shall inquire among a number of parties (including foster parents and "other suitable persons"), and "such person or persons may submit, and the court shall accept, all petitions for the adoption of the child."[17]

The mandate of the code, then, is to give the Family Court an opportunity to legitimately entertain all of the meaningful petitions filed by qualified prospective parents. In order to legitimately entertain such petitions, it is necessary that the court have purview to reach the merits of each and every potential custodial award. In other words, for the code to have any real bite, the court must

be given an opportunity to conduct a parental evaluation from the pool of petitions received. Such a power is entirely consistent with and, indeed, in furtherance of, the spirit of all placement law which is to give the child the greatest possible opportunity at arriving at the most appropriate custodial arrangement in her overall best interests.

The mandate of SSL § 383-c is facially unworkable, however, if an agency, acting under the authority granted by DRL § 111(1)(f) could unilaterally eliminate all but one of the possibilities from the pool in exercise of its consent powers. In such a scenario, the Family Court is placed in the untenable position of having to somehow "accept" petitions from suitable prospective parents that are, nonetheless, void under the Domestic Relations Law. Further, the agency is required by law to grant a consent, but only to one party when more than one set of qualified potential parents file for adoption.[18] It is the agency, therefore, and not the Family Court, that is compelled to make a best interests parental evaluation without the safeguards and due-process of a judicial hearing, even, perhaps, against its own unwillingness to make such a determination within the scope of its relevant competence. A strict reading of DRL § 111 would then make that determination binding on a judge limited in her review to only the one endorsed petition. Such a result is in clear contradiction to both the procedural mandate of SSL § 383-c and the spirit of the statute seeking judicial consideration over the maximum number of alternatives.

Given the problem of conflicting statutory command, one must look to alternative sources outside of the codified text for guidance on how best to resolve the issues presented. Case law before 1981 yields a mixed mandate of whether or not a strict reading of DRL § 111 trumps other statutory concerns. As early as 1946, the Supreme Court in the Fourth Department articulated the importance of a somewhat flexible, though generally constrained, approach to consent requirements:

> While there can be no question but that the validity of an adoption depends entirely upon compliance with the statute authorizing it, and although this, of course, may not mean a literal and meticulous compliance, it certainly means a compliance which can at least be said to be substantial.[19]

But as late as 1980, the Family Court of New York, Onondaga County, put forth the following in a decision dismissing a grandmother's petition for custody without agency consent:

> Since adoption was unknown at the common law, it is purely a statutory proceeding. . . . Thus, a person seeking to adopt a child whose guardianship and custody has been awarded to the commissioner or other authorized agency has no other course but to follow the statutory requirements and obtain the consent of the authorized agency if they are to adopt a child.[20]

The opinion went on to state that DRL § 111(2) offers no exceptions for agency consent, and that the only remedy available to the thwarted petitioner would be an article 78 proceeding.[21]

Indeed for many practitioners, the reading espoused by the Onondaga court is still good law. For example, in a practice treatise currently available on Lexis last updated in 2005, the author asserts that New York falls into a category of states reading the law such that:

> [T]he mandatory language of the . . . statute evinces a clear legislative intent that a court may not entertain or determine an adoption petition unless such agency consent to the adoption has been obtained. . . . [The statute] deprive[s] the court of jurisdiction to render a judgment on an adoption petition without the consent of the agency or institution having legal custody . . .[22]

Whatever the practice, however, this reading is patently incorrect. A 1981 decision (often cited only for its holding on article 78 proceedings[23]), the Court of Appeals has explicitly rejected any statutory reading that would preclude the Family Court from reaching the merits of competing petitions in an adoption hearing.[24] The facts of the case, *O'Rourke,* differ from the scenario outlined earlier in that the petitioner filed for adoption after the agency denied consent but before it had endorsed another set of prospective parents. The court concluded that the petition could not be entertained given that, procedurally, the agency's mandate to endorse someone compelled a fair consideration of the party it was to eventually back. In other words, until the court had an agency-endorsed petition to consider, no petition at all could be considered viable. At the time of the court's decision, then, petitioner O'Rourke was left with only the possibility of an article 78 remedy and not the *de novo* court sanctioned parental evaluation that was requested.

But significantly, the opinion went on to make explicit the following reading of the law:

> [A] *de novo* review of [the child's] best interests will take place in the eventual adoption proceeding. Indeed, it is the adoption proceeding, in which appellant has a right to intervene (*Social Services Law Sec 383, subd 3)*, which is the appropriate forum. . . . As appellant has the

> right to intervene in that proceeding, she will not be foreclosed by the agency's prior denial of consent (nor by judicial affirmance of such a denial) from once again presenting to the adoption court the claim that the child's best interests mandate adoption by appellant rather than the proposed adoptive parents. . . . Further, the adoption court, in whose discretion lies the propriety of the proposed adoption, may, after *de novo* review of [the child's] best interests, approve adoption by the proposed adoptive parents or by the foster parent, or reject adoption by either.[25]

O'Rourke, then, not only gives the Family Court clear jurisdiction to fully entertain petitions that do not have agency consent along with the one that does, but the decision justifies this holding as part and parcel of fulfilling the best interests of the child mandate. Parental evaluation is sanctioned not merely in the name of statutory consistency and clarity, but it is also necessary as the embodiment of important policy. To act in the best interests in permanency placement, the court must have full discretion to arrive at its own conclusions *de novo*. To effect this review, all petitions filed must be entertained.

Further, within the broader discussion of procedural law and policy, what can easily be lost to abstraction are the rights of the individual to due-process in the practical as well as the theoretical sense. Moving back to the scenario, the Pestancias' have a right to be heard. As quasi-relatives with a demonstrated interest in Cindy's well being, they qualify as "other suitable persons" worthy of having a voice in permanency placement. It can be argued that due process was afforded under the facts of the scenario. The agencies did weigh the benefits and burdens of placing Cindy with the Pestancias family against those of placement with Ms. Bailey-Luis. There is no evidence that either unfair bias or improper administrative procedure played a role.

But the question remains, was the process afforded the prospective parents enough? After all, agency determinations rest largely on whatever expertise the caseworker brings to the table in investigating, evaluating and ultimately deciding a placement. Such decisions are conducted without the benefit of public scrutiny or *stare decisis* as a guide, and only can be overturned judicially on a showing of wantonly negligent or reckless action (e.g., unreasonableness). It is easy to understand why prospective parents would seek to exchange an essentially bureaucratic process for one with the safeguards and protections of judicial review. Indeed, given that the parental evaluation and the best interests determination itself is, in any event, largely subjective and unscientific under the best of circumstances, it would only stand to reason that the more heavily regulated, norm-generating forum of the courtroom is the best location for assuring the parties' due process concerns are adequately met. That oftentimes experts, judges, and the community as a whole cannot come to a consensus on a placement under a given set of facts serves to underscore the importance of broad oversight and high level judicial involvement.[26]

II. Part Two: The Weighing of the Factors

As stated earlier, parental evaluation, even when it utilizes the best information, expertise and process available, is still a somewhat crude balancing test weighing variables that are not easily measured while employing conjecture to fill in informational gaps. But while it is imperfect, such a test is necessary whenever prospective parents are in the position of competing for custody of a child. Most often, competition will occur in conjunction with divorce proceedings in which the biological parents will petition the court for custody/visitation privileges. In those proceedings, the court will take under consideration evidence of each respective parent's fitness and render a binding decision subject to modification later should the circumstances change.[27] As the scenario alluded to earlier points out, there are also instances in adoption proceedings where competing petitions must be judged. In much the same way and using many of the same factors, then, the scales should be employed in these cases just as they are in C/V determinations.

Many of the factors necessary in a successful parental evaluation stem from intuitive notions of what comprises adequate childcare:

> In thinking about what it is that we are bound to require of adults in order to certify them as "good enough" parents, we ought first to think about some of the requirements of care. These will include the ability to satisfy basic nutritional needs, provide shelter, protection, education, and to love the child . . . by "love" here, I mean a certain structure of relationship in which one takes an active and (intentionally, at least) life-long interest in the interests of the other, making the development (and happiness) of the other one of the central (as opposed to trivial) goals of one's life.[28]

Assuming all petitioners adequately meet at least a minimum threshold in satisfying this basic criteria, the question then becomes who excels the most in these areas of childcare? At this stage, subtle differences between prospective parents can become deciding factors in awarding placement.

In the scenario, for example, Mr. And Mrs. Pestancias have an advantage in that they appear to have more monetary resources[29] available to provide, not just adequate, but superior food, shelter, protection and education for

Cindy than would Ms. Bailey-Luis. Further, based on age[30] and the number of family members available to help, Ms. Bailey-Luis is at a further disadvantage when thinking about what might happen to Cindy should she, as the primary guardian, become sick, disabled, or deceased before the child reaches the age of majority. Ms. Bailey-Luis, on the other hand, has a proven track record demonstrating her love and commitment for the child in raising her uninterrupted since the age of two weeks. Though the Pestancias have shown a great interest in forging a life-long emotional bond with Cindy in the future, the history of her psychological development thus far favors a placement with Ms. Bailey-Luis. Indeed, it is safe to say that removing the child from her foster mother and placing her with the Pestancias would, at a minimum, require great psychological adjustment and perhaps, at worst, prompt a period of personal trauma in the little girl's development. For this reason, ACS in its own parental evaluation endorsed Ms. Bailey-Luis, and that determination, itself, must be weighed in the overall analysis as having been given by social work experts.

The basic analysis goes on, of course, with a high level of care and detail used in fitting the facts to the eventual best interests determination. For the purposes of this article, however, it is necessary to examine other facets to the parental evaluation specific to the context of adoption with particular reference to the facts underlining the Cindy scenario. In divorce-related C/V cases, for example, there is not the same sort of need to weigh ties of blood relations between the child and the competing prospective parents. For divorcing couples (usually), the children are equally related to the contesting mother and father. In cases where grandparents or other similarly attenuated relatives have sought visitation and/or custody, the courts have been reluctant to grant special status to these individuals equal to that of the parents in asserting C/V rights.[31]

With adoptions, however, ties of blood can be significant in distinguishing between competing petitioners. A strong argument to assert, for example, is that the best interests are better served by placing a child with a maternal aunt over an unrelated individual if the two petitioners are otherwise deemed equally fit. In this situation, the aunt can provide something extra to the child that the competing petitioner cannot: a direct conduit to intimate knowledge of the history and traditions of the biological bloodline. Such information can be invaluable to an adopted child in parsing out her identity after lengthy exposure in the somewhat impersonal and bureaucratic adoptions system. Not surprisingly, this resource is something the courts may, in their discretion, deem valuable and allow to loom large in a given parental evaluation under the umbrella of the best interests of the child.

However, there may be good reason to reject, or at least minimize, the view that blood relations should be an important factor in adoptive placement proceedings. One author has suggested that in furtherance of "intergenerational social justice" it is necessary to intellectually divorce the idea of the qualified parental figure from that of the biologically related.[32] In this view, "[p]arental rights are conferred by the moral community rather than by biological happenstance."[33] Raising a child capable of functioning in the broader community is the critical factor of placement. Notions of bloodline, indeed, often signify a stifling sense of ownership over the child rather than a responsibility to her.[34] The norms of the community, then, pursuant to which its children receive their best prospects for living within it trumps issues of blood relation. In this view, the child's benefit in being an upstanding member of society instead of her sense of connectedness to her biological family is what should most concern the court in weighing the factors.

Going back to the Cindy scenario, the interesting question arises, then, what are we to do with the fact that the Pestancias have quasi-relative status to the young girl? If we take the position that bloodline does not weigh heavily in the evaluation, it would seem the factual distinction between the petitioners is of little importance. If, however, we are to give credence to the view that familial connection is valuable in adoption, it is still unclear how that factor plays out in this scenario. On the level of bloodline knowledge, Mr. Pestancias' own upbringing does give him a resource similar to that of a blood uncle. Under the facts given, however, it is unclear how deep such knowledge penetrates into the family tree (and thus, how valuable it would be to the child). Further, if the court entertains giving added value to a quasi-relative, at what point must it draw the line and declare that a relationship between the prospective parent and the child's biological family is simply too attenuated to be given added consideration?

Because there is no straightforward answer to such a broad question and courts have, unsurprisingly, failed to craft a single bright-line test, a best interests determination requires that the judge adopt neither of these polar positions in analyzing questions of blood relations. Instead, she must go beyond the facts as presented and inquire of the parties themselves what possession of bloodline knowledge means to them in their potential capacity as a parent. In this way, it is the parties' responsibility to demonstrate to the court that bloodline matters, or doesn't matter, *in their case* by relating their resource to other subject matter more within the competence of the court's evaluation.

For example, Mr. Pestancias could articulate a desire to see that Cindy is aware of special skills and talents that run in her family. In this way, he is adding to her instruction, and may, thus, have an advantage over Ms. Bailey-Luis in providing for her overall educational development. Significantly, such a framing also comports with the goals of each of the polar positions by both increasing Cindy's connectedness to her family and giving

her greater tools to interact with the community. Finally, by placing the onus on the parties to come forward with their own conceptualization of the significance of bloodline (rather than taking judicial notice one way or the other on what the biological facts mean), the court has increased the accuracy of the best interests analysis in clarifying the potential benefits to be afforded the child under the circumstances of this particular case.

III. Part Three: A Realistic Evaluation of Process and Outcome

As the example of bloodlines indicates, it is important to be aware of what types of information the court needs to solicit and what it will mean to the analysis. Moving from theory to practice, it is also important to question the reliability of all of the information assembled for the purposes of the parental evaluation proceeding. Complacency on the part of the lawyers, the judge and/or the experts with respect to the proper fulfillment of roles can lead to a distorted result despite basic due-process safeguards (e.g., SSL § 383) and a solid theoretical analysis of the evidence to be gathered. As a final piece of the best interests puzzle, then, it is imperative to evaluate the reliability of the evaluation itself by means of a critical self-reflective analysis.

The process of fact-finding involves the work of several important players. For example, though I have argued that the questions presented by the meaning of the bloodline factor are best answered through greater input from the parties themselves, many factors are standard questions of care that are best answered by outside third-party experts. Though a prospective parent may believe and assert to a judge, "I'm feeling very healthy, your honor," a medical doctor's opinion is required to assure the court with scientific accuracy whether the individual is at risk for a serious illness in the near future. In a best interests proceeding, use of trained professionals in testimony extends beyond experts in the physical sciences to include psychiatrists and psychologists, as well. In an attempt to better mete out fact finding in determinations, courts have grown increasingly dependent on these third-party expert evaluators.

But some have questioned the legitimate scientific reach of those evaluations as well as the over-dependence of such information by the professional and the court:

> The real problem is that the legal system all too often indulges the assumption, with no underlying evidence to support it, that mental health professionals *are* in a superior position to provide best interest answers. . . . Every time a mental health professional gives a recommendation, he or she implicitly communicates to the court, "We can do this.". . . Because the recommendation often comes to court wrapped in impressive credentials and shrouded in scientific-sounding jargon, an uninformed court may well give it greater weight than it warrants.[35]

The authors of the above passage (Timothy Tippins and Jeffrey Wittmann) go on to caution that in modern practice, dressed up guess work masquerading as accurate scientific procedure is regularly introduced as evidence in court unscrutinized by the lawyers and too heavily weighted by the judge.[36] The authors call for a "greater education in the empirical content of the behavioral science field" by all of the players such that limits of the scientific method are accurately recognized when assimilating testimony and gathering data.[37]

Increasing forensic reliability, then, requires the players to exhibit a stricter adherence to the core values of their profession than is currently the prevailing norm. It is not a far stretch to imagine in the Cindy scenario, for example, a psychiatric report entitled "Placement X is in the Best Interests for the Child's Emotional Development." It is equally plausible that such an evaluation could be used as the overriding evidentiary factor by the judge in her own determination. The psychologist, then, must be careful not to state opinion as scientific fact. The lawyers must be zealous and learned in their critique of the evidence as they seek to educate the court. Lastly, the judge (as operator of the scales) must not abdicate her role to the expert witness in the name of science.

If the critique is to be accepted, then, the assumption must be abandoned that the various players are doing their jobs in open court precisely as prescribed by law and proper practice. Such a vision of reality should be cause for alarm in that a system is only as good as the people who operate it and the methods they use. As a noted scholar of family law, Professor Martin Guggenheim has further observed that the breakdown of roles has led to inappropriate (though accepted) advocacy in parental evaluation proceedings by the law guardian.[38] Based on an improper understanding of ethics guides and a misconception of the role of law guardian, the lawyer is apt to advance either his own placement agenda (if the child is too young to form an opinion) or that of the child, neither of which he is authorized to advance by statutory law.[39]

If Guggenheim is correct, just as in the case of the expert who overreaches in the name of science, the law guardian equally distorts the proceedings in the name of professional responsibility. The end effect is an unacceptable tampering with the scales that are to be used in judgment in parental evaluations. For Guggenheim,

> the substantive law has disempowered [the law guardian] from advocacy based on the child's or personal objectives for

> placement. The lawyer's role is better served by assisting the judge to decide the case correctly with a minimum involvement by the child. The only way to accomplish this and perform a consistent role is for the lawyer to uncover the relevant facts that place the judge in the best position to decide the case and to protect the child from harm that may result from the litigation itself.[40]

In the Cindy scenario, it is unclear whether her law guardian would advocate on behalf of the seven year old's wishes, substitute her own judgment or serve consistent with a Guggenheimian model of advocacy. It is highly possible that any of these three courses could be taken, and all three are currently permissible in Family Court. That the three types of advocacy are radically different should signal an inherent problem with a system that strives for uniform justice.

As a final note on the issue of trusting the scales, even if the forensics used can be relied upon as accurate, and even if the parties in court are doing their proper jobs as prescribed by law, it may be that the law itself is too incomplete in its contextual reach to yield the proper result for children like Cindy. Based on the explicit language of *O'Rourke* in the passage cited in note 25, *stare decisis* demands a best interests analysis in permanency placement parental evaluation for a petition for which agency consent has been denied. Despite this language (and though best interests is the standard used in contested custody proceedings), it is not immediately clear that such a standard must be applied in contested adoption cases. Indeed, it is only when we start with that assumption and recognize that the agency is required by law to sponsor a competing petition that it would follow that, as matter of logic and equal treatment, the two petitions deserve evaluation under the same standard of review in a comparative setting.

Despite an absence of a statutory mandate,[41] I would argue that, as a matter of policy, best interests should not be monolithically applied in the parental evaluation given the inherently rigid nature of present permanent placement. Unlike with custody determinations, a judge has little flexibility in an adoptive proceeding and must award the child's full guardianship to one party or another. Issues of visitation cannot seemingly be built into the hypothetical permanency placement (as no statutory provision exists to allow such action), meaning that the one who loses will be a legal stranger to the child post-adoption. The evaluation, then, can seemingly only reach the all-or-nothing issue of who will be the parent and who ought to be cut off in the child's best interests. Intuitively, it seems better policy to implement a more flexible remedy that would ask and answer the question of not just who gets guardianship, but also who might have visitation (and perhaps other limited rights) in the best interests of a child like Cindy. After all, the benefits Cindy receives from all of the caretakers in her life are documented, tangible and ongoing.[42]

Though the legislature has not explicitly addressed the hypothetical of competing petitions in the text of the code, there is precedent for implementing adaptive permanency placement under the circumstances in other situations.[43] For example, in cases of judicial surrender, a guardian whose parental rights are being terminated can see her contact/communication wishes honored in the final adoption order if the judge agrees that they are in the best interests of the child. Similarly, there is the strong argument that it is in keeping with the spirit, if not the letter, of the law to allow the court greater latitude in fashioning outcomes drawing on the parties' interactions and how they ultimately benefit the child. Under this paradigm, perhaps a judge might rule to give Mr. Pestancias custody with an explicit understanding stating that it is necessary for Cindy's well being that Ms. Bailey-Luis be provided stable visitation (or the other way around). Absent a flexible paradigm, the court might feel compelled to reject both petitions in order to maintain the jurisdiction necessary to enforce split visitation/guardianship in the context of indefinite foster care oversight. Such a result would place Cindy's status in permanent limbo until she had aged out of the system. Further, it provides little security to the petitioners, little stability to Cindy herself as she struggles with familial identity, and a greater burden of costs on the parties, the agencies and the courts as a whole.[44]

Conclusion

As Tippins and Wittmann have aptly noted, the starting point of parental evaluation analysis is not to guarantee the child a perfect placement; it is merely to insure that the system is fair, balanced and functionally geared towards meeting the aims of its creators.[45] For Cindy, this means that even in an ideal world, a best interests analysis may not yield the best possible placement, only the best possibility of one. A critical view of the adoption process reveals that whether we give the court jurisdiction, how we ask it to gather information and who, ultimately, exercises the power to interpret the evidence and present it in finished form drastically impacts upon the justice we hope to achieve. The implementation of parental evaluation, then, requires careful fact finding, diligent service to the goals of the analysis, and a flexible implementation if it is to truly be in a child's best interests. In the end, then, we do well only by endlessly attempting to calibrate our practice and our law to the reality of the adoption paradigm. Based on the interests of the children involved, we must never think that we can set our expectations too high.

Endnotes

1. William Martin, The Best Liberal Quotes Ever 125 (Sourcebooks, Inc. 2004).
2. "Virtually all nations are guided by the precept that the primary consideration underlying any custody decision must be the best interests of a child." D. Marianne Blair & Merle H. Weiner, Family Law in the World Community 551 (Carolina Academic Press 2003). The best interests of the child standard is articulated locally in N.Y. Family Court Act § 1055, 1089 (FCA).
3. *See* FCA, N.Y. Domestic Relations Law (DRL), and N.Y. Social Services Law (SSL). These three codes also work in conjunction with the criminal code of New York. For example, if the custodial parent becomes incarcerated on felony convictions the child will be removed to the care of a relative or the social services agency pursuant to FCA § 1022 or 1024.
4. Though Family and Supreme Court have concurrent jurisdiction over some matters of Family Law, in other matters, the Family Court is given exclusive original jurisdiction. *See* FCA § 115. Family Court maintains concurrent jurisdiction in adoption and custody/visitation cases (§ 115(c)) and original jurisdiction in termination of parental rights cases (§ 115(a)(iv)).
5. DRL § 111(1)(f).
6. E.g., SSL § 383-c.
7. This scenario is adapted from a case currently pending in New York City Family Court. I have changed the names of the parties, though the relevant facts of the case remain essentially the same.
8. *See* FCA § 1022, 1024.
9. SSL § 384(3) makes it possible to transfer custody and guardianship extra judicially from a biological parent to an authorized non-foster care agency via prescribed method. The parent need not return to court in order for the judge to validate the surrender if the surrender meets the best interests of the child standard. The surrender and its agreed-to terms are, thus, approvable by the court pre-adoption. In a later adoption proceeding, the agreement must be incorporated into the adoption order having been annexed to the petition in order for it to have force (DRL § 112(b)(5)). The statute does not require the parent to be present in court for incorporation of the initial surrender, but he or she must have consented to the terms of the surrender in writing (DRL § 112(b)(2)) (something he or she will have had to have done anyway in order for the initial surrender to have been effective via § 384). If the agreement for surrender features specific terms for contact/communication, those terms must be approved by the court during the initial § 384 proceeding. If they are approved, they can be made a part of the order of adoption along with the whole of the surrender (DRL § 112(b)(1)). Failure to comply with the terms post-adoption does not set aside the adoption (DRL § 112(b)(3)). However, any party to the agreement or the law guardian may petition the court for enforcement of the terms (DRL § 112(b)(4)).
10. *See* FCA § 1055, 1089.
11. N.Y. Civil Practice Law and Rules 7803 (CPLR).
12. Indeed, even the casual observer is confronted with the sad reality that far from providing nurturing homes and stable environments, a shocking number of foster parents utterly fail the children under their care either through neglect, profiteering or outright abuse. *See* Carolyn A. Kubitschek, Justice for Abused Foster Children, *Trial Mag.*, Oct., 2003, at 42. Given the facts of the scenario outlined, the systemic deficiencies of foster care in New York (and elsewhere), a vitally important subject in its own right, is beyond the scope of this article.
13. DRL § 111(1)(f).
14. DRL § 111(2).
15. Demonstration that an agency acted unreasonably requires a showing of either arbitrary or capricious action on the part of the government in reaching its decision: "[In reviewing] the local agency's denial of consent to adopt, . . . the usual article 78 standards of [reasonableness] review are applicable (*CPLR 7803*, subds 3, 4)." *O'Rourke v. Kirby*, 54 N.Y.2d 8, 13, 444 N.Y.S.2d 566, 568 (1981). Because the evidentiary bar of wrongful action is set so high, the range of permissible government discretion is quite broad.
16. In the actual case, counsel for Mr. Pestancias agreed that the viability of his client's petition turned on consistency with statutory law (see *In re Robert Paul P.*, 63 N.Y.2d 233, 481 N.Y.S.2d 652 (1984)). His argument centered on the newly revised § 1089 of the Family Court Act, which provides in (d) sub (2)(ii) that a court may place a child with "other suitable person[s]" in order to further the child's best interests. FCA § 1089(d)(2)(ii). Nothing in the newly revised code, however, undermines or supercedes DRL § 111 establishing consent conditions necessary as a threshold of qualification of fitness for such other persons.
17. SSL § 383.
18. *In re Whitcomb*, 271 A.D. 11, 61 N.Y.S.2d 1 (4th Dep't 1946).
19. *Id.* at 5.
20. *Smith v. Lascaris*, 106 Misc. 2d 1044, 1050, 432 N.Y.S.2d 995, 999 (Fam. Ct., Onondaga Co. 1980).
21. *Id.* at 1050, 999.
22. Jane Massey Draper, *Adoption of Child in Absence of Statutorily Required Consent of Public or Private Agency or Institution*, 83 *American Law Reports* 3d. 373 (updated February 2005), *available at* <http://www.lexis.com>.
23. "The propriety of . . . agency decision is subject to administrative review and subsequent review by Supreme Court in a CPLR article 78 proceeding, and any agency decision that was not in the best interests of the child would necessarily be arbitrary and capricious or unsupported by substantial evidence (*Matter of O'Rourke v Kirby, supra, at 14*)." *In re Mary*, 227 A.D.2d 44, 47, 651 N.Y.S.2d 766, 768 (4th Dep't 1996).
24. *O'Rourke v. Kirby*, 54 N.Y.2d 8, 444 N.Y.S.2d 566 (1981).
25. *Id.* at 15, 569.
26. Indeed, in other jurisdictions with similar mandatory language in their code requiring various forms of consent to adoption, the courts have nonetheless stressed the importance of judicial oversight emphasizing the general spirit trumping a specific letter of the law. See *Stines v. Vaughn*, 319 N.E.2d 561, 566 (App. Ct. of Ill. 4th Dist. 1974) (denial of necessary agency consent is a matter for consideration at hearing, but not decisive on the question of jurisdiction); *M. v. Family and Children's Service*, 326 A.2d 74, 76 (Sup. Ct. of N.J., Chanc. Div. 1974) (court has "inherent jurisdiction" to set aside agency decisions either under a reasonableness review or based on its own best interests of the child analysis); *Ratcliffe v. Williams*, 250 S.W.2d 330, 331 (Sup. Ct. of Ark. 1952) (guardian consent does not raise a jurisdictional question). *See also In re Ritchie*, 216 N.W.2d 900 (Sup. Ct. of Minn. 1974); *In re Haun*, 286 N.E.2d 478 (Ohio Ct. of App. 1972); *In re Matthew*, 310 S.W.2d 185 (Sup. Ct. of Tenn. 1957). It is recognized, then, that circumventing explicit statutory language is sometimes necessary in order to protect the best interests of the child. As a matter of policy, the child is given the higher priority at the expense of rigid reading of the text.
27. FCA § 651, 652, DRL § 240.
28. Steven Scales, *Intergenerational Justice and Care in Parenting*, *Social Theory and Practice*, October 1, 2002.
29. [T]he Family Court Judge in this case has made a finding of unfitness with respect to the natural mother. He determined that she could not properly assume and finance the care, training and education of her child and that her own relationships were not sufficiently stable to warrant the return of the child. We believe this finding to be fully supported by the evidence.

    In re Infant D. (Anonymous), 41 A.D.2d 961, 962, 344 N.Y.S.2d 428, 429 (2d Dep't 1973).

30. "[T]he age of the prospective adoptive parents is one of a number of factors considered." *In re Adoption of Child*, 37 A.D.2d 78, 79, 322 N.Y.S.2d 532, 533 (4th Dep't 1971).

31. *See Troxel v. Granville,* 530 U.S. 57 (2000).

32. Steven Scales, *Intergenerational Justice and Care in Parenting*, *Social Theory and Practice*, October 1, 2002.

33. *Id.*

34. *Id.*

35. Timothy M. Tippins & Jeffrey P. Wittmann, *Tippins and Wittmann's Rejoinder: A Third Call: Restoring the Noble Empirical Principles of Two Professions*, 43 Fam. Ct. Rev. 270, 276 (2005).

36. *Id.* at 272.

37. I*d.* at 274.

38. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *Fordham Law. Rev.* 1399 (1996).

39. *Id.* at 1410, 1415.

40. *Id.* at 1432.

41. Only "[w]here circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood," may seek a visitation addendum to an adoption order. DRL § 71. Thus all others, even biological parents whose rights have been terminated (absent conditional surrender), cannot successfully petition for visitation.

42. In the actual case, a report prepared by an independent psychologist determined that, while placement of the child should go to Mr. Pestancias, it would be in Cindy's long-term interests to maintain significant contact with Ms. Bailey-Luis.

43. Indeed, the Third Department has gone on record having said,

> It is now recognized that the severance by adoption of the existing emotional ties between children and their parents, siblings and grandparents may be harmful to the children and that it may be beneficial to provide for visitation after adoption [though] [t]his concept has not been widely embraced in New York.

In re Hatch, 199 A.D.2d 765, 605 N.Y.S.2d 428 (3d Dep't 1993).

Based on the "emotional ties" rationale, there is no reason why such logic cannot be extended to others also deemed legal strangers post-adoption. In the case of the Pestancias family, the rationale for visitation would be even more compelling given that they have formed emotional ties with the child through extended contact and, though they are not biologically related, they nonetheless share a "familial" background with Cindy's blood ancestors.

44. Additionally, Cindy would be precluded from various inheritance and other corresponding rights and privileges commensurate with the status of legal child under New York law.

45. Timothy M. Tippins & Jeffrey P. Wittmann, *Tippins and Wittmann's Rejoinder: A Third Call: Restoring the Noble Empirical Principles of Two Professions*, 43 *Fam. Ct. Rev*. 281 (2005).

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Late Date Acknowledgments

By Elliott Scheinberg

Although approved in *dicta*,[1] the Court of Appeals has never squarely ruled on the question of late date acknowledgments. This crisis surfaces when, irrespective of the reason or presence of subscribing witnesses, a party or parties to a prenuptial agreement, separation agreement, settlement agreement, or the settlor of a will, have not acknowledged the document contemporaneous with its execution; they had forgotten that to win the race, it is necessary to actually cross the finish line, which is the acknowledgment of the agreement. This monograph supports the premise that late date acknowledgments, unfettered by artificial time constraints, are anchored within statutory and decisional authority.

Estates Powers and Trusts Law (EPTL) 5-1.1-A(e)(2), Right of Election by Surviving Spouse, provides that ". . . a waiver or release [of the right of election] must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property."[2] Domestic Relations Law (DRL) § 236B(3) encourages the contractual resolution of issues, both before the marriage [prenuptial agreement] or after the marriage [post-nuptial agreement, i.e., separation agreement or settlement agreement], via an opt-out agreement from the equitable distribution framework, which agreement may then be enforced within a matrimonial action,[3] provided the agreement comports with three procedural formalities: "it is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." Real Property Law (RPL) governs the procedural and substantive parameters of the acknowledgment process.[4]

As creatures of the Legislature, the EPTL and the DRL require compliance with the procedural format set forth in the statutory framework as an absolute predicate to the legislatively conferred benefit.[5] New York Statutes § 173 states: "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 performance 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." *Kennilwood Owners Ass'n, Inc. v. Spanier*[6] states 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."

It is well settled that the language "in the manner required to entitle a deed to be recorded" involves a two-step process: "that an oral acknowledgment be made before an authorized officer and that a written certificate of acknowledgment [as evidence that the named declarant made the requisite declaration] be attached."[7] The foregoing notwithstanding, it has, nevertheless, been held that : (1) there is no prescribed ceremonial format by which the person who signs the document must make the oral declaration of acknowledgment[8]; and (2) where the circumstances surrounding the taking of the acknowledgment adequately disclose compliance with the statutory requirements, there is no reason why the acknowledgment of the signer may not take the form of conduct that expressly or impliedly signifies the signer's assent,[9] effectively dismissing the absolutist view that the absence of the actual recitation of *haec verba* defeats the recordability of the document. *In re Estate of Levinson*[10] is very significant because the Appellate Division held that "RPL § 309-a(1) does not require the notary to observe the execution"; the clear implication is that the acknowledgment did not occur simultaneous with the execution of the agreement, document, or instrument.

Critically, not only did the Legislature in RPL § 298 delineate the various officers, including Supreme Court justices, authorized to complete the two-prong process but the statute also specifically emphasized that any of these statutorily designated officers may fulfill this duty "at *any* place within the state"[11]; there is absolutely no language limiting a justice of the Supreme Court from performing the task of affixing the certificate in the courtroom, even midtrial, which procedure has been accepted by the Court of Appeals and other courts, discussed below.

The language in the RPL § 298 is unequivocal and unwavering; all of the designated officers, including a Supreme Court judge, are equally ranked *vis à vis* the completion of the process. Nor did the Legislature make this process discretionary; a designated officer may not refuse to issue a certificate of acknowledgment once the proper representation has been made because "the function of the officiating person in taking the acknowledgment of a party to an instrument and certifying thereto is ministerial and not judicial."[12] A question, examined below, is whether a court may issue the certificate of acknowledgment against the will of a party once that party has admitted during testimony to having subscribed the agreement.

The Legislature alternatively provided that the deed or instrument of conveyance may be established with equal force by a person who witnessed such execution and who at the same time subscribed his or her name to

the conveyance as a witness.[13] The lawmakers thus deputized everyone in the State to authenticate a conveyance of property by simply signing as a subscribing witness to the event and thereafter executing a separate deposition. In sum, a deed or instrument of conveyance may be recorded with equal force based on either the acknowledgment by a party or subscription by a witness.

Outside their shared commonality as legislative artifacts, estates practice obviously differs from domestic relations in that in an estates matter the decedent is, clearly, no longer capable of coming forward to personally acknowledge the subject agreement, so that the exclusive method by which to establish the decedent's intent is via the subscribing witness(es). In a dispute arising under the Domestic Relations Law (prenuptial agreement, settlement agreement, separation agreement), the opposing spouse is very much alive and available to attest to his action at any time after the execution of the agreement.

The Purposes of an Acknowledgment

The purpose of an acknowledgment varies with which school of thinking one is aligned: the *Maul* view or the *Warren* view, analyzed below. In *In re Maul's Will*,[14] affirmed by the Court of Appeals and further cited with approval by the same court in *Matisoff v. Dobi*[15] in support of the proposition that late date acknowledgments are not invalid *per se*, declared that the function of an acknowledgment is essentially nothing more than a verification or authentication of the fact that a document was signed:

> Acknowledge means "to own or admit the knowledge of; to recognize as a fact or truth." Webster's New International Dictionary, 2d Ed., 1 Words and Phrases, Permanent Edition, page 620. In legal conception the term mentioned is defined as follows: "The acknowledgment is an authentication or verification of the signature of the petitioner, * * *. It establishes merely that the petition was 'duly signed.' It proves the identity of the person whose name appears on the petition, and that such person signed the petition."

In *Bristol v. Buck*,[16] the Appellate Division noted that an acknowledgment only verifies or authenticates a signature, it does not go to the heart of the petition. It establishes merely that the petition was "duly signed." It proves the identity of the person whose name appears on the petition, and that such person signed the petition.

In *In re Nurse*,[17] the Court of Appeals addressed EPTL 3-3.7 regarding testamentary dispositions to a trustee under or in accordance with terms of an existing *inter vivos* trust, wherein the appeals court stated that "the EPTL provides that these requirements [of execution and acknowledgment in the manner required by the laws of this state for the recording of a conveyance of real property] be met, not so that the instrument of amendment can actually be recorded, but in order to safeguard against fraud and overreaching."

Concern over fraud was also expressed in *People ex rel. Erie R. Co. v. Board of Railroad Com'rs*[18]:

> The purpose of an acknowledgment is to require greater formality in the execution of an instrument, and by not only requiring greater formality, but by thus obtaining an official act of a disinterested person, prevent, so far as possible, the perpetration of fraud.

In *Matisoff v. Dobi* the Court of Appeals stated that in addition to the prevention of fraud, an acknowledgment serves another valid purpose:

> Marital agreements within section 236(B)(3) encompass important personal rights and family interests. As we explained with regard to the similar prerequisites for proper execution of a deed of land:
>
> "When [the grantor] came to part with his freehold, to transfer his inheritance, the law bade him deliberate. It put in his path formalities to check haste and foster reflection and care. It required him not only to sign, but to seal, and then to acknowledge or procure an attestation, and finally to deliver. Every step of the way he is warned by the requirements of the law not to act hastily, or part with his freehold without deliberation" (*Chamberlain v. Spargur,* 86 N.Y. at 607, *supra*). Here, too, the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care.

An unclear view of acknowledgments is offered in *In re Howland's Will*,[19] wherein the court stated that "the acknowledgment requisite to a due execution of a waiver . . . involves something more than the identification of the signature." See discussion below, *In re Howland's Will.*

The Saga of *Matisoff v. Dobi*; the Court of Appeals Limited Its Ruling to the Facts Without Abridging Any Governing Law

In *Matisoff v. Dobi*,[20] the parties signed a written postnuptial agreement one month after their marriage but

failed to acknowledge their signatures. Thirteen years later the husband sought to have the agreement acknowledged during the divorce trial via the oral admissions of both parties during trial that they had signed the agreement. There were no allegations of fraud, duress, or overreaching alleged by either party. Supreme Court deemed the agreement unenforceable, concluding that oral testimony could not authenticate that the signatures on the agreement were genuine, as a matter of law, and, therefore, failed to validate or cure the unacknowledged agreement.

The First Department reversed, holding that the omitted acknowledgment was curable and "did not constitute an absolute bar" to enforcement.[21] The Appellate Division hinged its decision on the legislative intent behind the statute, namely, "to prevent fraud and overreaching in marital contracts," none of which had been alleged. The appellate court further looked to the equity of the situation and found that the terms of the postnuptial agreement were acknowledged and ratified in their daily activities and property relations throughout the marriage and upheld the agreement as a contract by the conduct of the parties.

The exclusive issue before the Court of Appeals was the validity of the husband's effort to have the postnuptial agreement acknowledged retroactively via his and his wife's oral testimony in their divorce proceeding—nothing more, nothing less. The Court of Appeals reversed based on the plain language of DRL § 236B(3), holding that the legislature exacts strict adherence with the procedural formalities and that compliance with the statutory language amounted to a *bright line* test.

Matisoff was limited to the facts therein. Furthermore, although the appeals court specifically declined to read any time restrictions into the Real Property Law, the Court nevertheless, emphasized *its own* prior affirmations of such acknowledgments:

> DRL § 236(B)(3) and the Real Property Law do not specify when the requisite acknowledgment must be made. It is therefore unclear whether acknowledgment must be contemporaneous with the signing of the agreement. While this Court has affirmed determinations allowing parties to provide the requisite acknowledgment under similar statutory requirements at a later date, we have never directly addressed the question whether and under what circumstances the absence of acknowledgment can be cured (*see, Matter of Maul*, 176 Misc.170, 26 N.Y.S.2d 847, *affd* 262 App.Div. 941, 29 N.Y.S.2d 429, *affd* 287 N.Y. 694, 39 N.E.2d 301 [unacknowledged waiver of elective share valid where acknowledgment subsequently supplied]; *Matter of Palmeri*, 75 Misc.2d 639, 348 N.Y.S.2d 711, *aff'd* 45 A.D.2d 726, 356 N.Y.S.2d 348, *aff'd* 36 N.Y.2d 895, 372 N.Y.S.2d 646, 334 N.E.2d 595 [same]; *see also, Matter of Stegman*, 42 Misc.2d 273, 247 N.Y.S.2d 727 [antenuptial agreement valid where acknowledged several years after its execution]).
>
> We note that other courts have refused to allow subsequent acknowledgment (*see, Rose v. Rose*,167 Misc.2d 562, 637 N.Y.S.2d 1002 [shareholder's agreement that was not acknowledged could not form basis of conversion divorce and could not be subsequently acknowledged]; *see also, Pacchiana v. Pacchiana*, 94 A.D.2d 721, 462 N.Y.S.2d 256, *appeal dismissed* 60 N.Y.2d 586 [unacknowledged waiver of elective share "void and of no effect at its inception"]).
>
> We need not resolve this issue today. Even assuming, without deciding, that the requisite acknowledgment could be supplied at the time of the matrimonial action, each party's admission in open court that the signatures were authentic did not, by itself, constitute proper acknowledgment under section 236(B)(3).

Matisoff said nothing more than an oral attestation alone does not satisfy the statutory directive as to the method of the acknowledgment. The case was remanded for unrelated determination.[22]

The Court of Appeals Highlighted What Mr. Dobi Could Have Done, Even Mid-trial 13 Years After the Agreement Was Signed, to Have Successfully Effected a Late Date Acknowledgment

Critically, although it was in the context of *dicta*, the high court "ruled" quite clearly on how Mr. Dobi might have remedied his dilemma, even mid-trial, and thereby have successfully salvaged his desperately sought after late date acknowledgment. The key words in the phrase "each party's admission in open court that the signatures were authentic did not, *by itself*, constitute proper acknowledgment under section 236(B)(3)" (emphasis provided) are "by itself." Accordingly, in presumable reliance on RPL § 298[23] (and possibly General Construction Law § 11[24]) which authorize(s) a Supreme Court justice to issue an acknowledgment "at any place," the Court of Appeals stated that all Mr. Dobi needed to have done was to have asked the trial judge to issue a certificate of acknowledgment, nothing more. Critically, the Real Property Law is broad as to place and, by its silence, also as to the time frame of completion of the acknowledgment process. This *dicta* is extraordinarily important because it affirms *In Re*

Maul,[25] discussed below, wherein the Surrogate affixed a certificate of acknowledgment following the testimony of a subscribing witness at trial. In other words, the Court of Appeals has informally ruled that an acknowledgment may be issued against a party's will.

It is academic that had the high court considered late date acknowledgments invalid *per se* it would not have made this recommendation. Clearly, in the eyes of the Court of Appeals (even if not in the eyes of the First Department, see *Schoeman, Marsh & Updike, LLP v. Dobi*, below),[26] Mr. Dobi would have apparently prevailed had he completed the last statutory step by requesting of the trial judge to issue the requisite certificate.

The Court of Appeals Cites Its Own Decisions Which Upheld Late Date Acknowledgments

Further evidence that the Court of Appeals, in *Matisoff* or anywhere else, did not reject late date acknowledgments as defective *per se* may be instantly garnered from the various decisions cited in *Matisoff* wherein the high court approvingly affirmed belated acknowledgments; nor did *Matisoff* remotely signal that a different result would obtain were those cases re-examined under a contemporary lens.

Furthermore, the psychology of nuanced word selections is brought into play as a guide to the Court's subliminal "body language," gleaned from its word choices. These words compellingly telegraph the Court's penchant on this subject: *Matisoff* divided the cited case law regarding late date acknowledgments into two groups, "us v. them." The cases affirming late date acknowledgments are labeled with approval while those rejecting such acknowledgments are dubbed as "other courts." A review of the cases follows.

Decisions Cited in *Matisoff v. Dobi*

In re Stegman's Estate[27] and *In re Stoeger's Will*,[28] both citing *In re Maul's Will* (discussed below),[29] upheld agreements as having "complied" with the formalities of execution required by the statute, "even though the acknowledgment by the subscribing witness took place a number of years following its execution by the respondent."

In *In re Palmeri's Estate*,[30] the court noted the "abundant authority for curing" a missing acknowledgment which can be done via "the taking in court of the acknowledgment of a person who witnessed a party execute an instrument . . . *and also the acknowledgment of the party himself to the instrument* (emphasis provided)." In *Palmeri* the Surrogate directed the son to "appear in the court room . . . to afford him an opportunity to acknowledge to the court execution of the renunciation." The *dicta* in *Matisoff* went further and emphasized that an acknowledgment may essentially occur against a party's will once that party has admitted having signed a document.

In *Pacchiana v. Pacchiana*,[31] a "them" case, the Second Department, citing *In re Warren's Estate* (reviewed below),[32] held that if the antenuptial agreement was not" acknowledged or proved in the manner required * * * for the recording of a conveyance of real property" (EPTL 5-1.1(f)(2)), it was void and of no effect at its inception." In *Rose v. Rose*[33] the court below correctly held that an agreement could not be later acknowledged by affidavit.

Maul, Warren

The *Maul* and *Warren* cases, both cited in *Matisoff*, represent the *Mason-Dixon* line of late date acknowledgments.

In re Maul

In re Maul[34] involved an antenuptial agreement executed in accordance with the predecessor statute to EPTL § 5-1.1. The widow had executed an instrument, concurrently with the execution by decedent of a codicil to his will providing for the widow, waiving her right of election. No certificate of acknowledgment had been attached but the signatures of two witnesses appeared after her signature on the document. At trial, one of the witnesses, testifying under subpoena,[35] stated that the widow signed the waiver in his presence, and gave the information about himself required by RPL § 304[36] for execution of a conveyance. After hearing this testimony, the Surrogate, relying on the ruling of the Court of Appeals in *Davin v. Isman*[37] (see below) affixed a certificate of acknowledgment and determined that the widow had waived her right of election.[38]

In re Warren's Estate

In *In re Warren's Estate*,[39] the Second Department drew a logic-challenging distinction between itself and *Maul*. In *Warren* the testator and his wife entered into a separation agreement which contained a waiver and release of each party's right of election against the estate of the other. Despite such mutual waivers/releases, after the testator's death his widow interposed a notice of election to take against his will, on the grounds that the waivers/releases were not effective because they had not been "properly acknowledged or proved in the manner required for the recording of a conveyance of real property."

At the trial the Surrogate directed the widow, over objection, to state whether she had signed the agreement. Under this direction, she admitted having signed the document, but added: "I refuse to acknowledge it." Although she made this admission, the Surrogate rejected the request of the executor's attorney that he attach a certificate of acknowledgment to the document. The Surrogate ruled that since it had not been acknowledged during the lifetime of the testator: (1) the waivers/releases were ineffective, (2) the notice of election was valid, and (3) the widow was thus entitled to share in the decedent's estate as in intestacy.

Warren observed that an acknowledgment must be a voluntary act and not one extracted under compulsion; that "the function of the officiating person in taking the acknowledgment of a party to an instrument and certifying thereto is ministerial and not judicial, and therefore is not coupled or implemented with a power to compel such acknowledgment."[40] However, even if a party refuses to answer the question about whether he did or did not sign the document, a negative inference could be drawn against him.

Warren Illogically Allowed a Late Date Acknowledgment by a Subscribing Witnesses But Prohibited It by a Party Himself

Furthermore, *Warren*'s distinction between itself and *Maul* based on the fact that *Maul* involved subscribing witnesses, not the surviving spouse, is intellectually unsatisfying and without seeming legal foundation because the Legislature presented two equally competent methods by which to record a deed: acknowledgment in proper form by a party or proof by a subscribing witness. Since the statute presents no preference between one method over the other[41] a court may not, pursuant to the canons of statutory construction, elevate one method while relegating the other to step-child status. Under the Real Property Law a subscribing witness may be subpoenaed to testify against his will, a party may always be called by the other side.

The court further held that the question of the right to elect should be tested as of the time of the deceased's death because that is when "property rights vested,"[42] that "expectations or hopes of succession, whether testate or intestate, to the property of a living person do not vest until the death of that person." This reasoning wrenches legislatively contemplated protection from a situation where confirmation of intent lies at the heart of the contest because irrespective of when the rights vest, they must conform to the intent of the agreement or the will at the time of the execution of the document—which intent could obviously only have come into being during the lifetime of the parties, and is simply confirmed *nunc pro tunc* via a belated acknowledgment. A late date acknowledgment neither rewrites the intent nor does it alter jural relationships, rather it confirms them and preserves their sanctity.

Warren's reasoning overlooks the key function of cross examination. The court's comment that the admission was not voluntary is irrelevant—it was not tortured out of her—the issue is was it truthful. To hold otherwise is to permit a party to profit from his own wrongdoing.

Justice Hopkins, the dissenting justice in *Warren*, poignantly stated:

> We do not think that the mere refusal to say the word "acknowledge" robs efficacy from the act, when at the same time the identity of the actor and the authenticity of the signature are admitted. Form and ritual have their place in the law. . . . But we may not so extend the purpose of ritual as to defeat the plain effect of an agreement acknowledged in open court to have been executed and performed by the parties. Once the demands of ritual have received substantial compliance, then we need press them no further; else form is elevated above substance. Here, the widow executed a waiver of her right of election, obtained material benefits as a result, and yet seeks to secure a further share from her estranged husband's estate. We hold that her waiver was acknowledged within the intent of the statute and that it is now effective to bar her right of election.

Warren's Prohibition Against Involuntary Acknowledgments Cannot Persist Following the *Dicta* in *Matisoff*

Another inescapable message from the unequivocal advice the appeals court gave Mr. Dobi, albeit in *dicta*, is that, unlike the court in *Warren*, the high court is not adverse to granting a certificate of acknowledgment even against the will of the challenging party once that party admits to having signed the agreement; that the admission leaves the presiding justice with no choice but to issue a certificate of acknowledgment once requested to do so.

This thesis is correct because it is strangely incongruous to permit the use of compelled testimony from an unwilling subscribing witness (RPL § 305) against a challenging party while testimony, albeit compelled, derived directly from the very person of the opposing party might be impermissible. That there is no need for a statutory basis to compel testimony from a party witness is self evident because a party witness may always be summoned to the stand in a civil case, which, in fact, occurs routinely in all branches of civil litigation. This is not unlike the concept of reverse partial summary judgment (RPSJ).[43]

Matisoff Is Not the First Time that the Court of Appeals Permitted Late Date Acknowledgments

Aside from affirming a late date acknowledgment in *In re Palmeri's Estate*,[44] *Matisoff* is not the first case wherein the appeals court tackled the question of late date acknowledgments. In 1920, in *Davin v. Isman*,[45] three-quarters of a century before *Matisoff*, the appeals court upheld a tardy acknowledgment wherein: (1) the area following the signature of the subscribing witness upon the assignment contained an unexplained acid erasure of a signa-

ture, (2) the second page also contained an unexplained blank acknowledgment filled in by the decedent but not acknowledged by him, and (3) the subscribing witness did not acknowledge the execution of the assignment until over one year later. Nevertheless, the Court of Appeals held that the acknowledgment by the subscribing witness was sufficient to authorize the recording of the instrument, in the absence of any formal acknowledgment by the decedent:

> No question is made that the signature of the subscribing witness appearing on the instrument was other than genuine. Upon the acknowledgment by a subscribing witness the instrument was complete so as to enable the holder of the same to have it recorded. Real Property Law § 304. A second subscribing witness was unnecessary. The fact that an erasure appears under the name of the subscribing witness does not in any degree change the language, terms, identity, or character of the instrument signed by Mr. Lilly, and was clearly an immaterial erasure, which defendant was not called upon to explain or account for.

That it involved a subscribing witness rather than a party himself is irrelevant; see discussion above.

Other Decisions on Late Date Acknowledgments

There is hardly statewide unanimity on this issue. Inconsistent rulings are hard to reconcile within the First and Second Departments. Here is how the cases evolved in each department.

The First Department

In re Stegman's Estate

In *In re Stegman's Estate*,[46] the decedent's children and her husband separately petitioned for letters of administration. The children contended that the husband was contractually precluded from the right to seek letters based on a prenuptial agreement wherein he relinquished all claims to share as a surviving spouse in the event of intestacy. The husband conceded having executed the agreement but insisted that it was invalid and unenforceable because it was neither acknowledged nor proved in the manner required for the recording of a conveyance of real property.

The attorney who prepared the agreement and who was present at its execution affixed his signature at that time as a subscribing witness after the parties signed the agreement. After the commencement of the proceeding for letters of administration, the subscribing witness voluntarily made due proof of the execution of the agreement before a notary public who attached his certificate so that the instrument was in recordable form in accordance with RPL § 304.[47]

Standing on *In re Howland's Will*[48] (discussed below) and *In re Warren's Estate*,[49] the husband in *Stegman* argued that the agreement failed and was of no moment because the acknowledgment was not contemporaneous with its execution. *Stegman* distinguished itself from *Howland* and *Warren* because those agreements were neither acknowledged nor subscribed by any witnesses, whereas *Stegman* had a subscribing witness at the time of execution whose proper attestation validated the agreement. *Stegman* relied on *Maul*,[50] which it deemed as being practically on all fours with itself, and on the Court of Appeals decision in *Davin v. Isman*,[51] that the statutory formalities can be complied with long after the execution of the agreement. Accordingly, the husband was held to have waived his right to share in the estate of his spouse and was not entitled to letters of administration in her estate.

Londin v. Londin: "There appears to be no time requirement as to when such proof need be taken."

On the execution page of the agreement in *Londin v. Londin*[52] was the signature of a witness. On the following page were defective verifications by each party in that only the signature of the notary public, who also was the attorney for both parties and draftsperson of the agreement, appeared in each verification.

The annexation of an affidavit by the attorney-notary to the effect that oral acknowledgments were given at execution but inadvertently not reduced to writing was held incapable of curing the omission.[53] However, the affidavit submitted by the subscribing witness was adequate proof so as to conform to the requirements of recording a deed (RPL §§ 292, 304).

Arzin v. Covello

In 1998, Supreme Court, New York County, upheld a late date acknowledgment in *Arizin v. Covello* based on the silence in the statutory scheme as to the time when an acknowledgment must be completed[54]:

> This court holds that an unacknowledged nuptial agreement which is acknowledged on a subsequent date is enforceable in a matrimonial action as long as the subsequent acknowledgment complies with the statutory requirements of DRL § 236(B)(3). Pursuant to DRL § 236(B)(3), the parties can enter into a nuptial agreement either before or during the marriage as long as it is properly acknowledged. There is absolutely no distinction in the statute as to how agreements entered into either before or during the marriage should be treated. Since there is nothing in the statute which would prevent these parties from subse-

> quently entering into another agreement altogether, there is no reason why they should be barred from reaffirming their prior unacknowledged agreement.

Anonymous v. Anonymous

In *Anonymous v. Anonymous*,[55] the First Department held that the defendant's motion to renew and reargue should not have been granted because it was based on "a certificate of acknowledgment, that defendant could have but did not submit on the original motion." Contrasting its ruling from *Matisoff*, the Appellate Division rejected "the defendant's attempt at a late date cure of a defective acknowledgment *via an affidavit* which was executed and which surfaced some 12 years after the fact in the midst of a contested matrimonial action in light of the required formalities of DRL § 236(B)(3) (emphasis provided)."[56]

The rejection was attributable to the improper method of the attempted cure—that an acknowledgment cannot be achieved by affidavit but rather only in the statutorily prescribed manner which is consistent with *Matisoff*. Clearly, the proponent could have effectuated the acknowledgment by either having brought in the subscribing witness[57] or, under the *dicta* in *Matisoff*, by having asked the trial judge to issue the certificate of acknowledgment.[58]

Furthermore, the rejection was premised on procedural grounds during the course of a motion to renew and reargue; the 12-year schism was seemingly aggravating but not the dispositive factor on the issue of late date acknowledgments.

Application of Saperstein

In *Application of Saperstein*,[59] the surviving husband brought an application for permission to file late notice of election against the estate of his deceased wife. The surrogate dismissed the application. The Appellate Division affirmed the dismissal because proof of execution prepared after the wife's death by the attorney who had signed the husband's waiver of the right to elect as the subscribing witness was sufficient to establish the validity of the waiver.

Schoeman, Marsh & Updike v. Dobi—First Department Summarily Rejects Belated Acknowledgments

In *Schoeman, Marsh & Updike, LLP v. Dobi*,[60] Steven Dobi, the unsuccessful party in *Matisoff v. Dobi*, was sued for unpaid legal fees by his former law firm. Mr. Dobi counterclaimed for legal malpractice because the law firm had failed to ask the trial judge to execute a certificate of acknowledgment for his 13-year old postnuptial agreement, an idea newly learned directly from the Court of Appeals; see above.

Although *Schoeman* pointed directly at the *dicta* in *Matisoff* wherein the Court of Appeals cited its own precedential authority in support of belated acknowledgments, the First Department, nevertheless, turned to its own precedent case, *Anonymous v. Anonymous*,[61] and, without any reference to RPL, recast it to blanketly forbid all belated acknowledgments:

> . . . parties in the midst of a divorce proceeding should not be able to obtain retroactive validation of a postnuptial agreement, that an insistence upon the formalities mandated by the Legislature requires that the parties have contemporaneously demonstrated the deliberate nature of their agreement. This provides a bright line for distinguishing enforceable and unenforceable agreements, and promotes consistency and predictability (*Matisoff*).

This decision is troublesome because there is absolutely nothing in any statutory scheme to support the argument that the Legislature considered tardy acknowledgments incurably defective *per se* sufficient to defeat "the deliberate nature of the agreement." As noted in *In re Maul's Will*,[62] *supra*, a case cited by the Court of Appeals in *Matisoff* in support of late date acknowledgments:

> The acknowledgment is an authentication or verification of the signature of the petitioner, * * *. It establishes merely that the petition was "duly signed." It proves the identity of the person whose name appears on the petition, and that such person signed the petition.

Not only did *Schoeman* reinterpret its ruling in *Anonymous*, where the rejection of the belated acknowledgment was grounded not on its 12-year delay but rather on a combination of two procedural grounds, each sufficient to defeat the application for an approval of a late date acknowledgment in that case, but also *Schoeman* reached a conclusion inconsistent with what the Court of Appeals itself flat out recommended as a viable solution for a belated acknowledgment (see also *Davin v. Isman*[63]). That recommendation cannot be viewed as having been made in a vacuum because it is anchored in statutory authority (RPL § 298) that unequivocally authorizes the processing of the acknowledgment procedure before a justice of the Supreme Court and would very likely have been the law had that been the issue before the high court; significantly, nowhere did the Legislature in the RPL preclude a Supreme Court justice from completing the acknowledgment process in the courtroom even during a trial—the Legislature could have imposed that restriction either initially or by way of amendment had it so intended. *Dicta*, although not binding, is certainly not gratuitous and must be weighed carefully. Had the high court wanted to state in *dicta* or otherwise that late date acknowledgments are invalid *per se* it could have done so, but it did not.

A late date acknowledgment confers no new rights or benefits outside the scope of the deed, instrument, or agreement; the two-step process simply attests to the occurrence of the event sought to be memorialized, to wit, the signing, thereby coating it with legal consequences. As noted in *Davin v. Isman*[64]: "The mortgagee . . . had prepared and signed the instrument. No alteration was made in that instrument as prepared by him. *His signature thereto completed the assignment in so far as the validity of the same was involved*." *Schoeman*'s conclusion that a party is incapable of confirming, verifying, or authenticating his own identity and as well as the act that he performed some time in the past (having signed a specific document), although the same act may be validly acknowledged by a subscribing witness (under the RPL) at a later date, is puzzling and challenges reason.

In *Kerner-Puritz v. Puritz*,[65] Supreme Court, New York County, rejected a late date acknowledgment. Clearly, the court was bound by precedent within its Department, see above. The court also declined to apply *In re Saperstein*[66] because it arose within the context of an estate matter and not a matrimonial matter. A cursory review of *Matisoff v. Dobi* evidences that the Court of Appeals addressed the issue of late date acknowledgments in estate matters as well; the appeals court did not suggest that late date acknowledgments in estate matters were distinguishable or to be treated differently from those in matrimonial actions.

The Second Department

Pacchiana v. Pacchiana

Pacchiana v. Pacchiana,[67] citing *In re Warren's Estate* (reviewed herein),[68] tersely held that if the antenuptial agreement was not "acknowledged or proved in the manner required * * * for the recording of a conveyance of real property" (EPTL 5-1.1(f)(2)), "it was void and of no effect at its inception." In light of RPL § 305, this decision should be read as "acknowledged or proved in the manner required * * * for the recording of a conveyance of real property [at the time of enforcement] [] it was void and of no effect at its inception [nunc pro tunc]."

In re Will of Henken

In *Matter of Will of Henken*,[69] the children of the decedent's first marriage challenged the election of the decedent's wife to take against the will on the grounds that she had executed an unacknowledged prenuptial agreement which contained a waiver of her right to share in or make a claim against the decedent's estate. The children's case was defeated when the subscribing witness, unlike the witness in *In re Maul*, testified that he was unable to recall when he signed the instrument or whether he was physically present when the agreement was signed by the surviving spouse, thus, there was no proof of compliance with either the EPTL (then § 5-1.1(f)(2)) or the RPL. Accordingly her waiver to partake in her husband's estate was held invalid and she was granted the right to elect against the will.

Detmer v. Detmer

In *Detmer v. Detmer*,[70] the purported separation agreement was not properly acknowledged at the time that it was executed. In its quote from *Matisoff* ("assuming without deciding that a defective acknowledgment can be cured after the fact") the Second Department ruled that the absence of any reference to an oral acknowledgment having been elicited at the time the agreement was signed invalidated the agreement's basis for a conversion divorce. This case simply echoes settled law that the acknowledgment must comply with the statutory directive and may not take another form; it is akin to those where a party has sought to cause the acknowledgment via affidavit rather than by the requisite certificate.[71]

Hurley v. Johnson, a lower court decision out of the Third Department (see below),[72] read *Detmer* as authorizing late date acknowledgments.

D'Elia v. D'Elia

In *D'Elia v. D'Elia*,[73] it was uncontroverted that the post-nuptial agreement was improperly acknowledged at the time of its execution. Relying on the First Department (*Anonymous v. Anonymous*,[74] *supra*) and Fourth Department (*Filkins v. Filkins*[75]), the Second Department rejected "the attempt to cure the acknowledgment defect by submitting a duly-executed certificate of acknowledgment at trial []as not sufficient." Significantly, however, *D'Elia* is inconsistent with and not supported by either *Anonymous* or *Filkins*.

D'Elia's reference to *Filkins*, a Fourth Department decision (see below), is puzzling because *Filkins* adopted *Arizin v. Covello*, *supra,* to accept a late date reacknowledgment of an agreement:

> It is undisputed that no written certificate of acknowledgment was attached when the parties entered into the agreement in 1995. Furthermore, plaintiff's attempt to cure the defect by having the agreement notarized and filed after commencement of this divorce action fails because the agreement was never reacknowledged in compliance with DRL § 236(B)(3).

The Third Department

Hurley v. Johnson

In *Hurley v. Johnson*,[76] Supreme Court relied on *Arzin v. Covello*, *supra*, to uphold an agreement that was acknowledged after its execution:

> . . . an unacknowledged nuptial agreement which is acknowledged on a subsequent date is enforceable in a matrimonial action as long as the subsequent acknowledgment complies with the statutory requirements of DRL § 236(B)(3). Like . . . *Arizin* . . . this Court also finds that the instant separation agreement is now clearly valid and enforceable since the subsequent acknowledgment complies with the statutory requirements of DRL § 236(B)(3).

Hurley also turned to *Detmer v. Detmer*, *supra*:

> . . . [*Detmer*] indicated that it is possible for a defective acknowledgment to be cured when it stated that [i]t is uncontroverted that the alleged separation agreement executed by the parties was not properly acknowledged at the time that it was executed. Assuming without deciding that a defective acknowledgment can be cured after the fact (*see, Matisoff v. Dobi . . .*) the appellant husband has failed to offer a proper acknowledgment.

The Third Department's endorsement of late date acknowledgments is confirmed in its ruling in *In re Estate of Levinson*,[77] wherein it held that "RPL §309-a(1) does not require the notary to observe the execution"; the clear implication is that the acknowledgment did not occur simultaneous with the execution of the agreement, document, or instrument. The Court of Appeals declined to review this decision.

The Fourth Department

The Fourth Department has reversed course from a laboriously arduous half-century old decision, *In re Howland's Will*,[78] which held against late date acknowledgments and currently seems favorably disposed toward such belated curative measures.

Filkins v. Filkins

Filkins v. Filkins[79] adopted *Arizin v. Covello*, *supra*, in support of a late date reacknowledgment of an agreement:

> It is undisputed that no written certificate of acknowledgment was attached when the parties entered into the agreement in 1995. Furthermore, plaintiff's attempt to cure the defect by having the agreement notarized and filed after commencement of this divorce action fails because the agreement was never reacknowledged in compliance with DRL § 236(B)(3).

In re Howland's Will

In *In re Howland's Will*, a decision once at the forefront of this dispute, the widow appealed from the Surrogate's ruling that she had waived her right of election to take her intestate share in the estate of her deceased husband. The parties' separation agreement, which included a provision regarding mutual waivers in their interests in their respective estates, was signed by both parties but never acknowledged by either. There was no appeal from the Surrogate's ruling that voided the Nevada divorce that the husband had secured following the separation agreement.

During the trial the attorney representing the administrator called the widow to the stand. She admitted having signed the agreement but refused to acknowledge either then or at the time of trial. Counsel for the estate moved the Surrogate to issue a certificate of acknowledgment based on her having identified her signature, which the Surrogate did thereby denying her the right to take against the estate.

The Appellate Division focused on the language in then Decedent Estate Law Subdivision 9 of § 18 (which largely comports with the current language in EPTL 5-1.1-A(e)(1))[80]:

> The husband or wife *during the lifetime of the other* may waive the right of election to take against a particular last will and testament by an instrument *subscribed and duly acknowledged*, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement *so executed*, made before or after marriage. An agreement *so executed* made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section. (Emphasis supplied.) L.1930, c. 174.

Howland observed that "It is clear that the acknowledgment requisite to a due execution of a waiver [] involves something more than the identification of the signature. The statute requires that the instrument not only be subscribed but duly acknowledged. The statute contemplates that both acts be performed within the lifetime of the other spouse. *As in all contracts intent to effect the waiver is an element*. Here, the instrument was not acknowledged during the lifetime of the husband and the widow refused to acknowledge it thereafter. The certificate of acknowledgment affixed to the instrument by the Surrogate, after the hearing, was based upon nothing more than the identification of the widow's signature at a time when she expressly refused to acknowledge or to give effect to the instrument." (emphasis provided).

The aforementioned paragraph is troublesome in that it fires off a series of disjointed non-sequiturs and unexplained conclusions and notions that make the decision increasingly incomprehensible.

Nowhere does *Howland* explain how it concluded that "It is clear that the acknowledgment requisite to a due execution of a waiver [] involves something more than the identification of the signature"—what is that something more?

Also, the statement "The statute contemplates that both acts be performed within the lifetime of the other spouse" is clearly contrary to RPL § 305, and is without a predicate foundation; it fails to reference or identify the source of the legislative "contemplation," such as the Sponsor's Memorandum, a possible Governor's Memorandum, or any other source to confirm the claimed intent.

Furthermore, there is no relevance or even minimal nexus between the statement "As in all contracts intent to effect the waiver is an element" and the text of the surrounding paragraph. The intent of the parties is baked into the body of the agreement and is gleaned exclusively from the extent of what is evidenced by the writing,[81] from within the four corners of the instrument,[82] by the language employed,[83] and no parol evidence is permissible.[84] That case law is unanimous that the acknowledgment process is a ministerial and not a judicial,[85] absolutely eliminates the consideration of intent from the entire procedural formality. The formulaic language of the acknowledgment does not require any recitation whatsoever as to intent; all that is required is that the signator's identity has been established before the officer taking the acknowledgment, nothing more, nothing less.

A belated acknowledgment, like a contemporaneous one, does nothing more than to corroborate and authenticate, in a statutorily prescribed manner, the occurrence of the signatures of the party(ies), which signature(s) confirm(s) the express intent as set forth in the contract, deed, or will; the acknowledgment process neither creates nor contributes to intent.

The placement of the following two sentences side by side links two notions unrelated in concept and in time:

> The statute contemplates that both acts be performed within the lifetime of the other spouse. As in all contracts intent to effect the waiver is an element.

It is a tautology and perhaps seemingly silly to state but it apparently must be said: intent to enter into a contract, sign a deed, or execute a will, can only be formed and expressed by the living which, *ergo*, can only occur during the lifetime of both parties—a decedent is incapable of doing anything, entering into an agreement, acknowledging one, or anything else, for that matter. All that thereafter remains to be done is to confirm the intent, by way of acknowledgment, as expressed by the signature—the signature is not the intent.

Howland's unexplained thinking that the statute contemplates that both steps of the acknowledgment process must occur during the lifetime of the other spouse overlooks that subscribing witnesses may be called at a later date to confirm the event.[86] Clearly, if a subscribing witness may be called at a future date to make the document viable it stands to reason that a subscribing party's own testimony should be no less valid; self serving flip-flops ought not be permitted to defeat the admission of the mutual intent between the parties.

Howland invalidated the Surrogate's acknowledgment and granted the widow the right to elect to take her intestate share in her husband's estate. Mrs. Howland's freshly crafted self-serving opposition to the original agreement, which included the waiver, violates the doctrines of contract construction and principles of equity because she was newly permitted to denude the deal bargained for and actually received as a result of the agreement she signed.

Furthermore, the phrase "during the lifetime of the other spouse," as stated in *Howland*, does not seem limiting; rather it seems expansive so as to give each party an opportunity during his or her lifetime to effectuate the waiver.

The Absence of a Specific Time Frame in the Real Property Law Is Critical Under the Canons of Statutory Construction Which Direct That Courts May Not Abridge Rights Beyond Their Statutory Limits When the Legislature Itself Has Not Done So

The issues herein arise from statutory mandates which, therefore, implicate compliance with the canons of statutory construction; courts may neither extend statutes beyond the bounds of the legislative intent, nor restrict their obvious application.[87] Statutes § 72 states:

> . . . [a] statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all of the problems and complications which might arise in the course of its administration; and no matter what disastrous consequences may result from following the expressed intent of the Legislature, the Judiciary cannot avoid its duty.

It is well settled that alterations to a statute must emanate from the Legislature and may not be imputed to the Legislature in the absence of a clear manifestation of such intent.[88] The conspicuous absence of time restrictions

within a statute must thus be construed as presented within the statutory realm; they may not be judicially legislated into the statute where the Legislature has not done so.

It is a further fundamental principle of statutory construction that the Legislature is presumed to know what statutes are in effect when it enacts or amends new laws.[89] The Legislature is undoubtedly aware that RPL, DRL, and EPTL call for acknowledgments and the serious implications and consequences flowing from their omissions. Significantly, these statutory schemes are all mature and not recent enactments. There has not been a paucity of opportunity across many decades for the Legislature to amend the existing framework by building in time limitations had it chosen to do so.

The following examples clearly establish the Legislature's lack of reluctance to act and craft laws uniquely limited to the matrimonial domain when deemed necessary:

1. CPLR 211(e): In 1987 the Legislature broadened the statute of limitations applicable to enforcement of spousal maintenance and child support to 20 years.
2. The prohibition of reverse partial summary judgment in matrimonial actions only; CPLR 3212(e)[90] was enacted in 1984 to curb what was perceived as a procedural technicality which granted an unfair advantage to husbands seeking expeditious exits from their marriages "without paying the piper."
3. Enforcement proceedings set forth in CPLR 5241 and 5242 stemming from matrimonial actions.

Consequently, courts may neither abridge nor enlarge what the Legislature has said or what it has failed or omitted to say.

Validity of Unacknowledged Agreement in Other Actions

It is important to note that a common error assumes that once an agreement has been rejected as unenforceable in a matrimonial proceeding it likely has no validity in any other action or proceeding either; that it is a nullity devoid of legal value and unenforceable for all purposes. Such, however, is not the case; the agreement absolutely retains its viability in other actions and proceedings.[91]

Conclusion

The case law appears unanimous that the act of taking an acknowledgment is ministerial or administrative and not judicial. Accordingly, all that transpires during the process of a late date acknowledgment is the subsequent authentication and verification of the identity of the party to the agreement, deed, or will, and the confirmation that that party duly signed the instrument in question.[92] A late date acknowledgment confers no new or additional jural rights just as an acknowledgment made contemporaneous with the execution of the document does not.

It challenges reason and logic that the very party who executed the document is incapable of confirming his own identity and the act he had performed at a time in the past whereas a subscribing witness may come forward at a future time to attest to the same event and thereby successfully acknowledge the document. There is no authority that distinguishes between permitting a late date acknowledgment by a subscribing witness but not by a party to the agreement. The Legislature endowed both methods with equal statutory authority and did not prefer one method over the other[93] for which reason courts may, therefore, not elevate one method while relegating the other to step-child status.

For the aforementioned reasons, belated acknowledgments are well within the statutory and decisional purview and, therefore, valid.

Endnotes

1. *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).
2. McKinney's Statutes EPTL 5-1.1-A Practice Commentaries, 1999 Main Volume, Margaret Valentine Turano: "The spouse can waive her right of election by a signed, acknowledged writing, and it is effective whether executed before or after the marriage, whether unilateral or bilateral, whether supported by consideration or not, and whether absolute or conditional (subparagraph (e))."
3. *See* E. Scheinberg, *Expedited Challenges to and Enforcement of Settlement Agreements*, July 3, 2006, N.Y.L.J., p. 4.
4. Examples of other statutory schemes that also require an acknowledgment as part of the process include Agriculture and Markets Law § 36; Agriculture and Markets Law § 43; Arts and Cultural Affairs Law § 59.21; Banking Law 11.
5. Trusts and Estates Practice: *In re Guarnieri's Will*, 50 Misc. 2d 599, 271 N.Y.S.2d 126 (Sur. Ct., Erie Co. 1966): The rights concerning the right of election of a spouse are created by the laws of the State, not by contract. Since rights of descent and distribution of a decedent's estate are the creatures of the Legislature, the State alone may modify such rights and related procedural compliance except that it may not take away property which has vested by virtue of such rights. *See also In re Sherman's Estate*, 153 N.Y. 1, 46 N.E. 1032 (1897); Domestic Relations Law: *In re Kucera's Estate*, 73 Misc. 2d 456, 342 N.Y.S.2d 812 (Sur. Ct., Erie Co. 1973), "Inasmuch as the rights of a spouse are created by the laws of the State of New York and not by contract, statutory compliance will be strictly adhered to."; *Northrup v. Northrup*, 43 N.Y.2d 566, 373 N.E.2d 1221, 402 N.Y.S.2d 997 (1978), "The courts of this State have no common-law jurisdiction over divorce or its incidents."; *Waddey v. Waddey*, 290 N.Y. 251, 49 N.E.2d 8 (1943), "Courts have jurisdiction over the marriage relation, its incidents and its ultimate consequences only as such jurisdiction is conferred by statute. . . . The power of the Legislature to enact the statute under consideration . . . cannot be doubted."; *Hoops v. Hoops*, 292 N.Y. 428, 55 N.E.2d 488 (1944); "Jurisdiction over the matrimonial relation and its ultimate consequences exists only by virtue of statute."; *Pajak v. Pajak*, 56 N.Y.2d 394, 437 N.E.2d 1138, 452 N.Y.S.2d 381 (1982) and *Brady v. Brady*, 64 N.Y.2d 339, 476 N.E.2d 290, 486 N.Y.S.2d 891 (1985):

" . . . the jurisdiction of the courts to grant a divorce exists only by virtue of statute."

6. *Kennilwood Owners Ass'n, Inc. v. Spanier*, 42 A.D.2d 571, 344 N.Y.S.2d 194 (2d Dep't 1973).

7. *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997), citing Real Property Law §§ 291, 306, the Court of Appeals explained, "[a]n instrument is not 'duly acknowledged' unless there is not only the oral acknowledgment but the written certificate also, as required by the statutes regulating the subject."; *Garguilio v. Garguilio*, 122 A.D.2d 105, 504 N.Y.S.2d 502 (2d Dep't 1986), . . . the defendant's affidavit submitted in support of her motion for summary judgment, in which she admits having signed the separation agreement, is not a sufficient substitute for the acknowledgment. There are two aspects to an acknowledgment: the oral declaration of the signer of the document and the written certificate, prepared by one of a number of public officials, generally a notary public.; *Rose v. Rose*, 167 Misc. 2d 562, 637 N.Y.S.2d 1002 (Sup. Ct., N.Y. Co. 1995): "An acknowledgment consists of two aspects: the oral declaration of the signer of the document and the written certificate prepared by a public official . . . generally a notary public attesting to the parties' oral declaration. . . . The agreement must also have endorsed on, or attached, a certificate stating "that the person taking the acknowledgment knows or has satisfactory evidence that the person making the oral declaration is the person described in and who executed [the] instrument."

8. *In re Kazuba*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 918 (Sur. Ct., Nassau Co. 2005).

9. *Kazuba*, 9 Misc. 3d 1116(A).

10. *In re Estate of Levinson*, 11 A.D.3d 826, 784 N.Y.S.2d 165 (3d Dep't 2004), *lv. to appeal denied*, *Estate of Levinson v. Benson*, 4 N.Y.3d 704, 825 N.E.2d 133, 792 N.Y.S.2d 1 (2005).

11. RPL § 298:

> The acknowledgment or proof, within this state, of a conveyance of real property situate in this state may be made: 1. At any place within the state, before (a) a justice of the supreme court; (b) an official examiner of title; (c) an official referee; or (d) a notary public.

12. *In re Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2d Dep't 1962); *In re Howland's Will*, 284 A.D. 306, 132 N.Y.S.2d 451 (4th Dep't 1954): "The taking of an acknowledgment is an administrative rather than a judicial act."; *Lynch v. Livingston*, 2 Seld. 422, 6 N.Y. 422, 1852 WL 5438 (1852); *Albany County Sav. Bank v. McCarty*, 149 N.Y. 71, 43 N.E. 427 (1896), "It is settled in this state that the act of taking and certifying an acknowledgment is not judicial, but ministerial, in character; and this accords with the rule in most of the states."; *see* Purpose of an Acknowledgment, below.

13. Section 292. By whom conveyance must be acknowledged or proved:

> Except as otherwise provided by this article, such acknowledgment can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness.

See In re Maul, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd without op*. 287 N.Y. 694, 39 N.E.2d 301 (1942); *Londin v. Londin,* 100 Misc. 2d 965, 420 N.Y.S.2d 326 (Sup. Ct., N.Y. Co. 1979); McKinney's Forms Real Property Practice § 4:30, Chapter 4. Deeds and Acknowledgments, Rudolph de Winter and Larry M. Loeb.

14. *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur. Ct., Erie Co. 1941), *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942); *In re Kazuba*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 918 (Sur. Ct., Nassau Co. 2005).

15. *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).

16. *Bristol v. Buck*, 201 A.D. 100, 194 N.Y.S. 53 (3d Dep't 1922).

17. *In re Nurse's Estate*, 35 N.Y.2d 381, 321 N.E.2d 537, 362 N.Y.S.2d 441 (1974).

18. *People ex rel. Erie R. Co. v. Board of Railroad Com'rs*, 93 N.Y.S. 584 (3d Dep't 1905).

19. *In re Howland's Will*, 284 A.D. 306, 132 N.Y.S.2d 451 (4th Dep't 1954).

20. *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).

21. *Matisoff v. Dobi*, 228 A.D.2d 200, 644 N.Y.S.2d 13 (1st Dep't 1996).

22. In its remand of the case the appeals court gave a wink and nod to the Appellate Division that, its ruling regarding the bright-line test to the contrary notwithstanding, the axis of the determination on remand could gyrate about equitable factors to wit, how the parties had managed their financial affairs ("the equitable factors raised by defendant cannot save the unacknowledged agreement, they may be relevant to the Appellate Division's review of the award"). The Appellate Division was tacitly guided in the direction of considering the very factors on which it had been reversed. The Court of Appeals seemingly wanted to underscore the gravity of procedural compliance under the statute while, nevertheless, leaving the equitable back door wide open.

    On remand, *Matisoff v. Dobi*, 242 A.D.2d 495, 663 N.Y.S.2d 526 (1st Dep't 1997), *appeal denied*, 91 N.Y.2d 805, 691 N.E.2d 632, 668 N.Y.S.2d 560 (1998), the First Department's seemingly puzzled and stern tenor at its treatment by the Court of Appeals (being guided to consider the factors on which it was originally reversed) was to be expressed at Mr. Dobi's expense. Noting the Court of Appeals' refusal to allow harsh results attributable to a "bright-line" test to deter it from establishing a *per se* rule (of invalidity to non-complying agreements), the Appellate Division applied a similar thesis regarding the relevance of the parties' financial relationship during the marriage and concluded that if the result cannot be achieved *ab initio* because of the *per se* rule, neither can it be backed into, as the high court had seemingly suggesting *sotto voce*. Caught in the crossfire between the appellate courts, Mr. Dobi was handed a huge defeat from the very court which originally supported him; his effort to appeal the defeat on remand was rebuffed by the Court of Appeals, *Matisoff v. Dobi*, 91 N.Y.2d 805, 691 N.E.2d 632, 668 N.Y.S.2d 560 (1998).; *See* Elliott Scheinberg, Prenuptial and Postnuptial Agreements, § 50.04[2][b][iii][A]-[B] Lansner & Reichler, Matthew Bender New York Civil Practice: Matrimonial Actions.

23. See *supra* note 11 for text of RPL § 298.

24. GCL § 11. Acknowledgment or proof of instrument:

> When the execution of any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to be filed or recorded in a public office, *the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded* in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed (emphasis provided).

25. *In re Maul*, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941) *aff'd without op*., 287 N.Y. 694, 39 N.E.2d 301 (1942); *also see Londin v. Londin*, 100 Misc. 2d 965, 420 N.Y.S.2d 326 (Sup. Ct., N.Y. Co. 1979).

26. *See Schoeman, Marsh & Updike, LLP v. Dobi*, 264 A.D.2d 572, 694 N.Y.S.2d 650 (1st Dep't 1999), *lv. to appeal denied*, 100 N.Y.2d 508, 796 N.E.2d 477, 764 N.Y.S.2d 385 (2003), we are left in the dark as to why the Court of Appeals declined to review this case wherein Mr. Dobi sued his law firm for malpractice for not having asked

the trial court to issue a certificate of acknowledgment, especially when it was the high court's recommendation that he should have done so.

27. *In re Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur. Ct., Bronx Co. 1964).

28. *In re Stoeger's Will*, 30 Misc. 2d 1090, 220 N.Y.S.2d 603 (Sur. Ct., Nassau Co. 1961), *modified on other grounds*, 17 A.D.2d 986, 234 N.Y.S.2d 537 (2d Dep't 1962).

29. *In re Maul*, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941) *aff'd without op.*, 287 N.Y. 694, 39 N.E.2d 301 (1942).

30. *In re Palmeri's Estate*, 75 Misc. 2d 639, 348 N.Y.S.2d 711 (Sur.Ct., Westchester Co. 1973), *aff'd*, 45 A.D.2d 726, 356 N.Y.S.2d 348 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 895, 334 N.E.2d 595, 372 N.Y.S.2d 646 (1975).

31. *Pacchiana v. Pacchiana*, 94 A.D.2d 721, 462 N.Y.S.2d 256 (2d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 586 (1983).

32. *In re Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2d Dep't 1962).

33. *Rose v. Rose*, 167 Misc. 2d 562, 637 N.Y.S.2d 1002 (Sup. Ct., N.Y. Co. 1995).

34. *In Re Maul*, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941) *aff'd without op*. 287 N.Y. 694, 39 N.E.2d 301 (1942).

35. RPL § 305. Compelling witnesses to testify:

> On the application of a grantee in a conveyance, his heir or personal representative, or a person claiming under either of them, verified by the oath of the applicant, stating that a witness to the conveyance, residing in the county where the application is made, refuses to appear and testify concerning its execution, and that such conveyance can not be proved without his testimony, any officer authorized to take, within the state, acknowledgment or proof of conveyance of real property may issue a subpoena, requiring such witness to attend and testify before him concerning the execution of the conveyance. A subpoena issued under this section shall be regulated by the civil practice law and rules.

36. RPL § 304. Proof by subscribing witness

> When the execution of a conveyance is proved by a subscribing witness, such witness must state his own place of residence, and if his place of residence is in a city, the street and street number, if any thereof, and that he knew the person described in and who executed the conveyance. The proof must not be taken unless the officer is personally acquainted with such witness, or has satisfactory evidence that he is the same person, who was a subscribing witness to the conveyance.

37. *Davin v. Isman*, 228 N.Y. 1, 126 N.E. 257 (1920).

38. Citing RPL §§ 291, 292, 298 and 306 Real Property Law (McKinney, 1988); *In re Rubin's Will*, 48 Misc. 2d 539, 265 N.Y.S.2d 407 (Sur. Ct., Nassau Co. 1965). In addition thereto, the petitioner has waived her right of election by entering into a binding joint and mutual will which was subscribed by two witnesses and the said two subscribing witnesses' depositions are on file with the clerk of this court.

39. *In re Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2d Dep't 1962).

40. See The Purposes of an Acknowledgment, above.

41. *In re Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur. Ct., Bronx Co. 1964) made this distinction as well.

42. *Also see In re Matthews' Will*, 255 A.D. 80, 5 N.Y.S.2d 707 (2d Dep't 1938), *aff'd*, 279 N.Y. 732, 18 N.E.2d 683 (1939).

43. In RPSJ, a party, usually the husband, would request judgment in favor of the wife on the issue of grounds for divorce. This typically occurred where the wife either sued or counterclaimed for divorce but where the husband had no grounds for divorce and was desperate to quit the marriage without parting with substantial assets as a premium for the way out. Although this procedure was initially endorsed by the Court of Appeals because awarding a party what he or she was suing for did not qualify that party as an aggrieved party under CPLR 5511, it was legislatively terminated under CPLR 3212(e).

44. *In re Palmeri's Estate*, 75 Misc. 2d 639, 348 N.Y.S.2d 711 (Sur. Ct., Westchester Co. 1973), *aff'd*, 45 A.D.2d 726, 356 N.Y.S.2d 348 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 895, 334 N.E.2d 595, 372 N.Y.S.2d 646 (1975).

45. *Davin v. Isman*, 228 N.Y. 1, 126 N.E. 257 (1920).

46. *In re Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur. Ct., Bronx Co. 1964), cited with approval in *Matisoff*.

47. See *supra* note 36 for text of RPL § 304.

48. *In re Howland's Will*, 284 A.D. 306, 132 N.Y.S.2d 451 (4th Dep't 1954).

49. *In re Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2d Dep't 1962).

50. *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur. Ct., Erie Co. 1941), *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942).

51. *Davin v. Isman*, 228 N.Y. 1, 126 N.E. 257 (1920).

52. *Londin v. Londin*, 100 Misc. 2d 965, 420 N.Y.S.2d 326 (Sup. Ct., N.Y. Co. 1979); *also see In re Maul*, 176 Misc. 170, 26 N.Y.S.2d 847, *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941) *aff'd without op.*, 287 N.Y. 694, 39 N.E.2d 301 (1942).

53. *Garguilio v. Garguilio*, 122 A.D.2d 105, 504 N.Y.S.2d 502 (2d Dep't 1986), ". . . the defendant's affidavit submitted in support of her motion for summary judgment, in which she admits having signed the separation agreement, is not a sufficient substitute for the acknowledgment."

54. *Arizin v. Covello*, 175 Misc. 2d 453, 669 N.Y.S.2d 189 (Sup. Ct., N.Y. Co. 1998).

55. *Anonymous v. Anonymous*, 253 A.D.2d 696, 677 N.Y.S.2d 573 (1st Dep't 1998), *leave to appeal dismissed*, 93 N.Y.2d 888, 711 N.E.2d 644, 689 N.Y.S.2d 430 (1999).

56. *Garguilio v. Garguilio*, 122 A.D.2d 105, 504 N.Y.S.2d 502 (2d Dep't 1986), ". . . the defendant's affidavit submitted in support of her motion for summary judgment, in which she admits having signed the separation agreement, is not a sufficient substitute for the acknowledgment."; *see Rose v. Rose*, 167 Misc. 2d 562, 637 N.Y.S.2d 1002 (Sup. Ct., N.Y. Co. 1995), "The agreement cannot be subsequently acknowledged by affidavit."

57. RPL § 304; see: (1) *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur. Ct., Erie Co. 1941), *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942); (2) *In re Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur. Ct., Bronx Co. 1964), and (3) *Londin v. Londin*, 100 Misc. 2d 965, 420 N.Y.S.2d 326 (Sup. Ct., N.Y. Co. 1979).

58. RPL § 298; *Matisoff v. Dobi*, 90 N.Y.2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 (1997).

59. *Application of Saperstein*, 254 A.D.2d 88, 678 N.Y.S.2d 618 (1st Dep't 1998).

60. *Schoeman, Marsh & Updike, LLP v. Dobi*, 264 A.D.2d 572, 694 N.Y.S.2d 650 (1st Dep't 1999), *lv. to appeal denied*, 100 N.Y.2d 508, 796 N.E.2d 477, 764 N.Y.S.2d 385 (2003).

61. *Anonymous v. Anonymous*, 253 A.D.2d 696, 677 N.Y.S.2d 573 (1st Dep't 1998), *leave to appeal dismissed*, 93 N.Y.2d 888, 711 N.E.2d 644, 689 N.Y.S.2d 430 (1999).

62. *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur. Ct., Erie Co. 1941), *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942); *In re Kazuba*, 9 Misc. 3d 1116(A), 808 N.Y.S.2d 918, 2005 WL 2467045 (Sur. Ct., Nassau Co. 2005).

63. *Davin v. Isman*, 228 N.Y. 1, 126 N.E. 257 (1920).

64. *Id.*

65. *Kerner-Puritz v. Puritz*, N.Y.L.J., September 25, 2006, p. 22, col. 1.; *also see Stein v. Stein*, N.Y.L.J., December 6, 2006, p. 23, col. 1.

66. *In re Saperstein*, 254 A.D.2d 88, 678 N.Y.S.2d 618 (1st Dep't 1998).

67. *Pacchiana v. Pacchiana*, 94 A.D.2d 721, 462 N.Y.S.2d 256 (2d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 586 (1983).

68. *In re Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2d Dep't 1962).

69. *In re Henken*, 150 A.D.2d 447, 540 N.Y.S.2d 886 (2d Dep't 1989), *appeal denied*, 74 N.Y.2d 612, 545 N.E.2d 870, 546 N.Y.S.2d 556 (1989), cited in *Matisoff v. Dobi*.

70. *Detmer v. Detmer*, 248 A.D.2d 582, 669 N.Y.S.2d 911 (2d Dep't 1998).

71. *See Garguilio v. Garguilio*, 122 A.D.2d 105, 504 N.Y.S.2d 502 (2d Dep't 1986); *Rose v. Rose*, 167 Misc. 2d 562, 637 N.Y.S.2d 1002 (Sup. Ct., N.Y. Co. 1995); *Anonymous v. Anonymous*, 253 A.D.2d 696, 677 N.Y.S.2d 573 (1st Dep't 1998), *leave to appeal dismissed*, 93 N.Y.2d 888, 711 N.E.2d 644, 689 N.Y.S.2d 430 (1999).

72. *Hurley v. Johnson*, 4 Misc. 3d 616, 779 N.Y.S.2d 771 (Sup. Ct., Rensselaer Co. 2004).

73. *D'Elia v. D'Elia*, 14 A.D.3d 477, 788 N.Y.S.2d 156 (2d Dep't 2005).

74. *Anonymous v. Anonymous*, 253 A.D.2d 696, 677 N.Y.S.2d 573 (1st Dep't 1998), *leave to appeal dismissed*, 93 N.Y.2d 888, 711 N.E.2d 644, 689 N.Y.S.2d 430 (1999).

75. *Filkins v. Filkins*, 303 A.D.2d 934, 757 N.Y.S.2d 665 (4th Dep't 2003).

76. *Hurley v. Johnson*, 4 Misc. 3d 616, 779 N.Y.S.2d 771 (Sup. Ct., Rensselaer Co. 2004).

77. *In re Estate of Levinson*, 11 A.D.3d 826, 784 N.Y.S.2d 165 (3d Dep't 2004), *lv. to appeal denied*, *Estate of Levinson v. Benson*, 4 N.Y.3d 704, 825 N.E.2d 133, 792 N.Y.S.2d 1 (2005).

78. *In re Howland's Will*, 284 A.D. 306, 132 N.Y.S.2d 451 (4th Dep't 1954).

79. *Filkins v. Filkins*, 303 A.D.2d 934, 757 N.Y.S.2d 665 (4th Dep't 2003).

80. EPTL 5-1.1-A(e)(1):

> Waiver or release of right of election. A spouse, during the lifetime of the other, may waive or release a right of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b)(1) made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

81. *Carrasco v. Carrasco*, 301 A.D.2d 553, 756 N.Y.S.2d 225 (2d Dep't 2003).

82. *Meccico v. Meccico*, 76 N.Y.2d 822, 559 N.E.2d 668, 559 N.Y.S.2d 974 (1990); *Fetner v. Fetner*, 293 A.D.2d 645, 741 N.Y.S.2d 256 (2d Dep't 2002), *citing Nichols v. Nichols*, 306 N.Y. 490, 496, 119 N.E.2d 351 (1954).

83. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 780 N.E.2d 166, 750 N.Y.S.2d 565 (2002).

84. *Shea v. McFadden*, 227 A.D.2d 543, 642 N.Y.S.2d 963 (2d Dep't 1996); *Katina, Inc. v. Famiglietti*, 306 A.D.2d 440, 761 N.Y.S.2d 327 (2d Dep't 2003).

85. *See supra* note 12.

86. *Davin v. Isman*, 228 N.Y. 1, 126 N.E. 257 (1920); *Application of Saperstein*, 254 A.D.2d 88, 678 N.Y.S.2d 618 (1st Dep't 1998); *In re Henken*, 150 A.D.2d 447, 540 N.Y.S.2d 886 (2d Dep't 1989), *appeal denied*, 74 N.Y.2d 612, 545 N.E.2d 870, 546 N.Y.S.2d 556 (1989); *In re Warren's Estate*, 16 A.D.2d 505, 229 N.Y.S.2d 1004 (2d Dep't 1962); *Londin v. Londin*, 100 Misc. 2d 965, 420 N.Y.S.2d 326 (Sup. Ct., N.Y. Co. 1979); *In re Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur. Ct., Bronx Co. 1964); *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur. Ct., Erie Co. 1941), *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942); § 304.

87. McKinney's Statutes § 73.

88. *Knight-Ridder Broadcasting Co. v. Greenberg*, 70 N.Y.2d 151, 518 N.Y.S.2d 595, 511 N.E.2d 1116 (1987).

89. *People ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981).

90. Partial summary judgment; severance. In a matrimonial action summary judgment may not be granted in favor of the nonmoving party. In any other action summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just.

91. *In re Estate of Sbarra*, 17 A.D.3d 975, 794 N.Y.S.2d 479 (3d Dep't 2005):

> Respondent asserts that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. We cannot agree. A separation agreement must be properly acknowledged only in order to be enforceable in a matrimonial action. . . . Since respondent does not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement is enforceable in other types of actions despite the alleged insufficiency of the acknowledgment (cites omitted).

Singer v. Singer, 261 A.D.2d 531, 690 N.Y.S.2d 621 (2d Dep't 1999):

> Contrary to the appellant's contention, the separation agreement was enforceable as an independent contract in this plenary action commenced by the plaintiff. . . . Although the parties' agreement would not be enforceable as an "opting out" agreement in a matrimonial action because it was not acknowledged . . . the action at bar was commenced to recover damages, inter alia, for breach of contract. Since the appellant's companion action for a divorce was dismissed prior to the trial of the action at bar, we find no impediment to enforcement in a contract action of the provisions of the parties' agreement insofar as it concerns their personal property and certain monetary obligations (cites omitted).

92. *In re Maul's Will*, 176 Misc. 170, 26 N.Y.S.2d 847 (Sur. Ct., Erie Co. 1941), *aff'd*, 262 A.D. 941, 29 N.Y.S.2d 429 (4th Dep't 1941), *aff'd*, 287 N.Y. 694, 39 N.E.2d 301 (1942).

93. *In re Stegman's Estate*, 42 Misc. 2d 273, 247 N.Y.S.2d 727 (Sur. Ct., Bronx Co. 1964) made this distinction as well.

Selected Cases

Editor's Note: It is our intention to publish cases of general interest to our readers which may not have been published in another source and will enhance the practitioner's ability to present proof to the courts in equitable distribution and other matters. The correct citations to refer to in cases that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Winter 2007) New York State Bar Association

We invite our readers and members of the bench to submit to us any decision which may not have been published elsewhere.

P. R. v. R. F., Supreme Court, New York County (Jacqueline W. Silbermann, J, April 21, 2006)

In this post-judgment of divorce matrimonial action, the defendant (hereinafter "father") moves for an order adjudicating the plaintiff (hereinafter "mother") in contempt of Court for her wilful refusal to comply with the orders of this Court regarding the father's parenting-time with the parties' daughter, M., dated June 9, 2000, September 13, 2000, June 7, 2001, April 16, 2002 and May 1, 2002. The mother opposes the motion.[1]

As a result of several years of struggles in which the Court and counsel have attempted to assist the parties in normalizing M.'s parenting-time with her father with only nominal, if any, positive results, this Court, in a decision and order dated April 26, 2005, appointed Dr. P. to conduct a forensic examination of the parties and M. and determine (1) whether M. has been alienated from her father by her mother; (2) whether the father has contributed, if at all, to the strained relationship with M.; and (3) what steps can be taken to normalize the relationship?

In a report dated September 9, 2005, Dr. P. concluded that M. is alienated from her father. He indicated that "M. spoke negatively of the father, found few positive qualities in him, expressed no interest in pursuing or maintaining her relationship with him and overall described him as an annoyance." He noted that M. "refuses overnight visits and expresses strong dislike for the day visits, does not present guilt or ambivalence about the minimal relationship with the father or the potential loss of the relationship with the father, and presented trivial reasons for the rejection . . ."

Dr. P. indicated he ". . . experienced the child as anxious and rigid . . ." and that he believes M. ". . . might be harboring feelings of anxiety and that she has 'discovered' that structuring her day and activities and focusing on a task relieves that anxiety." Indeed, Dr. P. reports that M. needs to occupy her time to such an extent that she will not attend a birthday party unless she is provided with assurances that structured activities are planned.

Dr. P. indicated the mother has contributed to M.'s alienation from her father, and the Court concurs. Specifically, he reported that the mother is "very anxious, sees the father as threatening and has likely communicated that view to the child." Disturbingly, he reported that the mother "does not see any positive contribution by the father or a need for maintaining a relationship with the father except for the need to comply with Court Orders." Tellingly, Dr. P. reports that when he queried the mother if she had any concerns that the tense relationship between M. and her father may affect her ability to engage in a healthy relationship with a man in the future, she stated that "fortunately there are good examples of healthy relationships between men and women in her family." As a result, Dr. P. noted that traditional therapy involving the mother as a participant is unlikely to be effective in resolving the problem, as the mother has expressed no motivation to expand the role of the father in the child's life. He further noted that Dr. D. (the therapist treating the family for almost two years in an attempt to normalize M.'s relationship with the father) indicated the mother is *not* willing to undergo individual treatment and does not see faults in herself. He further reported Dr. D.'s statement that the mother "was unable not to complain (about the father) or devalue him in M.'s presence."

Dr. P.'s findings are consistent with the allegations made by the father about the mother's behavior throughout this Court's involvement in this case. Indeed, from the time M. was just three years old, the father has alleged, and the Court believes, that the mother has contributed to M.'s lack of comfort in visiting with her father by communicating her own negative views of him to M., directly and indirectly.

While it is true that Dr. P. believes the father's behavior has contributed to M.'s alienation from him, it is clear that M.'s disdain for her father lacks any proportion to his alleged inappropriate behavior. Moreover, it is indisputable that the father has gone to considerable lengths to attempt to normalize his relationship with M., to wit: he has participated in individual therapy for several years, he has made repeated motions to the Court for assistance in normalizing his parenting time (and has paid counsel fees of $27,718 since July 2003 and owes an additional $9,500 as of the time of submission of the motion), and he has sought and paid for half the cost of family therapy for a period of two years despite his daughter's refusal to spend more than a few hours with him.

Dr. P. explained that alienation is problematic for children in part because it distorts their view of the world. In essence, children who grow up extremely aligned with one parent "develop a powerful mechanism to simplify the world" and often apply this mechanism to other areas of their lives. As a result, alienated children "may . . . develop problems in their own intimate relationships, where one needs to be able to tolerate mixed feelings towards other individuals and learn how to communicate those feelings without necessarily breaking up the relationship. The ability to have a realistic relationship with both parents creates a template for relationships later in life."

In light of the foregoing, this Court believes that action must be taken to repair the relationship between M. and the father, as such a result undoubtedly is in her best interests. Accordingly, it is hereby

ORDERED that the father and M. commence treatment with a therapist who has an expertise in treating children who are alienated from a parent and that treatment with this therapist commence within 20 days of the date of this order; it is further

ORDERED that if the parties cannot agree on an appropriate therapist within the allotted time, the father shall have the final right to make a determination in this regard; it is further

ORDERED that the unreimbursed cost of the abovementioned treatment shall be shared equally by the parties; it is further

ORDERED that in the event M. misses a scheduled visit with the therapist (unless M. is suffering from an illness which prevents her from attending school or a family emergency occurs), the mother shall pay the entire unreimbursed cost of the missed visit as well as a $250.00 penalty to the father within three days of the missed visit; it is further

ORDERED that the therapist shall forward a report of the progress of treatment to this Court every three months; it is further

ORDERED that any parenting-schedule recommended by the therapist shall immediately be forwarded to the Court for review and implementation by the Court. It is further

ORDERED that in connection with the access schedule currently in effect, and any revised schedule implemented by the Court upon recommendation from the therapist, the mother shall pay a fine to the father in the amount of $250.00 each time a visit is missed, and shall pay to the father the sum of $50.00 per hour for each hour any visit is shortened by M. or the mother. Such fines shall be paid within 3 days of the missed or shortened visit; it is further

ORDERED that the mother shall pay to the father the sum of $10,000 as and for counsel fees incurred by the father in attempting to normalize his relationship with M., in an exercise of its discretion and as a result of her failure to abide by prior orders of this Court with regard to parenting time. The fees shall be paid within 90 days of this date. If the fees are not paid as directed, the Clerk is directed to enter judgment in favor of the defendant-father and against the plaintiff-mother in the sum of $10,000 with interest from the date of service of this order with notice of entry. No further notice is required. It is further

ORDERED that all relief not specifically addressed herein is hereby denied, without prejudice to renewal if the directives in this Order are not followed.

Endnotes

1. The cross-motion for an order directing that the Court hold an *in camera* interview with M. was granted, and the Court conducted an interview with the child.

* * *

Benjamin T. W. v. Shelly L. K., Supreme Court, Madison County (McDermott, Dennis K., Acting J.S.C., October 13, 2006)

Decision and Order

Index No. 01-1373

Appearances of Counsel

For Plaintiff	Harlan B. Gingold, Esq., of counsel Macht, Brenizer & Gingold, P.C.
For Defendant	Howard J. Woronov, Esq., of counsel Melvin & Melvin, PLLC

Opinion of the Court

Dennis K. McDermott, Acting Justice.

Plaintiff, the father of the parties' 14-year old son, seeks a modification of an earlier order of this court pertaining to the child's custody. The parties were divorced in California in 1993. They have two children, a daughter, now 16 years of age, and their son, James, who is the subject of this application. In 2001, an order was made in this court (O'Brien, J.) based on the parties' stipulation whereby the parties were awarded the joint custody of their children, with primary physical placement in the defendant-mother's home and the father to have visitation.

In 2005, the daughter had been accepted at the Lawrenceville School in Lawrenceville, New Jersey, where the father is employed as a member of the facu1ty. The father petitioned for an award of primary physical custody with respect to the daughter inasmuch as she would be

residing primarily with him while attending the school. However, shortly after matriculation, the daughter left the school and returned to residence in her mother's home. Consequently, that application was withdrawn.

Now, the son has been accepted at Lawrenceville and, for purposes of resolving the mother's motion to dismiss the father's application on the pleadings, the Court accepts as true the allegation that the son has expressed the desire to reside with his father. The mother's motion is based on her contention that all of the foregoing, even if true, is insufficient as a matter of law to warrant the relief sought.

When seeking the modification of an established custody arrangement, the petitioner must demonstrate that there exists ". . . a change in circumstances warranting a real need for change in order to insure the continued best interests of the children." *Matter of Morgan* v. *Becker,* 245 AD2d 889, 890 (3d Dept 1997). *See also, Matter of Crocker* v. *Crocker,* 307 AD2d 402 (2003), *lv. den.* 100 NY2d 515 (2003); *Matter of Ciannemea* v. *McCoy,* 306 AD2d 647 (3d Dept 2003); *Matter of Gregio* v. *Rifenburg,* 3 AD3d 830 (3d Dept 2004); *Redder* v. *Redder,* 17 AD3d 10 (3d Dept 2005). Here, there is no allegation that the mother has become unfit since 2005 when this Court was last called upon to review the parties' circumstances. The only changed circumstance alleged is the son's acceptance at Lawrenceville and his desire to attend that school and reside there with his father.

The Court can find no basis in these allegations to disturb the existing custody order. The son may enroll in Lawrenceville, residing there with his father while school is in session, and the parties will continue to have joint custody of him. While the child may, in fact, be residing more with his father than with his mother during the school year, the Court sees no need to alter her status as primary physical custodian in order to protect or promote the son's best interests. Just as the domicile of a minor attending school away from his parents' home remains with the parents, so too the son's primary residence is deemed to be in his mother's home notwithstanding that he is attending school in New Jersey.

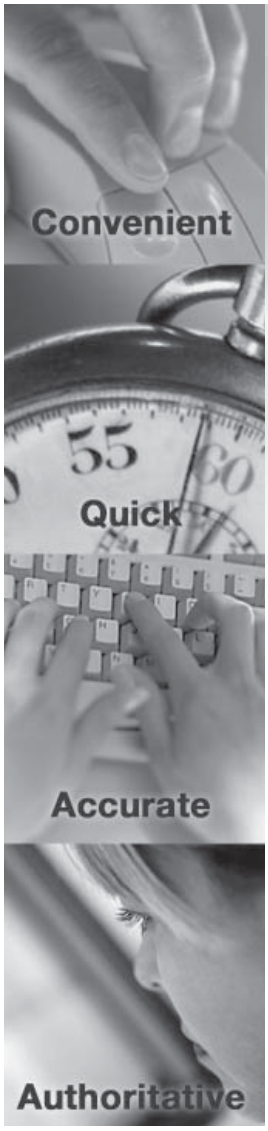
The Court accepts as true the father's allegation that the son wishes to reside with him. A child's stated desires with respect to custody and visitation are given such weight as the Court deems appropriate on a case-by-case basis. While those wishes may be considered and given some degree of weight, they are not dispositive of the ultimate issue. *Eschbach* v. *Eschbach,* 56 NY2d 167, 172-173 (1982); *Matter of Delafrange* v. *Delafrange,* 24 AD3d 1044 (3d Dept 2005); *Matter of Meola* v. *Meola,* 301 AD2d 1020 (3d Dept 2003); *Matter of ladicicco* v. *Iadicicco,* 270 AD2d 721 (3d Dept 2000). Here, the son wishes to attend Lawrenceville and reside with his father. He has not expressed any desire to alter the mother's status as his primary physical custodian. That status may remain, yet the child will reside with his father while attending Lawrenceville.

Additionally, the Court is mindful that the parties' daughter remains in the mother's primary physical custody and that the son's attendance at Lawrenceville will result in a separation of siblings. While neither parent objects to that, the Court finds that there are strong policy reasons for fostering a close relationship between the children *(Eschbach, supra; Obey* v. *Degling,* 37 NY2d 768) and nothing in the relief the father requests would promote that relationship.

For these reasons, the father's application is denied. There is no need to schedule a hearing. *Matter of Ritchie* v. *Waters,* 1 AD3d 839 (3d Dept 2003); *Matter of Lynn* v. *Lynn,* 15 AD3d 765 (3d Dept 2005). The parties should attempt to come to agreement with respect to each other's parenting time during both the school year and periods of school recess. If they are unable to come agreement, either may petition the Family Court for further relief. *Matter of Peabody* v. *Peabody,* 3 AD3d 804 (3d Dept. 2004); *Matter of Blanchard* v. *Blanchard,* 304 AD2d 1048 (3d Dept. 2003).

All future issues concerning the custody, visitation and support of the parties' children are now hereby referred to the Family Court of the State of New York for resolution. Accordingly, a copy of this Decision and Order is to be filed in the office of the Clerk of the Family Court, Madison County.

SO ORDERED.



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EDITOR & COMMENTATOR:

Willard H. DaSilva, a member of DaSilva, Hilowitz & McEvily LLP, is a veteran matrimonial law practitioner with offices in Garden City and New City, New York.

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Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Recent Legislation

Rules of the Chief Judge: Part 41 Integrated Domestic Violence Parts of the Supreme Court. Section 41.1(a) amended on October 1, 2006

The amendment provides that "domestic violence cases pending in a criminal court in the county shall be eligible for disposition in the Integrated Domestic Violence Part if necessary to best utilize available court and community resources for domestic violence cases."

New *Ex Parte* Temporary Restraining Order Rule Section 1202.7(f) of the Uniform Civil Rules for the Supreme and County Courts, effective October 1, 2006

The new subdivision was added to require that a motion for a temporary restraining order must be on notice to the other party, unless the moving party provides an affirmation demonstrating that there will be significant prejudice to a party seeking a restraining order to provide such notice. If there is no prejudice, then the attorney's affirmation must state that a good-faith effort was made to provide notice to permit the opposing party an opportunity to appear and be heard.

Author's note: CPLR 6313(a) requires that the movant show an "immediate and irreparable injury." It also requires that if the TRO is granted, a hearing is scheduled at "the earliest possible time." Apparently, the stringent statutory standards were being overlooked, and the chief administrative judge deemed it necessary to rectify the problem.

In the matrimonial context, the TRO is often used to prevent the monied spouse from transferring or dissipating the marital assets and/or destroying evidence. To give notice would simply allow the recalcitrant spouse the opportunity to do exactly what the TRO is designed to prevent.

Collection of Money Judgments

The information below is relevant to the collection of child support, maintenance, equitable distribution and counsel fee awards.

CPLR 5224 (a-1), effective August 24, 2006

A person served in New York with a subpoena duces tecum by a judgment creditor must produce all documents in his/her control, even if such materials are maintained outside of the state. This statute is to rectify the unfairness of Judiciary Law 2-b, which prohibits the service of a New York subpoena outside of the state.

CPLR 5224(a)(3)(I-iv): Information Subpoena Amendments, effective January 1, 2007

In response to complaints by businesses that they are burdened by responding to a large volume of information subpoenas served by judgment creditors who are fishing for information and where the businesses do not have any knowledge of the judgment debtor, the new rules provide certain restrictions on the service of information subpoena on third parties.

CPLR 5224(a)(3)(I) requires the attorney or judgment creditor to certify on the information subpoena that they have a "reasonable belief" formed after "an inquiry reasonable under the circumstances" that the person served knows something that will assist in the collection of the judgment. Without such certification, the subpoena is void. CPLR 5224(a)(3)(ii).

New Deposition Rules

Part 221 of the Uniform Rules of the New York State Trial Courts: Uniform Rules for the Conduct of Depositions, effective October 1, 2006

The rules were promulgated in an effort to curb discovery objection abuses. There are no specific enforcement remedies for noncompliance, and therefore one must rely on CPLR 3126 (disclosure misconduct remedies) and N.Y.C.R.R. 130-1 (sanctions).

§ 221.1—Objections at Depositions: The only objections permitted are those under CPLR 3115(b), (c), and (d), which would be waived if not raised, including objection as to form of the question. For all other objections, the objection shall be noted, but the answer must be given.

§ 221.2—Refusal to answer when objection is made: The objection must be stated "succinctly and framed so as not to suggest the answer." If the questioning attorney requests a reason for the objection, the objecting attorney must "make a clear statement as to any defect to form or other basis of error or irregularity." All questions must be answered except to "preserve a privilege or right of confidentiality," to enforce a court ordered limitation, or where the question is "plainly improper" causing "significant prejudice."

§ 221.3—Communication with the deponent: The defending attorney shall not interrupt the deposition to communicate with the client unless both parties agree or it is for the purposes of determining whether a question should not be answered pursuant to 221.2. The defend-

ing attorney shall "succinctly" state the reason for the communication.

Gay Marriage Update

New Jersey Legislature Passes Civil Union Bill

On December 14, 2007, our neighbor, New Jersey, voted 23 to 12 to recognize civil unions for same-sex couples, based on the New Jersey Supreme Court's mandate to provide equal rights and financial benefits to gay couples. The legislature was permitted to decide whether to permit gay marriage or provide a separate parallel track.

The law will take effect sixty days after the governor signs the bill into law, and it will expand on the domestic partnership arrangements the state has had since 2004, including establishing benefits like adoption privileges, inheritance rights, and the ability to take a partner's surname without going to court.

Socially conservative legislators were unsuccessful in restricting the definition of marriage to the union of one man and one woman. Therefore, without this amendment, it leaves open the possibility of allowing same-sex marriage sometime in the future.

New Jersey is the third state in our country to establish civil unions, joining Connecticut and Vermont. Massachusetts is currently the only state to recognize gay marriage, and it has a residency requirement. In addition, our neighboring country Canada recognizes gay marriage.

The Aftermath of *Hernandez v Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (2006)

As discussed in my previous column, the recent Court of Appeals decision held that the New York State Constitution did not compel the recognition of same-sex marriage, and deferred to the legislature's determination on the issue. The result in this case was the exact opposite of what happened in New Jersey.

When same-sex partnership relationships dissolve, and there is no written agreement controlling the parties' financial intentions, there is no uniform method for equitably dissolving their relationships and for safeguarding their interests and those of their minor children. A case following the high court's decision, ***Cannisi v Walsh***, 2006 N.Y. Slip. Op. 52075U, 13 Misc. 3d 1231A (Kings County, 10/30/2006, J. Saitta), dealt with this exact problem.

The litigants were domestic partners for approximately 19 years and conceived and raised two minor children. At issue was the division of the sale proceeds of a Brooklyn property which sold for over $1 million. The plaintiff argued that she paid for the property, and made all financial contributions to it, and therefore the defendant is not entitled to any share of the proceeds. The defendant argued that they had an oral agreement that she would be responsible for raising the parties' children, and the plaintiff would be responsible for the financial support of the family. During discovery, the defendant sought the plaintiff's retirement account statements. The plaintiff objected, stating that this is a simple partition action, and their domestic partnership relationship should not be considered.

The court opined that it was appropriate in a partition action, which is based on equity, to consider the intentions of the parties to raise a family in addition to the financial contributions made to the property. The court permitted the discovery, and based its reasoning on what it considered to be an unfortunate holding under ***Hernandez v Robles***:

> The Legislature failed to create a mechanism to ensure the welfare of dependent children of separating same-sex couples. Although the Legislature has yet to act, it is antithetical to public policy and inconsistent with existing legislation to believe the Legislature intends that the interests of the minor children of a same-sex relationship should not be considered in dividing the assets of the couple.
>
> Notwithstanding the absence of a clear directive from the Legislature, the Court must fashion a remedy to deal with the dispute before it. In determining what would be equitable in dividing the proceeds of the sale, the respective roles the parties assumed in the relationship, as well as any understandings by the parties regarding support of the children of the relationship, must be considered. *Id* at 13.

Recent Cases

Electronic Discovery

There are few reported decisions regarding electronic discovery. In the matrimonial context, this column previously reported the case *Etzion v Etzion*, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (Nassau County, 2/17/2005, J. Stack), in which the court permitted the wife to copy the hard drives of the husband's business and personal computers. Following that decision, in ***Delta Fin Corp v Morrison***, 13 Misc. 3d 604, 819 N.Y.S.2d 908 (Nassau County 8/17/2006, J. Warshawsky), the court ruled that the moving party was entitled to relevant electronic documents, whether deleted and on backup tapes or currently maintained.

Child Support

College Education Expenses

***Berliner v Berliner*, ___A.D.3d____, 823 N.Y.S.2d 189 (2d Dep't 2006)**

The court below improperly imposed a "SUNY-cap" on the husband's contribution towards the children's college education expenses where the children attended private boarding secondary school. The wife's income was $440,000/year and the husband's income was only approximately $76,000/year.

***Matter of Benno v Benno*, ___A.D.3d____, 823 N.Y.S.2d 252 (3d Dep't 2006)**

The parties' separation agreement, which was incorporated but not merged into the parties' judgment of divorce, provided that the father would pay for the child's college education contingent upon the child attending Rutgers University for four years. After the child's second year of college, she transferred from Rutgers to SUNY Albany because she was suffering from depression which required psychological counseling and medication, and therefore she wanted to be closer to her family. When the father stopped paying for the child's education, the mother brought a modification petition, seeking to compel the father to pay for the other school. The court found that the daughter's depression was an unanticipated change in circumstances warranting a modification.

Prior Consent for Educational Expenses

***Matter of Susan A v Louis C*, 32 A.D.3d 682, 821 N.Y.S.2d 687 (4th Dep't 2006)**

The father agreed to pay all of his daughter's high school education expenses, so long as his prior consent was obtained, which consent should not be unreasonably withheld. Where the parent does not dispute his financial ability to pay nor the quality of the institution, the court will apply the best interests of the child standard. The court found that the father did not have a close relationship with the child, and that his refusal was not based on any concerns directly related to the child. The mother specifically invited the father to be involved in the selection process but the father refused, and he did not do any independent investigation of the various high schools. Therefore, the court found that the father unreasonably withheld his consent, and directed him to pay the child's education.

Modification of Support

***Matter of Ianniello v Fox*, ___A.D.3d____, 823 N.Y.S.2d 246 (3d Dep't 2006)**

Two years after the parties divorced, the parties' children were diagnosed with learning disabilities. The mother had since remarried and enjoyed an affluent lifestyle. She left her employment to devote her time to the children. The mother sought an upward modification of the parties' separation agreement which was incorporated but not merged into the parties' judgment of divorce.

The lower court found that the mother was entitled to an upward modification based on the children's diagnosis. However, the appellate court reversed, finding that the mother failed to show that the children's needs were not being met, nor that the unanticipated change significantly altered the fairness of the agreement. The children's teacher testified at the hearing that it was not necessary for the mother to stop working to meet the children's educational goals.

Custody

***Matter of Tavarez v Musse*, 31 A.D.3d 458, 817 N.Y.S.2d 667 (2d Dep't 2006)**

The award of sole custody to the father was upheld on appeal, which was supported by the record and the opinion of the court-appointed forensic evaluator and the law guardian. Contrary to the mother's contentions, joint custody was not an option due to the history of animosity between the parties.

Author's note: The court relied, in part, on the opinion of the law guardian. Since a law guardian is a lawyer appointed for the child, and is not a psychological expert or any other type of expert, the law guardian's opinion should not have been considered. In other states, like Connecticut, the court appoints a guardian for the child who is a psychologist. This seems to make more sense.

Maintenance

There appears to be a developing trend to limit maintenance until the age of entitlement to collect Social Security benefits, i.e., age 62 or 65. Two recent decisions make such limitation, without any reasoning.

***Freas v Freas*, ___A.D.2d____, 822 N.Y.S.2d 798 (3d Dep't 2006)**

The parties were married for over thirty years, and have three emancipated children. The wife was out of the workforce for almost 20 years to raise the parties' children. She later re-entered the workforce, and at the time of trial, she was earning $17,000/year part-time, and was seeking full-time employment. In 2002, the husband was grossing over $57,000/year, but by the time of trial he was only earning $38,000/year because of a voluntary change in his work shift. The court awarded the wife maintenance in the sum of $450/month until age 62.

***Hamroff v Hamroff*, 2006 N.Y. Slip. Op. 9167, 2006 N.Y. App. Div. LEXIS 14560 (2d Dep't 12/5/2006)**

Throughout the parties' 14-year marriage, the wife worked in the husband's medical staffing business, and received almost no compensation. Upon the commencement of the divorce action, the husband fired his wife.

The wife was awarded $500/week maintenance until age 65.

Author's note: Once again, the appellate court failed to state the relevant facts such as the parties' ages, income levels, educational background, and the like. This unfortunate trend prevents the practitioner from using said case as precedent.

Termination of Maintenance

Clark v Clark, 2006 N.Y. Slip. Op. 7686, 2006 N.Y. App. Div. LEXIS 12772 (2d Dep't 10/23/2006)

Pursuant to the parties' divorce agreement, maintenance would terminate upon the wife's cohabitation with an unrelated male. The husband's motion to terminate maintenance was denied. The husband merely showed that the wife and children were living with another family, but failed to show that there was any relationship. The wife provided documentary evidence that the area of the house where she and the children were living was an accessory apartment, and that she was paying rent to the owner.

Enforcement of Awards

Hinkson v. Daughtry-Hinkson, 31 A.D.3d 608, 819 N.Y.S.2d 535 (2d Dep't 2006)

The court below properly adjudicated the husband in contempt for his failure to transfer the marital residence to the wife. The wife's loan commitment expired while she was waiting for the transfer of the property, and she was forced to negotiate a new loan at a higher interest rate, causing actual damages. However, the award of damages in the sum of in excess of $50,000 was found to be excessive and not supported by the evidence.

It was error for the court to calculate the loss by multiplying the increase in the wife's anticipated loan payments by the number of months in the 30-year term of the loan, without discounting the resulting figure to present value or considering other potentially relevant factors that could impact on the wife's actual loss. Therefore, the matter was remitted to the court below for a further determination.

Equitable Distribution

Personal Injury Awards

SM v MM, 2006 N.Y. Slip. Op. 51636U, 13 Misc. 3d 1201A (Nassau County, 8/24/2006, J. Falanga)

The wife was injured in an automobile accident, and commenced a personal injury lawsuit that was settled. The check was made payable to both parties in the net sum of in excess of $400,000. The check was endorsed by both parties and deposited into the wife's bank account.

DRL 236 (B)(1)(d)(2)(5)(a) specifically excludes compensation for personal injuries in the definition of marital property. However, where the unallocated settlement proceeds of a personal injury lawsuit are made payable to both spouses, who were named as plaintiffs in such action, the divorce court must determine what portion of the proceeds was paid to compensate the injured spouse for her damages, and what portion, if any, was paid to the other spouse for his loss of consortium claim. Therefore, the wife's motion to declare the entire personal injury award as her separate property (and all purchases made from said proceeds) was referred to the trial where the court can determine said proportions.

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 WBSesq1@aol.com. The firm's websites are www.matrimonial-attorneys.com and www.newyorkstatedivorce.com.

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