NYSBA FALL/WINTER 2003 | VOLUME 35 | NO. 2

Family Law Review

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

Notes and Comments

Elliot D. Samuelson, Editor

Can a Spousal Support Waiver or Changed Financial Circumstances Existing at the Time a Prenuptial Agreement Is Challenged, Provide the Basis for a Claim of Unfairness or Unconscionability?

A recent decision, *Cron v. Cron*, that appeared in the *New York Law Journal* on Friday, October 17, 2003, p. 18, col. 3, initially decided by a Special Referee and affirmed by Justice Gische in the Supreme Court, New York County, should command more than casual review. It contains a most interesting discussion of what factual predicates, following the Court of Appeals decision in *In re Greiff*, 92 N.Y.2d 341 (1998), will be sufficient to declare that the relationship between contracting parties to a prenuptial agreement manifest probable unfair advantage, therefore forming the basis to shift the evidentiary burden to the party seeking to uphold the agreement to prove a lack of fraud, deception or undue influence. Before considering the facts in *Cron*, one must consider that Judge Bellacosa, writing for a unanimous court, was careful to articulate the rules that should be applied by the trial court when determining this conundrum. Two suggestions appear to be most informative. The first was a remark that where a fiduciary relationship existed, or there appeared to be a reliance based upon ". . . weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, . . . *it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.*" He later remarked concerning the proof necessary to reach the threshold question, that it was simply necessary to establish a "particularized inequality." And later in the decision, he remarked that this particularized inequality must necessarily include an "exceptional scrutiny."[1] Whether Justice Gische abided by these mandates when rendering her decision will be exceptionally scrutinized in this column.

Before examining the facts that were considered by the court, it is interesting to note that it quickly determined that a provision with respect to child support, which capped at $80,000 (including discretionary expenses) the income by which the percentage formula could be applied, was not binding on the court since, as the Referee had found, it was neither valid nor enforceable. The court correctly observed that it was entirely proper to strike down one portion of the prenuptial agreement and sustain others, citing *Christian v. Christian*, 42 N.Y.2d 63 (1977), although it later failed to consider the clause in determining "unconscionability."

This decision was also notable for its review of when a claim of bias could be considered by the trier of facts, when used to urge that a new hearing should be had in an action to set aside a prenuptial agreement.

Inside

There were several arguments put forth by counsel and included:

1. The Referee made unfavorable findings which were the product of bias.
2. A witness at the trial, the attorney who drew the agreement, was once a law secretary, as was the hearing officer herself during the same time period.
3. That unfavorable comments were made against the defendant throughout the hearing.
4. The Referee refused to permit defendant's attorney the right to timely cross-examine the attorney he called who represented the defendant in the negotiation and execution of the prenuptial agreement until far later in the trial.
5. The Referee refused to permit the defendant to call certain rebuttal witnesses.
6. The Referee made a comment that a twelve-year-old memory is not reliable with respect to a witness that the defendant sought to call.

The court dismissed each argument advanced and concluded that none of them could possibly be viewed as bias, reflecting that the Referee's comment of the unreliability of a twelve-year-old memory was nothing more than an obvious conclusion that the passage of time affects the credibility of one's testimony; that such conclusion was applied in an even manner and apparently acceptable; and that the failure to permit timely rebuttal testimony was harmless error since whatever witnesses might be called, would merely have bolstered defendant's testimony and be cumulative, because the defendant and her mother had both testified similarly on her direct case. In reaching this conclusion the court apparently relied on *Irrizary v. Velez*, 95 A.D.2d 713 (1983), for the proposition that the trier of facts has the discretion to limit cumulative testimony.

In explaining why it was proper to preclude defendant's attorney from timely cross-examining the witness he called on the grounds of hostility, the court ruled that he was able to do so later in the hearing after the record developed facts to infer that the witness was hostile. The court also commented that because the Referee and the attorney witness were once contemporary law secretaries, this merely evidenced a "passing familiarity" ". . . and is of no import unless it interferes with the jurists ability to remain impartial." Finally the court concluded that the facts urged which constituted bias were "benign" and therefore not actionable; and that there is no evidence that the witnesses sought to be called in rebuttal, would have given testimony that would change the ultimate result.

We now return to an exploration of whether the hearing which considered the legal sufficiency of the prenuptial agreement, comported with the prescription articulated by Judge Bellacosa in *In re Greiff* to first explore whether there was a particularized inequality. Before doing so, however, a brief examination of the facts of the case is warranted. The parties, prior to executing the prenuptial agreement, were each employed, the husband earned close to $1 million a year as an executive, and the wife $35,000 as a secretary. She had $10,000 in assets and the husband approximately $3 million. At the time of the commencement of an action for divorce, the parties were married nine years, during which time the wife had been out of the work force, and bore two children. They lived in a 32-room house on 8 acres of property. The wife's financial position had not changed, but the husband had apparently increased his net worth to nearly $30 million.[2] The agreement contained a clause by which the wife waived any claims to maintenance, and a provision to cap income against which child support could be calculated at $80,000. Another provision provided for a formula to compute a sum for equitable distribution, depending upon the husband's net worth at the time of divorce. Before the hearing commenced before the special Referee, the husband conceded that the provision for child support was neither valid nor enforceable.[3] Another salient provision provided the wife and children with a life estate (but not ownership) in a residence to be purchased by the husband with a value not to exceed $200,000.

The court began its exploration, stating, "The spouse seeking to set aside an agreement has the burden of establishing fraud, duress, or other impediment, attributable to the other spouse (e.g., the agreement's proponent)," citing *Greiff*. Yet, *Greiff* required an initial determination of a particularized inequality, before a contestant could be held to retain the burden to demonstrate fraud or overreaching. Justice Gische then concluded that there was a failure of proof of fraud, duress, or any "strong arm" conduct on the part of the husband, without a discussion of the parties' relative financial conditions; the fact that the wife had been out of the work force for nine years; whether the provision for child support limiting the calculation to only $80,000 of gross income, and the waiver of maintenance, was unfair or unconscionable (albeit that the parties agreed that the child support provision was unenforceable and required a *de novo* determination).

In so doing, it appears that the court ignored the mandate of the Court of Appeals to conduct ". . . a particularized and an exceptional scrutiny" before placing the burden on the contesting party to prove fraud, duress, or another impediment. As such, the wife was prejudiced and the husband was relieved of the burden to prove a lack of unfairness and unconscionability.

Consistent with such holding, the court went on to discuss why it felt that the wife had failed to meet *her* burden of demonstrating fraud, duress, or overreaching. It was unconvinced that the wife felt "overmastered" by her husband (despite their relative maturity, education,[4] and hugely disparate earnings and assets). It thereafter discussed whether the agreement as a whole could be considered unconscionable (without consideration that the child support provision was stricken as unenforceable), and specifically found that in considering whether the agreement was tinged with unconscionability, it could only consider facts that were obtained *at the time of the execution of the agreement*, and not subsequent events. However, the court did note that with respect to maintenance the provision must be conscionable at the time the judgment of divorce is rendered, but that no "version of events" met this statutory standard. (Despite the fact that at the time of trial the husband had assets of at least $30 million and was earning approximately $4 million a year.)

The court then concluded that the bargain struck by plaintiff did not shock its conscience, and that it was fair and reasonable at the time of its making. The court was also impervious to the waiver of maintenance, finding that "Parties can always agree to waive maintenance," and such waivers are routinely enforced. There was no discussion that the plaintiff had been a stay-at-home mom throughout the marriage; had been out of the work force for nine years; and had lived an opulent lifestyle consistent with her husband's now $4.5 million income, although the court did find that the mother was capable of self-support.[5]

The last point covered by the court dealt with the alleged error of the Referee to preclude evidence concerning the present financial circumstances of the parties as it touched upon the present inequity of the waiver of maintenance. It concluded that even if such evidence had been introduced, the defendant could not prevail in proving the agreement was unconscionable, since she failed to claim or prove that she was incapable of self-support, suggesting that unless she was in danger of becoming a public charge, her argument could not be upheld.

Nowhere in the statute or in the decision of the Court of Appeals in *Greiff* is there any requirement that a contesting spouse must be in danger of becoming a public charge, before the issue of fairness and unconscionability can be considered. This holding seems to provide a new standard in litigation seeking to set aside prenuptial agreements. The *Cron* court explained as follows:

> She cannot show that she will become a public charge. At most she can show that her standard of living will decrease upon the dissolution of the marriage. Her criticism of the agreement is in hindsight and though she may now regret the deal she made 11 years ago, it is not "unconscionable" simply because of the passage of time and because she did not work in the intervening years.

Justice Gische concluded her decision with the following declaration:

> Even if the court accepts defendant's position that the Referee should have allowed testimony about present financial circumstances, this is not an error that requires another, or further hearing on current finances.

Whether the case will be appealed to the Appellate Division remains to be seen, but if so, it will be of great interest to follow to see whether the *Greiff* decision will be strictly followed or whether a lesser standard will be applied based upon the lower court's decision in *Cron*. Nonetheless, counsel should be ever vigilant in tracking all decisions rendered since *Greiff* in order to frame a proper complaint in an action to set aside a prenuptial agreement. Perhaps in drafting the complaint facts should be alleged to enable the court to conclude that there was a "particularized inequality" at the time of execution in order to shift the burden to the proponent.

Endnotes

1. Prior to the Appellate Division sustaining the agreement, the Surrogate Court initially determined to set aside the prenuptial agreement, finding as a compelling fact, that the husband selected and paid for the wife's attorney.
2. Although the facts did not appear in the court's decision, plaintiff's attorney had filed a brief setting forth the respective financial circumstances of the parties.
3. Query, did such concession prevent the court from considering this provision when ascertaining whether the terms were unfair when made, or unconscionable at the time a judgment of divorce was rendered?
4. Husband was a college graduate, and the wife a high school graduate.
5. Plaintiff had been a secretary earning approximately $35,000 a year when the agreement was executed; the children were ten and seven.

Mr. Samuelson is a partner in Samuelson, Hause & Samuelson, LLP in Garden City, New York and a past president of the American Academy of Matrimonial Lawyers—New York Chapter, and is listed in the Best Lawyers in America.

Valuation of Professional Practices

By Jessica K. Gartland

While similar to the valuation of closely held businesses in several respects, the valuation of professional practices requires special considerations from the discovery process to the value conclusion. Several of these special considerations are discussed below.

Discovery and Inspection

Discovery and inspection for the valuation of a professional practice entails the identification of certain documents not typically required in the valuation of a closely held business. For example, when valuing an interest in a law firm, copies of engagement letters for all cases of active status during the valuation period may need to be reviewed. This request should be extended to include engagement letters for cases which have been designated as being paid on a contingency basis, regardless of case status during the valuation period. In addition to invoices and billing records, fee schedules for all services, broken down by professional level and applicable invoice period, will further assist the valuator in estimating contingency fees.

A schedule of accounts receivable, work in progress, accounts receivable write-offs, retainer fees received, invoiced fees received and contingency fees received for each year-end encompassed in the valuation period is necessary. Although it may seem like a case of too much information, analysis of work in progress and contingency fees is an integral component of the valuation of a law firm.

Valuation Methodologies

Generally speaking, there are three approaches to valuing a business: the income approach, asset approach and market approach. The income approach determines the value of a practice based on net cash flow and expected future benefits associated with the practice. The asset approach is used primarily for the valuation of manufacturing, real estate and fixed-asset-intensive entities and involves the restatement of all assets and liabilities to fair market value as of the valuation date. Use of an asset approach when valuing a professional practice may not be practical since the main asset is generally the service provided by the professional, also known as human capital.

While the market approach provides real-world data, it is often encumbered with the effects of synergies on purchase price, incomplete facts, and problems with comparability. Until 1990, the American Bar Association Model Rules of Professional Conduct prohibited the sale of a law practice. Since 1990, Model Rule 1.17, or a similar rule, has been adopted by several states including New York, and allows the sale of a law practice under certain circumstances. As law firm transaction data continues to become available, valuation analysts may be able to increase the use of the market approach.

Valuation methods primarily used in the valuation of a law practice focus on the income approach and include methods such as the capitalization of earnings. The capitalization of earnings method requires use of normalized income and determination of a capitalization rate. Common normalization adjustments include adjusting contingency fees for timing issues, owners' compensation, travel, entertainment and other perquisites, and non-recurring expenses. Use of the discounted cash flow method is generally not feasible when valuing law practices operating on a contingency fee basis, since income projections are not available due to the uncertainty of collecting such fees.

"Generally speaking, there are three approaches to valuing a business: the income approach, asset approach and market approach."

Another valuation method predominantly used in the valuation of professional practices in family law proceedings is the excess earnings method. The excess earnings method calculates the return on the practice's net tangible assets (assets minus liabilities) on a fair market value basis, subtracts this return from the practice's normalized income to arrive at "excess earnings," and applies an appropriate capitalization rate to the excess earnings to arrive at the value of the intangible asset(s). The fair market value of the net tangible assets is then added to the calculated value of the intangible assets to arrive at the value of the practice.

Professional practices often have buy-sell agreements, or similar provisions in a partnership agreement. The valuation analyst should consider the date of the agreement, relationship of the value indicated by the agreement to the practice's financial position and outlook, and the economic reality of the value indicated by

the agreement. The courts will consider the intent and value indicated by the buy-sell agreement as it relates to the current market for reasonableness. Book value may be the prescribed valuation methodology in a buy-sell provision of the partnership agreement. While not an indication of fair market value, the book value of a practice as of the valuation date often provides a starting point for the valuator.

Special Considerations

When valuing a professional practice, the following factors should be considered:

- The practice's historical earnings;
- The impact of contingency fees;
- The impact of work in progress; and
- Professional goodwill vs. practice goodwill.

Historical Earnings. As with the valuation of any business, historical earnings play a major role in the synthesis of a value conclusion. When valuing a closely held company, we sometimes see historical earnings begin to decline with the commencement of a matrimonial action. This decline may be normalized after removing the effects of personal and non-operating expenses and perquisites. Owners' compensation is another area generally requiring an adjustment to bring it in line with what is seen in the industry and in other similarly sized practices. Additionally, to the extent a large nonrecurring contingency fee was received during the valuation period, historical earnings may be distorted. The valuator may consider allocating the contingency fee over the periods in which the services were performed.

Contingency Fees. Contingency fees pose a unique problem for valuators. First and foremost is the uncertainty and timing of realizing this income. Since contingency fees are dependent on the outcome of a case, if a case has not been decided or settled as of the valuation date, no clearly defined method exists to determine the amount of fees likely to be collected or when the collection will occur. In the Second Department, the position has been taken that contingency fees should be valued only after the case has been settled, and such valuation should be based on the actual time an attorney spent on the case.

In the matrimonial setting, it is necessary to determine which fees were earned by the professional or professional practice during the marriage and which fees were earned after the valuation date to determine the portion includable in the marital estate. This is not as easy as it sounds. The period in which contingency fees are collected usually does not correspond to the period in which services were rendered. A complete analysis of services rendered in relation to the valuation date will assist the valuator in determining the portion of contingency fee income attributable to the efforts expended during the marriage.

The courts have been on both sides of the fence in determining the appropriate treatment of contingency fees. In *In re Zells*, the court determined that contingency fees not yet received were not marital property since the attorney does not have the right to receive the fee until the case is decided or settled, there is no assurance that the fee will ever be received, and the amount of the fee to be received is dependent on the amount awarded, and therefore highly speculative.[1] To the extent a contingency fee was acquired during the marriage, i.e., services were performed during the marriage, courts have held that the fee was marital property. This reasoning was evident in *Potter v. Potter*.[2] Perhaps the most crucial evidence to be presented when dealing with contingency fees is the substantiation of services provided in relation to the fee collected.

Work in Progress. Work in progress plays an integral role in the valuation of a law firm, especially when dealing with contingency fees. The matching principle of accounting directs the matching of income with the expenses incurred to generate the income. Analysis of work in progress provides the valuator with a way to determine fees likely to be collected in the future. This analysis should include making distinctions between the amount to be billed to the client and the portion expected to be collected.

Goodwill. A distinction must be made between professional goodwill and practice goodwill. Professional goodwill is a result of an individual's skills and efforts. Practice goodwill is a result of the practice's location, capital structure, employees and reputation. When valuing a law practice, both professional and practice goodwill should be considered since it may be the practice's most important intangible asset. The professional's age, health, professional success in relation to his peers, reputation for judgment and knowledge, and historical earnings power on both an individual basis and in terms of contributions to the practice should be considered when analyzing professional goodwill. When analyzing practice goodwill, the length of time the practice has existed, client referral base, capital structure, demographics of current office location(s), types of clients serviced, size of practice, and local competition should be considered.

With respect to the distribution of goodwill, court rulings can be generally classified as one of the following: professional goodwill is synonymous with future earnings, and therefore, not distributable; professional goodwill is the same as tangible business assets, and

therefore, is distributable; professional goodwill is distributable property only if it is separate and distinguishable from the professional's reputation. Professional goodwill and practice goodwill may overlap, especially in the case of a sole practitioner. Therefore, the valuation analyst must be certain that he has not double-counted goodwill in his valuation conclusion.

"Once a value is obtained, the economic reality of the value conclusion must be tested for reasonableness."

Value Conclusion

Once a value is obtained, the economic reality of the value conclusion must be tested for reasonableness. The impact of contingency fees, work in progress and buy-sell agreement provisions should be considered in light of the value conclusion. Questions to be asked by the valuator include: Does the value indication correlate to the expected revenues and cash flow? Have accounts receivable been properly adjusted for the probability of collection? Has professional and/or practice goodwill been properly reflected in the value conclusion? As with any valuation, the facts and circumstances of the instant case will largely influence the value conclusion obtained by the valuator.

Endnotes

1. *In re Zells*, 554 N.E.2d 289 (Ill. App. 1 Dist. 1990).
2. *Potter v. Potter*, 655 S.W.2d 382 (Ark. 1983).

Jessica Gartland is a Consultant in the Litigation Consulting and Bankruptcy Services Department of Margolin, Winer & Evens LLP and holds her B.S. degree in accounting. Ms. Gartland's areas of practice include business valuations, marital actions, fraud and forensic investigations and bankruptcy consulting. Ms. Gartland continues to expand her professional competence and credentials by participation in technical seminars and lectures and publication of professional literature. Ms. Gartland is a Certified Public Accountant and a member of the AICPA, the NYSSCPA, and the American Society of Appraisers.

Out the Door

By Sharon Arisohn

The man and woman sat in the courtroom, having finally come to the end of a long and painful experience. Husband and wife would soon be divorced. Each felt some degree of exhaustion, elation, regret and fear. Above all, however, they each yearned for the relief available to those who come to the end of a miserable road and cross over.

They had battled and hurt for close to two years over such issues as custody and visitation, property distribution and support. At some point during the hostilities, one had commenced a lawsuit for divorce against the other. Bitter words had been spoken and set down on paper. Principles enumerated firmly at the beginning had crumbled by the end. It had been a roller-coaster ordeal and now it was almost finished.

The court officer called the courtroom to order. All present rose as the judge entered and took the bench. One of the lawyers then dictated every last detail of their hard-fought agreement into the record, with occasional interruptions and corrections by the other lawyer. A legal stenographer took down every comment, halting the proceedings briefly at one point to change her paper.

Next came the questioning part their lawyers had explained to them. In New York State, a married couple is technically unable to dissolve the marriage using grounds of irreconcilable differences. No such cause of action exists within state law.

However, the law provides an official loophole in Domestic Relations Law § 170(6). Where a couple have executed a written agreement that resolves all of the ancillary issues in a divorce, and after they have lived "separate and apart" for at least one year in compliance with the terms of that agreement, either one of them can move the court for a judgment of divorce that incorporates the provisions of the agreement without having to prove further grounds.

That is, nobody need prove that fault grounds exist sufficient to allow entry of a judgment of divorce and nobody is being accused of being at fault for the break-up of the marriage. The judgment entered will, in effect, be based upon the irreconcilable differences of the parties and ugly accusations can be set aside. Some of the bitterness that is inevitable in a contested action, as well as the unfortunate repercussions on the children of divorced parents, may well be averted.

However, by the time most litigants in New York's divorce courts have reached this stage, they are in no mood to embark on yet another year's waiting period. They have heard, directly or through counsel, enough words of blame and accusation, examined enough nooks and crannies of each other's finances and, usually, given up more than they ever imagined would be necessary. They are ready to stop.

At this point, the law provides a second, if unofficial, loophole. One party accuses the other of innocuous grounds and the accused does not contest the allegations. The dirty linen is packed away and the parties are divorced. The accusation customarily utilized for this purpose is called "constructive abandonment," which must have existed for at least one year.[1]

Constructive abandonment simply means an abandonment in which no one actually abandons his or her spouse physically. The claim boils down to the assertion that the guilty spouse has refused to have marital relations with the other party, without justification, for the statutory period of time. If this claim is not disputed, the matter is resolved.

For those who settle their action before a trial date, the papers necessary to obtain a dissolution on the uncontested grounds of constructive abandonment can be filed with the court. However, for the many contested actions in which settlement is not reached until the day scheduled for trial, an inquest or mini-trial is usually held at which time the settlement agreement is placed upon the record verbally and the parties give oral testimony to establish entitlement to entry of judgment. It is, obviously, a bit more up-close-and-personal than the mere signing of often unread papers.

In the case I was witnessing, as in most cases, the parties had agreed that the wife would be the husband's accuser. With one hand on the Bible, she swore an oath to tell the truth, the whole truth and nothing but the truth. Then, she began answering a series of questions from her attorney that established the validity of the marriage, the jurisdiction of the court over the parties, the proper conveyance to the defendant of notice and an opportunity to be heard and other technical necessities. Her lawyer was allowed to lead her, suggesting the answer to each question in the wording of the question. Efficiency was paid its customary deference. They had reached the issues of grounds.

The lawyer cleared his throat and asked the wife, "Now, is it true that for a period of at least one year prior to the date this action was commenced, the defendant, your husband, refused to have marital relations with you, although he was physically and mentally able

to do so and although you asked him to have marital relations with you and that his refusal has continued to this day?"

The woman's face took on a slightly reddish hue and she stammered, "You mean . . . whatta you mean . . . you're talking about sex?"

"Every day in New York courts, judges routinely listen to testimony they know is false, elicited by lawyers who have suborned perjury, given by ordinary citizens, testifying under oath to something untrue, while everyone involved looks on with approval."

The lawyer, clearly discomforted, nodded his head.

"You want to know if we've had sex since this divorce thing started?" the wife asked, looking around the courtroom for help from someone, anyone. No one returned her looks. A deep sigh. "Well, yeah, sure we have."

A heavy silence settled upon the room. Spectators and court officers began staring at the flaking paint on the ceiling, as if the ceiling had been painted by Michelangelo himself. She turned back to her lawyer, looking at him anxiously.

He tried again, injecting a little obfuscation. "Now, Ms. X, isn't it true that your husband constructively abandoned you for a period of at least a year before you filed for divorce? Didn't he refuse to have conjugal relations with you although he was fit and you asked him to have relations? Aren't those the grounds for this divorce?"

"Yes, yes, the grounds are constructive abandonment . . . but, hey, I just swore an oath to tell the truth. I didn't know you were going to ask me if we've had sex. It was just at Christmas, ya know, just when he came over to leave the kids their gifts. We had a little wine and, er, well, things happen, you know?"

The leather chair made a loud bang as it rolled sharply away from the bench, striking the wall behind it. The judge was half out of his chair. "Counselor," he said in a low and angry voice, "we'll take a five-minute recess. I think you need to speak with your client. You told me this case was ready for inquest."

"Well, what am I supposed to do?" cried the wife in the direction of the judge's disappearing back. "Am I supposed to lie under oath?" Her lawyer leaned close to her ear, whispering. They began an earnest discussion, in tones too low to be overheard by spectators.

Every day in New York courts, judges routinely listen to testimony they know is false, elicited by lawyers who have suborned perjury, given by ordinary citizens, testifying under oath to something untrue, while everyone involved looks on with approval. A claim of constructive abandonment usually means merely that the parties don't want to wait another year to get divorced. Our law, however, will not allow them to be divorced any sooner than one year unless they engage in this conspiracy and actually commit perjury. They may not be divorced merely because they both want a divorce.

The woman left the stand, eye brimming with tears and made a beeline for the ladies' room. After a few minutes she returned to the courtroom, said something to her lawyer and took her seat. Her attorney nodded at the court officer, who shortly bellowed out "All rise!" The judge returned to the bench.

The judge gave the woman a sidelong glance and turned away, speaking briefly to the air: "The witness will remember that she is under oath." The questioning resumed. This time she agreed it was true that she and her husband had not engaged in sex for at least a year prior to the day the action had been commenced. The judge stared straight ahead, eyes seemingly transfixed by the large clock on the opposite wall.

When it was all over, the judge announced that the parties were divorced, although they were not free to remarry until the judgment had been duly entered in the Clerk's office. He then rose abruptly from his chair and exited the courtroom before the guards had a chance to repeat, "All rise."

The man and the woman walked out of the courtroom separately and took different elevators to the ground floor. The court officers slipped into relaxed postures and began shooting the breeze in one corner of the courtroom. The lawyers and court stenographers were the last to leave, after packing up their papers. Oh, yes. There was one more quiet departure: a little bit of respect for the law walked out of that courtroom as well.

It happens every day in New York.

Endnote

1. Domestic Relations Law § 170(2).

The Truth About Mediation

By Glenn E. Dornfeld

Introduction

Family and divorce mediation is becoming ever more popular among consumers of legal services, yet some attorneys are opposed to it without understanding it or knowing its place in matrimonial practice. I thought it would help to introduce readers of *Family Law Review* to matrimonial mediation.

What Is Mediation?

Simply put, mediation is the use of a neutral third party to help parties resolve a dispute. People often confuse mediation with arbitration. The essential difference is that an arbitrator is charged to make decisions for parties, whereas a mediator facilitates their negotiation, but does not make decisions or rulings. But it is equally important to understand that mediation is far from merely "settling cases." In fact, mediation involves the use of a specific set of conflict resolution skills and techniques developed through history and over decades of academic research and practical experience.

Perhaps the most essential principle of mediation is neutrality. The mediator's job is specifically *not* to take sides or render judgment between parties, but to help their negotiation. Many attorneys find it difficult to switch into the neutral role: lawyer training is very much slanted toward advocacy for one position or party—to assert who is "right" or "wrong." I recently worked on a case where an attorney unknown in mediation circles started out as the parties' "mediator," then turned around and represented the wife, drafting very adversarial papers to which I had to respond. I hope that anyone reading this article sees the conflict inherent in switching roles from "neutral" to "advocate" in the same contested negotiation.

Another important characteristic of mediation is its focus on the future: the process acknowledges the past, but then helps parties move forward by resolving disputes rather than getting stuck in them or arguing fruitlessly and pointlessly about long-past events. Sadly, many divorcing people obsess over back history, and get stuck reliving it in their personal lives. Others become mired in revolving-door litigations where each party hauls the other back into court over petty noncompliance issues; in such cases, the couples seem to use court as a crude, mutually destructive form of postmarital therapy. Without minimizing the emotional devastation of divorce, one could argue that the whole point of divorce is for the parties, when each is ready, to move on with their (separate) lives, after reaching a fair and proper settlement. Mediation maximizes parties' ability to move forward in life at their own pace, in this fashion.

In mediation, couples become problem-solvers: they explore their options, cooperate in talking through and testing out proposals, and seek out final terms that mutually benefit them given their respective priorities. The mediator helps them find, if/when possible, "win-win" solutions most likely to strengthen their ability to cooperate in the future—e.g., by supporting rather than undermining each other's parenting efforts.

"The essential difference is that an arbitrator is charged to make decisions for parties, whereas a mediator facilitates their negotiation, but does not make decisions or rulings."

There are a number of schools of mediation for divorcing couples to choose between. There are transformative, facilitative and directive mediators, among other modes. Many practitioners may vary between these modes as called for by the case at hand. (This article will leave further discussion of the modes of mediation for another author and forum.)

Family and divorce mediation has been codified into the laws of many states: California, Florida, Texas and New Jersey (among others) in various ways require divorcing parties to try mediation before litigating. In fact, perhaps taking a page from such states, the New York State Office of Court Administration (OCA) is about to start a pilot program for the mediation of custody and visitation cases in New York County.

What Are the Steps of a Typical Mediation?

Mediation usually begins with an introduction to the process and the signing of an Agreement to Mediate. The Agreement to Mediate discusses mediation "ground rules," including confidentiality and the parties' rights to obtain legal advice (and the mediator's expectation that they will do so); clarifies the mediator's role in working with the couple; and sets forth the fee.

(Most mediators charge session-by-session, for the time spent in each session, rather than requiring upfront retainers as lawyers do. Thus, mediating couples

invest merely hundreds of dollars, instead of thousands (or tens of thousands) to start a case. Many clients find this more appealing, and cite it as an added advantage of mediation.)

Part of the mediator's role is to educate parties on the law. The mediator does this as neutral advisor, not as advocate or lawyer. Thus, session-by-session, the mediator: explains the parties' rights, both procedural and substantive; identifies tasks that the parties need to complete; and helps them select and resolve issues, until all terms of a potential agreement are provisionally worked out. A neutral attorney hired by both parties then creates the first draft of the parties' agreement, and sends it to both parties for review with their respective attorneys. After the agreement is reviewed and sufficiently fine-tuned—sometimes in an additional mediation session—the parties sign it, and uncontested divorce papers are also prepared, signed and filed.

The Benefits of Mediation

Refocusing priorities: Mediation helps put some of the focus back on the clients' priorities (which are frequently resolution, closure, children, healing), rather than only emphasizing the areas that many attorneys feel most comfortable with (frequently financial issues). Attorneys too commonly get locked into "spitting contests" and completely lose sight of the big picture. Mediation puts the focus back on the parties and their families, and the ostensible goal of efficiently producing a fair and mutually workable agreement.

Transparency: Mediation is a transparent process. Clients see the mediator do all of the work in front of them. In adversarial cases, clients don't see the work happen: negotiation by lawyers resembles a game of "telephone," where the end parties communicate through two (or more) intermediaries, rather than directly with each other. The client doesn't know how accurately his or her priorities are being communicated to the other side's attorney, or how accurately he or she is hearing the other party's proposals back from his own lawyer.

Directness: Mediation is cost-efficient and process-efficient: In adversarial cases, every hour of lawyer negotiation costs *two* hours' time (one for each client); then, after each attorney charges for talking to the other side, he also naturally charges to report the other side's comments back to his own client. In mediation, *one* professional hour (not two) is billed for every hour of negotiation. Lawyer negotiation doubles or triples the amount of billable time otherwise needed for face-to-face discussion in mediation.

Mediators encourage clients to take whatever steps they can together—for example, dividing up "the stuff," or picking one neutral appraiser rather than getting into the dance of the five appraisers. (I've witnessed this dance, in which—as in Olympic scoring—the high and low appraisals are thrown out, and the other three are averaged to come up with the "right" value—at a waste of thousands of dollars which could've gone to help pay for college.)

Win-win solutions: Mediating parties are encouraged to find win-win solutions wherever possible, in recognition that divorce need not be a zero-sum game. In a surprising number of cases, when one party shows flexibility or concession, the other party responds in kind.

Self-determination and empowerment: In mediation, parties are fully informed of their legal rights by the mediator and by advising counsel, but are free to explore various trade-offs and options within the bounds of the law. They frequently craft agreements that give *both* parties more—in different ways—than each would get under the cold judgment of a court.

Privacy/Confidentiality: Mediation keeps the parties out of court, and their differences out of the newspapers. This is obviously of great benefit to all concerned, including the children.

Control of the process: The parties are encouraged to discuss the process throughout, and to adjust it to suit their needs, rather than having to submit to external deadlines, court dates, etc. Many clients appreciate the flexibility of the timing and structuring of the process. (One couple I worked with wanted to start and finish the process very quickly. They met with me all day on a Wednesday, and I had their agreement finished by the following Monday, at which point their divorce was, for all purposes, done. This is unheard-of in adversarial practice, where even simple matters are much more likely to take at least a year or two to resolve.)

Enhances present and future cooperation: Divorcing couples, especially those with children, have to cooperate post-divorce. Studies have consistently shown that mediation greatly enhances parties' post-divorce ability to work together.

Peaceful resolution: Mediation almost always greatly reduces or eliminates friction between even hostile parties: a premium is put on minimizing harm to the participants, allowing them to suffer much less emotional damage from the separation/divorce, and start healing that much sooner.

Respectful: Couples splitting up need not become mortal enemies. Mediation honors their former relationship as it moves them toward closure on that part of their lives, allowing them whenever possible to respect each other in spite of the end of the relationship.

Greater compliance: It has long been established that the rates of parties' compliance with agreements are significantly higher for mediated cases than for lawyer-negotiated cases (or adjudications). This makes intuitive sense, as mediating parties help construct the terms of their own agreements, rather than having them imposed by judges or opposing counsel. Enforcement procedures are always available after mediation, but they are much less likely to be needed than after litigation. The compliance effect compounds the cost-reduction aspect of mediation as contrasted with litigation.

Partial agreements even in rare terminated cases: In those few cases where the parties do not reach full agreement through mediation, they still clarify many of their points of agreement and disagreement. Even though attorneys finish negotiating such cases, the participants frequently work out in mediation important pieces of their eventual agreements—such as parenting plans, timing of a move-out, etc.—which pieces can otherwise linger to the detriment of all.

Much lower costs: Mediation almost always costs participants much less than negotiated or litigated divorces. It is much more common for a litigated case to cost over $100,000 in combined fees than it is for a mediated case to cost even $10,000 in total fees.

Mediation Is a Safe Process for Participants

Initial and ongoing screening: For a "basic" family/divorce mediation training to be accredited, it must include a component on screening for domestic violence (DV). In fact, the New York State Council on Divorce Mediation (NYSCDM) (among other mediation organizations) requires that members take refresher courses on DV in order to maintain their accreditation. To my knowledge, matrimonial attorneys, in contrast, face no such requirement. Trained family/divorce mediators also screen cases—both before and continuing during mediation—for power imbalance and capacity to mediate (also unlike the matrimonial bar).

Full disclosure: Full disclosure of assets and liabilities, valuation of assets, net worth statements—all of these safeguards are discussed in every mediated case. These procedures are employed when appropriate—under the eye of reviewing attorneys—rather than as an automatic knee-jerk reaction, in many cases saving clients thousands of dollars when finances on both sides are often quite limited. Any discovery procedure available to parties in litigation is available to parties in mediation.

Review attorneys: During and/or after mediation, and before signing an agreement, each participant is expected to have his or her own separate attorney review the draft agreement or the terms under discussion in mediation. This step affords mediation participants the best of both worlds: the bulk of the negotiation may be done in mediation, and yet protection and advocacy are still provided by that party's partial review counsel. This results in a much more efficient and affordable process than negotiated or litigated divorce. Sometimes separation agreements merely need to be fine-tuned; in other cases whole subject areas need to be re-negotiated, but by keeping discussion in the mediation context, parties (with their counsel) maintain their focus on working efficiently toward their common goal of a mutually signable agreement.

"Mediation almost always costs participants much less than negotiated or litigated divorces."

Training: No professional should call herself a divorce mediator unless she has had at least basic divorce mediation training, and preferably a practicum and other experience thereafter. Any mediator should be able and ready to tell her clients her mediation training and experience.

Extensive Continuing Education: The community of family/divorce mediators very actively supports and is involved in a variety of mediation-related professional organizations, which offer nearly limitless continuing education (CE) opportunities. The number of hours of CE offered by mediation organizations such as the NYSCDM and the Family and Divorce Mediation Council of Greater New York (to name but two such groups) greatly exceeds OCA's CLE standards. These seminars deal with very specific family/divorce-related topics in great detail. It's not unusual for my peers to qualify for over 40 hours/year of CLE credit (we sometimes joke about how rich we could be if we could only sell our excess CLE credits to other lawyers!)—and that doesn't even include attendance at conferences staged by completely separate national conflict resolution organizations and their sections or chapters. These mediators—attorneys and non-attorneys alike—are highly-trained experts in their field. In many cases, we are more highly educated in our profession than members of the matrimonial bar, and are likely to be the most knowledgeable professionals doing family/divorce work.

Specialization: Many attorneys dabble in family/divorce cases, as part of a broader general practice—also including some real estate closings, a few contracts to draft, a bit of simple criminal work (misdemeanors, traffic violations), and so on. Many of these attorneys know little if anything about QDROs, the tax ramifications of the sale of a house, and many other

essential components of family/divorce law. I know this from personal experience, having worked with a number of such "generalist" attorneys on divorce cases.

In contrast, in my experience, family/divorce mediators focus on family and divorce work as a major component or the sole component of their practices. Very few of these mediators handle a significant number of cases in any area other than family law. Not every mediator knows the answer to every question, but in my experience, the community of mediators knows the questions and how to spot issues much better than many attorneys out there who "do" matrimonial law.

Model standards: Mediators and mediation organizations from across the United States and Canada worked to draft the *Model Standards for the Practice of Family and Divorce Mediation*. Readers can find the Model Standards online by going to the Web sites of the New York State Council on Divorce Mediation—www.nyscdm.org—or the Family and Divorce Mediation Council of Greater New York—www.fdmcgny.org. The Model Standards set out specific rules stating what family-divorce mediators are required to do or proscribed from doing in various instances during mediation. The two above-mentioned organizations require all of their members to annually affirm that they have read the Model Standards, and agree to abide by them in their practices. By formalizing and codifying mediation practice, the Model Standards have helped to teach mediators best practices, thus regulating and making uniform the practice of family/divorce mediation, and maximizing the professionalism of the field.

What Is Mediation Training?

Mediation training programs are regimented, and must comply with criteria established years ago by the Academy of Family Mediators (now, after a merger, the Family Section of the Association of Conflict Resolution). Roughly half of those who train to mediate come from backgrounds in the law—predominantly as matrimonial attorneys—and their feedback shows that they learn through training a great deal about the mediation process that they otherwise would never have known.

To be clear: the mere fact that an attorney has years of experience in matrimonial cases does *not* qualify him to call himself a divorce mediator. The field of family/divorce mediation faces a grave problem in the form of those attorneys (and others) who would "jump on the mediation bandwagon" without formal mediation training, apprenticeship or experience. Any attorney who wants to call himself a mediator needs to take formal basic (and advanced) training, join mediation membership organizations, keep up with continuing education in the field, and so forth.

Conclusion

Anyone seeking to work with a family/divorce mediator should investigate the mediator's training, the extent of his or her continuing education, and the mode(s) of mediation in which he or she practices. Not every case is appropriate for mediation, and there will always be a place for adversarial litigation. However, mediation is a professional, formal and participant-friendly discipline with many benefits to offer to a broad sector of the divorcing public, when compared with traditional family-divorce dispute resolution.

Glenn E. Dornfeld is President of the New York State Council on Divorce Mediation.

Post Note of Issue and Mid-Trial Discovery

By Elliott Scheinberg

It is not uncommon for freshly substituted counsel, or even initial counsel, who has otherwise properly discharged his stewardship of the case, to, on occasion, be confronted with the daunting scenario where, either the eve of trial is rapidly approaching long after the filing of the note of issue, or, during a trial in progress, it is first learned that additional critical discovery has not been conducted or requires drastic further exploration. Is it too late to conduct discovery during these latest of hours?

Although divorce law and all ancillary relief are creatures of the legislature and may neither be abridged nor expanded in any manner other than via legislative fiat,[1] the rules of discovery, however, are not so rigidly anchored and have been the subject of innumerable judicially elastic interpretations in both matrimonial and non-matrimonial proceedings. Furthermore, divorce actions are, indisputedly, proceedings in equity, as indicated by its common name, "equitable" distribution, and may be judicially massaged so as not to violate the underlying bedrock of the action, to wit, equity.

What is equity? How is it quantified or qualified? Although the term "equity," or its variant form, "equitable," has been incorporated in innumerable judicial pronouncements including legal maxims such as "to get equity one must do equity," it remains juridically amorphous[2]; there is no "bright line" test. An accompanying definition is seldom, if ever, offered. It is akin to the United States Supreme Court's definition of pornography: "We cannot define it but we know it when we see it." Family Court in *Doe v. Smith*[3] essayed an attempt at a definition:

> Equity has . . . been defined as the application of the dictates of conscience or the principles of natural justice to the settlement of controversies. . . . Equity in its broadest and most general signification denotes the spirit and the habit of fairness, justice and right dealing which would regulate the intercourse of men with men, the rule of doing to all others as we desire they should do to us (55 N.Y.Jur.2d, Equity § 1).

In *Edmonds v. Ronella*,[4] the court put forth an observation:

> Equity delights to do justice, and That not by halves. (Black's Law Dictionary, 4th Ed.; Tallman v. Varick, 5 Barb. 277, 280.). . . Equity in its broadest and most general signification denotes the spirit and the habit of fairness, justness and right dealing which would regulate the intercourse of men with men, the rule of doing to all others as we desire they should do to us; or, as it is expressed by Justinian, "to live honestly, to harm nobody, to render to every man his due." It is, therefore, the synonym of natural right or justice, but in this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precept of the conscience.

Black's Law Dictionary (7th ed. 1999) defines "equity" as:

> 1. Fairness; impartiality; evenhanded dealing (The company's policies require managers to use equity in dealing with subordinate employees). 2. The body of principles constituting what is fair and right; natural law (the concept of "inalienable rights" reflects the influence of equity on the Declaration of Independence). 3. The recourse to principles of justice to correct or supplement the law as applied to particular circumstances (the judge decided the case by equity because the statute did not fully address the issue),—also termed natural equity. 4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called 'law' in the narrower sense) when the two conflict (in appealing to the equity of the court, she was appealing to the "king's conscience").

It might be said that equity is a natural law which emanates from within mankind. It is the human compassionate component of the law, fluid in nature; the concept where our collective conscience is stirred by basic instincts of fairness and the difference between right and wrong sufficient to warrant a focal shift beyond the strict black letter. This principle rings loudly and true in divorce actions.

Public Policy Favors that Divorce Actions Be Resolved on the Merits

It is well settled that parties to a matrimonial action are entitled to "broad pretrial disclosure . . . regarding the value and nature of the marital assets."[5] Absent such broad-based disclosure a party is completely disadvantaged to either negotiate an intelligent settlement or to vigorously proceed to trial.

In *Richter v. Richter*[6] the Appellate Division went beyond *Kaye* by elevating financial disclosure to the level of public policy, thereby raising it beyond the plateau of a mere right.[7] The significance of such a designation (public policy) is more than simple nomenclature because it implies heightened judicial scrutiny over the subject area.

Since a failure to conduct discovery has the equivalent effect of taking a default, a brief overview of judicial thinking on public policy regarding defaults is warranted. In *Otto v. Otto*,[8] an atypical, extraordinarily lengthy opinion from a judicial department known for its terse fact bare decisions, the Second Department painstakingly analyzed the potential harm attributable to a denial of equitable distribution as a result of a default in the divorce action (describing such defaults as "daily" occurrences in divorce actions)[9]:

> Under the circumstances of this case, where the default judgment of divorce contains provisions for equitable distribution, maintenance and/or child support, the court should hold an inquest to enable it to grant a judgment which complies with the mandates of Domestic Relations Law § 236(B). The precise form of the inquest will be determined by the trial court in its sound discretion dependent upon the circumstances of the case and the nature of the default.

In, *Otto*, decided barely two years after *Richter*, the Second Department, relying on *Antonovich v. Antonovich*,[10] once again reaffirmed the status of discovery in divorce actions as a matter of public policy underscoring[11] that divorce actions are not governed by the same exacting procedural regulations which apply to general litigation: (1) "[I]t has repeatedly been held that the general rule in respect to opening defaults in ordinary actions is not to be applied so rigorously in a matrimonial action . . ." and (2) "the strong public policy that actions should be disposed of on the merits."

Otto further emphasized the reasoning in *Ettinger v. Ettinger*,[12] which discussed the procedure to be followed *vis à vis* equitable distribution in the presence of a default[13]:

> The statute makes no distinction between a contested matter and one in which there has been a default by one of the parties. The court appears to be required, even where there is an inquest taken on the nonappearance of a party, to consider the above factors[14] when it equitably disposes of marital property in the final judgment.

Otto cited a litany of cases in support of the proposition that the economics of a case should not and may not be resolved on a default basis[15]:

> It is critical to hear evidence presented by both sides with respect to the factors involved in the economic issues (see D.R.L. sec. 236, Part B, subds. 5, 6 and 7). Otherwise it would be pointless and absurd to make a determination on the economic issues which are oppressive to the defaulting party to the point that they are unenforceable under the discretionary enforcement provisions of the Domestic Relations Law and other laws (see, e.g., D.R.L. secs. 244 and 245; Personal Property Law, sec. 49b; Judiciary Law, sec. 756) (Orlan v Orlan, NYLJ, June 11, 1982, at 18, col 1).
>
> A rule allowing a defaulting party to participate in an inquest on economic matters would be harmonious with the purposes of the Equitable Distribution Law. As stated in Rodgers v. Rodgers, 98 A.D.2d 386, 391, 470 N.Y.S.2d 401 [emphasis added]: "In a divorce proceeding, which triggers the right to equitable distribution, property acquired during marriage need not be distributed equally, but, rather, "in a manner which reflects the individual needs and circumstances of the parties" (Memorandum of Governor Carey, 1980 McKinney's Session Laws of NY, p 1863) . . . "Equitable distribution, as a remedy in marital actions, is not designed either to result in a penalty or a windfall."[16]

The Filing of a Note of Issue Does Not, Thus, Erect an Automatic Bar to Additional Discovery; A Party's Right to Equitable Distribution Should Not Be Limited to Redress via a Legal Malpractice Claim Against Prior Counsel

Decisional authority reflects a liberal and consistent symmetry regarding the opening of late date discovery

in divorce actions. Foreclosing discovery to a spouse, even at the latest stages of a case, may produce the unsavory result of his or her having no option but to seek equitable distribution from prior counsel via a malpractice action, a time-consuming, costly battle whose feasibility may be beyond the reach of the aggrieved spouse due to an inability to access or disburse sufficient funds with which to sustain an active prosecution of such an action. Furthermore, even if the wronged spouse can access funds with which to aggressively pursue a legal malpractice claim, the value of the recovery will be dramatically diminished as a result of the legal fees expended because there is no authority to recover counsel fees from a non-spouse.[17]

In *Perez v. Perez*,[18] the Second Department held that a discovery demand made eight months after the filing of a certificate of readiness did not preclude additional discovery. The court held that the need for complete disclosure superseded the element of tardiness:

> We further conclude that the Supreme Court did not abuse its discretion in directing the defendant to submit to additional pretrial discovery as to his finances. Although a certificate of readiness had been filed more than eight months prior to the plaintiff's cross motion and a date had been set for trial, the need for complete financial disclosure in this action involving equitable distribution compels the conclusion that the plaintiff was properly accorded a further opportunity to examine the defendant's finances (see, Colella v. Colella, 99 A.D.2d 794, 472 N.Y.S.2d 124). It is significant to note that the plaintiff had recently retained new counsel shortly before the plaintiff's cross motion for further discovery was made.

Underlying *Perez* was the presence of newly retained counsel who determined the inadequacy of prior discovery[19]:

> The plaintiff's newly retained counsel, upon reviewing his client's file, determined that inadequate discovery had been made into the defendant's finances, including his interests in two limited partnerships, various pensions and annuity contracts. Counsel also required additional time to conduct a complete evaluation of the defendant's medical license. In view of these circumstances, additional discovery was properly ordered.

In *Ross v. Ross*,[20] the Second Department permitted an EBT even after the Note of Issue had been filed because the need for equity superceded a blind adherence to form:

> Although the plaintiff had already filed a note of issue at the time the defendant sought leave to conduct the deposition, the "need for complete financial disclosure in this action involving equitable distribution compels the conclusion that the [defendant] was properly accorded a further opportunity to examine the [plaintiff's] finances." (cites omitted)

In *Colella v. Colella*,[21] the court held that the need for complete discovery outweighed the fact that a note of issue had been filed already and that the case had been placed on the trial calendar:

> Thus, while a motion to strike an action from the calendar may be denied where the moving party has had an ample opportunity to complete discovery but has failed to do so . . . the need for full financial disclosure in equitable distribution actions . . . compels us to conclude that defendant should be given a further opportunity to examine plaintiff before trial regarding his financial circumstances, including the contents of his sworn statement of net worth. Under the rules of this court (22 NYCRR 675.7), such examination may be conducted after the action has been placed on the trial calendar. (cites omitted)

In a very recent decision, *Guastella v. Emma*,[22] involving an action to recover damages for legal malpractice and to set aside a judgment of divorce on the grounds of unconscionability, the wife appealed from so much of an order as denied that branch of her motion seeking to compel additional disclosure. Notwithstanding the fact that her application for additional discovery was made after her having signed a certification acknowledging the completion of discovery, the Second Department, citing, *Perez* and *Ross, supra,* held that the facts of the case warranted the granting of an additional opportunity to examine her husband's books relative to his ownership of an insurance brokerage business.

Courts Have Even Halted Trials to Permit Continued Discovery

So important is the right to conduct discovery that the Appellate Division has even gone as far as adjourning cases mid-trial in order to reopen discovery. In *Riggi*

v. Riggi[23] the court stayed the trial and reopened the discovery process:

> Instead, however, of encumbering our increasingly taxed judicial resources and the efficient administration of justice with voluminous unreviewed documents, and in light of the unusual circumstances surrounding the maintenance of defendant's records and the unfulfilled promises made by defendant and his attorneys to produce the documents demanded, this court in the exercise of its discretion (cites omitted) will stay the trial and order that discovery be reopened.

In *Dayanoff v. Dayanoff*[24] the Appellate Division affirmed the lower Court's order directing mid-trial disclosure of the husband's business records as not being an abuse of discretion and not warranting a reversal: "The defendant contends that the Trial Judge improperly permitted the plaintiff to conduct discovery and inspection of his business records during the course of the trial. Under the circumstances of this case, directing midtrial disclosure was not an abuse of discretion and does not warrant reversal."

In *Cuevas v. Cuevas*,[25] the wife discharged her attorney several hours before trial for failure to have conducted proper discovery. The lower court denied her request for an adjournment to retain new counsel and to complete new discovery. In reversing and remanding for a new trial on the financial issues *Cuevas* found two significant issues, *inter alia*, to have been determinative:

a) that she only sought to litigate the economic issues which her prior attorney had not properly prepared, and

b) that she was entitled to her attorney of choice.

In *Gellman v. Gellman*,[26] the Appellate Division affirmed *nisi prius* adjournment of a trial in order to allow for additional discovery notwithstanding the wife's extensive delay in enforcing compliance with the discovery demand. *Gellman* held that the retention of new counsel and the defendant's hospitalization constituted sufficient grounds to involve the provisions of IAS Court Rules 22 N.Y.C.R.R. § 202.21(d and e) which allow the granting of additional discovery in cases involving "unusual or anticipated circumstances."

In *Charpentier v. Charpentier*,[27] the wife moved to: (1) stay the trial pending further disclosure by husband, (2) entry of money judgment for support arrears, and (3) for an order directing husband to post a security bond. The Supreme Court granted wife's motion. The Appellate Division affirmed holding that the trial court properly stayed matrimonial action pending completion of discovery:

> Special Term properly stayed the matrimonial trial pending completion of discovery. In a matrimonial action involving issues of equitable distribution of marital property, public policy clearly mandates full financial disclosure (see, Domestic Relations Law § 236(B)(4); Fox v. Fox, 96 A.D.2d 571, 465 N.Y.S.2d 260). Here defendant has failed to comply with repeated disclosure requests, and, therefore, discovery is incomplete.

Charpentier underscored that a trial may not be held unless and until a reasonable period of time has not elapsed to allow for the completion of meaningful discovery[28]: "An action may not be placed on the calendar when a reasonable time to conduct and complete discovery proceedings has not elapsed" (cites omitted).

In *Covington v. Covington*[29] the Supreme Court denied the wife's motion to, *inter alia*, strike the note of issue to permit further discovery. The Appellate Division reversed. The Appellate Division held, *inter alia,* that a party's failure to seek vacatur of a note of issue and certificate of readiness does not preclude a trial court from issuing a further discovery order:

> Supreme Court did not err in ordering plaintiff to disclose the documents he intends to rely on to support his assertion that the bulk of the assets amassed during the parties' 24-year union are his separate property, or be barred from introducing these documents into evidence. While plaintiff suggests that defendant's failure to seek vacatur of the note of issue and certificate of readiness should preclude her from obtaining this relief, *this ignores what is undeniable, that Supreme Court may vacate a note of issue at any time, on its own initiative, if it finds that the representations contained in the certificate of readiness are inaccurate* . . . . (emphasis provided)

Covington emphasized the necessity to allow "a reasonable time to conduct discovery proceedings" especially where the untitled spouse "is confronted with a spouse reluctant to disclose information as to his assets, [and] had not been afforded an adequate opportunity to substantiate her claims." The Appellate Division ordered the note of issue stricken and the case removed from the calendar.[30]

In *Malamut v. Malamut*[31] the wife appealed from an order denying her motion to strike the note of issue and

statement of readiness in a matrimonial action involving equitable distribution. The Appellate Division held that the interests of justice mandated a continuation of equitable distribution.

> In this equitable distribution case, the note of issue and statement of readiness were served prior to the completion of discovery. This court has previously recognized the need for broad disclosure in such cases (see Rubin v. Rubin, 87 A.D.2d 587, 447 N.Y.S.2d 762). Although the failure to complete discovery in a timely fashion was due to a conflict between the wife and her attorneys, which eventually resulted in the substitution of those attorneys by her present attorney, we exercise our discretion, in the interest of justice, to grant both parties 30 days in which to complete reciprocal discovery. The action shall remain on the trial calendar.

In *Kinney v. Kinney*,[32] an appeal was taken from an order which denied a motion to vacate a note of issue and strike the action from the calendar. The Appellate Division held that although it was clear that certain statements in the certificate of readiness were incorrect, the court did not abuse its discretion in denying the motion to strike the note of issue because it granted the movant reasonable time in which to further examine plaintiff. *Kinney*[33] stressed that a note of issue must be stricken once it is clear that statements contained in the certificate of readiness are incorrect (note that *Kinney* cites non-matrimonial cases as precedent):

> It is clear from a review of the record, however, that certain statements contained in the certificate of readiness are incorrect. As a general rule when a case is not ready for trial, contrary to the certificate of readiness, the note of issue must be stricken (see Polsinelli v. Hanover Insurance. Co., 62 A.D.2d 376, 405 N.Y.S.2d 781; Collins v. Jamestown Mut. Insurance. Co., 32 A.D.2d 725, 300 N.Y.S.2d 391). Special Term, however, in denying the motion, specifically granted defendant a reasonable time in which to examine plaintiff. Consequently, on this record, we find no prejudice to defendant and are unable to say that Special Term abused its discretion. There should be an affirmance.

In *Novaro v. Jomar Real Estate Corp.*,[34] the Appellate Division held that the plaintiff was not precluded from obtaining discovery by virtue of prior filing of note of issue and certificate of readiness. *Novaro* held that the "certificate of readiness was premature since some of these discovery requests were still outstanding."

> The IAS Court did not abuse its discretion in permitting further discovery under the circumstances of this case. Nor is the plaintiff precluded from obtaining discovery by virtue of his prior filing of a Note of Issue and Certificate of Readiness at an earlier stage of this action. When at that time the defendants successfully moved to strike that Note of Issue and Certificate of Readiness, it became a nullity. Since then, further discovery demands have been made by the parties, and the defendants' current filing of the instant Note of Issue and Certificate of Readiness was premature since some of these discovery requests were still outstanding.

Conclusion

In light of the firmly enunciated public policy favoring the disposition of divorce-related economic relief on the merits rather than on default, or any other procedural consideration, which could lead to unjust enrichment, it is eminently clear that courts are judicially encouraged and resoundingly directed to not permit procedural hurdles to overshadow a just disposition of the marital fisc. Accordingly, it should, therefore, also be of no moment if the note of issue sought to be struck was filed by the very party seeking its vacatur, pursuant to *Guastella v. Emma*,[35] because, as the Appellate Division emphasized in *Otto*, the trial court may examine the reasons behind the tardy request and fashion whatever remedy necessary around the reopening of the discovery so as to avoid abusive behavior.[36]

Endnotes

1. *Pajak v. Pajak*, 56 N.Y.2d 394, 396, 452 N.Y.S.2d 381 (1982); *Brady v. Brady*, 486 N.Y.S.2d 891, 64 N.Y.2d 339, 346 (1985); *Northrup v. Northrup*, 43 N.Y.2d 566, 572, 373 N.E.2d 1221, 1224, 402 N.Y.S.2d 997, 1000 (1978).
2. *Doe v. Smith*, 156 Misc. 2d 942, 943, 595 N.Y.S.2d 624, 625 (N.Y. Fam. Ct. 1993).
3. 156 Misc. 2d 942, 943, 595 N.Y.S.2d 624, 625 (N.Y. Fam. Ct. 1993).
4. 73 Misc. 2d 598, 599, 342 N.Y.S.2d 408, 410 (1973).
5. *Kaye v. Kaye*, 102 A.D.2d 682, 478 N.Y.S.2d 324 (1984).
6. 131 A.D.2d 453, 515 N.Y.S.2d 876 (2d Dep't 1987).
7. "It is settled that "[i]n a matrimonial action involving issues of equitable distribution of marital property, public policy clearly mandates full financial disclosure" *Charpentier v. Charpentier*, 114 A.D.2d 923, 495 N.Y.S.2d 89; *see* Domestic Relations Law § 236[B][4]; *Rubenstein v. Rubenstein*, 117 A.D.2d 593, 594, 497 N.Y.S.2d 950; *Hirschfeld v. Hirschfeld*, 114 A.D.2d 1006, 495 N.Y.S.2d 445, *aff'd*, 69 N.Y.2d 842, 514 N.Y.S.2d 704, 507 N.E.2d 297"; *Id.*

8. 150 A.D.2d 57, 58, 545 N.Y.S.2d 321, 322 (2d Dep't 1989).
9. *Id.* at 58.
10. 84 A.D.2d 799, 444 N.Y.S.2d 158 (2d Dep't 1981).
11. *Id.* at 799.
12. 107 Misc. 2d 675, 435 N.Y.S.2d 916 (1981).
13. *Otto v. Otto*, 150 A.D.2d 57, 63, 545 N.Y.S.2d 321, 325 (2d Dep't 1989).
14. D.R.L. § 236, pt. B, subds. 5, 6 & 7.
15. *Id.* at 67.
16. *Id.* at 67.
17. *See supra* note 1.
18. 131 A.D.2d 451, 451, 516 N.Y.S.2d 236, 237 (1987).
19. *Id.* at 451.
20. 140 A.D.2d 683, 684, 529 N.Y.S.2d 106, 107 (2d Dep't 1988).
21. 99 A.D.2d 794, 795, 472 N.Y.S.2d 124, 125 (1984).
22. __ N.Y.S.2d __, 2003 WL 21276446 (2d Dep't 2003).
23. 177 A.D.2d 788, 789, 576 N.Y.S.2d 399, 401 (1991).
24. 118 A.D.2d 679, 680, 500 N.Y.S.2d 31, 32 (2d Dep't 1986).
25. 110 A.D.2d 873, 488 N.Y.S.2d 725 (1985).
26. 160 A.D.2d 265, 553 N.Y.S.2d 705 (1st Dep't 1990).
27. 114 A.D.2d 923, 495 N.Y.S.2d 89, 90 (2d Dep't 1985).
28. *Id.*
29. 249 A.D.2d 735, 735, 673 N.Y.S.2d 746, 748 (3d Dep't 1998).
30. *See Carella v. Carella*, 97 A.D.2d 393, 467 N.Y.S.2d 214; *Gross v. Gross*, 83 A.D.2d 809, 442 N.Y.S.2d 8.
31. 100 A.D.2d 897, 897, 474 N.Y.S.2d 583, 584 (2d Dep't 1984).
32. 81 A.D.2d 942, 943, 439 N.Y.S.2d 512, 513 (3d Dep't 1981).
33. *Id.* at 943.
34. 156 A.D.2d 213, 213, 548 N.Y.S.2d 475, 476 (1st Dep't 1989).
35. __ N.Y.S.2d __, 2003 WL 21276446 (2d Dep't 2003).
36. *See supra* note 9.

The License, the Practice and the Wizard of Oz (Part I)

By Stuart A. Gellman

Remember Carnac? When Johnny Carson would don his all-knowing turban and Ed McMahon would sit there with a host of sealed envelopes? Johnny would place each sealed envelope to his turban, spout out the answer, and the envelope would then be opened to reveal the correct question. Well, let me provide one for the legal community to ponder. The answer: "The value of the license, the value of the practice and the Wizard of Oz." And the question: "Name three works of fiction, only one of which is entertaining."

The legal community has wrestled for some time with the concepts enumerated in *O'Brien*[1] some 18 years ago. This article is not meant to rehash what has been battered around time and again. Licenses, degrees and all matters relating to enhanced earnings have been characterized as marital assets, valued and distributed for years now, much to the dismay of legal practitioners and academicians alike. Even the editor of this publication has recently posed the question of whether it is time to reverse *O'Brien*.[2]

At the same time, going businesses have too been valued by valuation experts and have been similarly distributed for purposes of equitable distribution. One will note that outside of an aberrational valuation that flies in the face of the facts at hand, or perhaps emanates from an over-zealous evaluator, there has been little that has been written or has caused any furor when it comes to the valuation of the going business enterprise. It is only the valuations associated with those areas involving enhanced earnings that has caused consternation among courts, attorneys and clients alike, primarily because most consider those valuations to border upon and even exceed the outrageous, both in concept and amount.

It is the purpose of this article to cause us all to step back a moment, and give considerable thought to those variances of valuation methodologies which are existent when evaluating a business on the one hand and a license or degree on the other. As to these differences, which have wreaked havoc upon litigants, lawyers and courts alike, we will then digest those variances and attempt to explain why they are inappropriate, and ultimately, armed with the understanding of those variances, we will try and present a viable and hopefully practical solution to this perennial problem.

Initially, our discussion will revolve around the concepts utilized in the valuation of a going business enterprise. To begin with, let us start with a very basic but practical example. Most of us drive an automobile, which means most of us will, in turn, insure that automobile against collision loss. When faced with purchasing that insurance, a question that will be posed by our insurance agent is what deductible to elect, knowing that the higher the deductible, the more will be our out-of-pocket exposure should an accident occur and correspondingly lower our premium.

Let me provide you with an example. Let us assume that your collision insurance will cost $600 if you choose a $250 deductible and $500 if you choose a deductible that is $500. The question of course is which one would you select? To rephrase the question, were you to opt for the lower premium, with the corresponding greater risk, how long would it take for you to come out ahead? The answer, of course, would be two and one-half years. If you did in fact select the lower premium, and two and one-half years went by where you were not involved in any accident, you would save $250 in premiums over that period of time as contrasted to the higher insurance and the lower deductible. From that time forward, you would be ahead of the game. Were an accident to occur any time after two and one-half years for which you would incur collision liability, the extra amount of the deductible which you would have to pay ($250) would be less than the premium savings. Put another way, your investment would be returned to you in 2½ years. It is reasonable to assume that most individuals reading this article would acknowledge that any investment that could be returned to you in 2½ years would be worthy of your consideration.

Let us consider an additional example. Let us assume that the premium for the $250 deductible collision insurance still would cost $600 per year, but the $500 deductible would cost $595 per year rather than $500 as set forth in my previous example. Now if I was to ask which you would choose, the choice certainly becomes clearer. To opt for the lower premium, and therefore the higher deductible, it would now take 50 years to recoup your investment ($250 ÷ $5), clearly an unacceptable alternative.

So what do we learn from these examples? Most would agree that if we were to make an investment that returns our money in 2½ years, it would be extremely enticing. To wait for 50 years for that same return would be unacceptable. Between the 2½ and 50 lies an area that, as we compress the differences between these two numbers, will ultimately reach a zone where the choices will not be clear at all. But overriding all of this is the question one must ask before making any investment, or, if you will, purchasing a business, i.e., how long will it take for one to recoup his or her investment

so that beyond that time, the monies would totally belong to the investor.

Let us move to a separate but still relatively simplistic example. Let us assume that Harry, a plumber, is earning $50,000 per year. Across town we have Jack, who owns an established plumbing business, who makes $75,000 per year. Jack is interested in selling and Harry is interested in buying Jack's business. Forgetting for the moment whether Jack has any fixed assets for sale that go along with the business, let us just concentrate on the value of the goodwill of Jack's business, or if you will, the excess earnings. The question that Harry must ask is what figure represents the fair market value of Jack's business or goodwill. From Harry's perspective, he will ask two questions:

1. What is the likelihood that, were he to purchase Jack's business, the net income of $75,000 per year would continue at that level, at least for the immediate future?

2. Assuming a positive response to question #1, what would Harry be willing to pay for the right to earn $25,000 more per year (or, were we to follow the logic of the insurance premium example, how long, at the price Harry is willing to pay, will it take for him to receive back his investment)?

Let us move tangentially to valuation concepts generally in an attempt to answer the questions posed above. When the initial valuation cases arose under equitable distribution we read, time and again, that the courts utilized the concepts enumerated in Revenue Rulings 59-60 and 68-609.[3] Now with the passage of time, these same businesses are being valued utilizing concepts such as interest rates on 10-year Treasury bills, comparison of those interest rates to corporate bonds, the consideration of additional rates of return for greater risk (and less for risks not so great) and the modification of those rates to equities, and then impacting all of the above with premiums and discounts that relate to supposed marketability. With due respect to my colleagues and not to belittle the sophisticated methodologies they utilize when valuing businesses for purposes of equitable distribution, I would suggest for the most part that these methodologies have become unnecessarily complicated and do not equate themselves to the pragmatism of the real world. The typical purchaser of a business does not find a great need to know what the current rate of interest may be on the 10-year Treasury bond, nor are they so interested in defining, in quantitative terms, the upward or downward risks that they are willing to take. In reality, the purchaser of an average business seeks to know the additional income that he or she will garner from the purchase of that business, and knows, from their own business experience, as well as the experience of the marketplace, that they will expect to pay a certain multiple of those additional earnings. Excluding specific synergies which may be existent which can in turn make a business more valuable to a particular purchaser, the purchase of a business is based upon the earnings of that business, with the prospective purchaser then asking what the likelihood might be that those earnings will continue into the immediate future. As to the expected rate of return on that investment, the marketplace over the years has set forth, and purchasers as well as sellers have accepted, within reasonable parameters, rates of return that should be expected.

This article is not meant to serve as a treatise or commentary on the methodologies currently used to value business interests for purposes of equitable distribution. We leave that discussion for another date. For now, it is respectfully submitted by this writer that realistically, valuation is predicated upon the stream of earnings that the business will provide to the purchaser, regardless of whatever and however the valuation method might be. In simple terms, regardless of how you get there, businesses generally are purchased and sold at a multiple of excess earnings.

Let us return then to Harry and Jack. How much should Harry pay for the right to earn that additional $25,000 per year? If Harry were to feel that a figure of $75,000 would be fair, what is he in essence really saying? Firstly, he says that he is willing to give up the additional $25,000 per year that the business generates over and above his current income for a period of three years (to pay for the business) before he will enjoy the bounty of his purchase. He is also saying that he would like a 33-1/3% rate of return on his investment. (We are saying here that Harry's current earnings of $50,000 per year are reasonable and whatever more he earns from purchasing Jack's business comes from his investment, so $25,000 ÷ $75,000 = 33-1/3% return on his investment). If Harry were to agree to pay $250,000 for the right to earn the additional $25,000 per year, Harry is saying that he would be willing to give up that additional $25,000 per year for ten years before he would enjoy it all for himself. He further would be saying that he is willing to accept only a 10% rate of return on his investment ($25,000 ÷ $250,000). Again, without seeking the right answer, or at least acceptable parameters, regardless of what methodology your valuation expert may utilize, it still comes down to a multiple of excess earnings. History has dictated for some time now that non-listed, private businesses will sell at a multiple of excess earnings that generally will range between 1 and 6, with perhaps the majority being between 3 and 5. If the reader of this article will review recent cases, or even analyze the reports of their own experts, they will find that regardless of the methodology that their expert has utilized, if they equate the ultimate valuation determined as a multiple of excess earnings, it will

almost always be between the figures set forth immediately above. For our purposes here, it is not important what the specific multiple might be, but only what range may be considered acceptable. We are only interested, for the purpose of this discussion, in determining the low and high of these multiples, which we have set between 1 and 6. With knowing only little in regard to the valuation of businesses generally, the reader would probably agree, without necessary quantitative justification, that if Harry were to spend $75,000 for Jack's business, that would be a reasonable price to pay, and that paying $250,000 for that very same stream of earnings would probably be too high. However, as will be seen shortly, the exactness of these numbers is of little consequence. It is the concept that becomes primary in scope.

The above discussion was restricted to the valuation of a viable business interest, and set forth principles generally accepted by the practical, real world. Let us now attempt to analyze the valuation methodologies associated with any case that would involve enhanced earnings, where some attaining event has taken place during the marriage, i.e., the securing of a degree, license or certificate. It should be noted here that this discussion will not review whether or not this attainment, and its concomitant increase in earnings, should or should not be characterized as marital property. The courts have spoken loudly that it is, from inception when *O'Brien*[4] was decided and on to its many progeny. The legal community often thought that when the Court of Appeals ultimately reviewed the concepts initially expressed in *O'Brien*, upon reflection, it would alter the course of enhanced earnings cases, or at the very least, restrict the principle to selected fact patterns. In retrospect however, we all know that that was little more than wishful thinking on the part of the legal community, even perhaps semi-delusional. *O'Brien* has not only been reinforced, but remains the epicenter of enhanced earnings cases.[5] It has now been made very clear that courts will not be the vehicle to alter the concept of enhanced earnings as to whether or not this attainment is marital property. With that in mind, let us now address the valuation methodology utilized in these types of cases.

We are, of course, very familiar with the valuation methodology that has been utilized by the valuation experts and courts alike when enhanced earnings are involved. A calculation is made of the difference between the working, lifetime income that the attaining individual would earn as a result of the attainment, and what they would have earned during that same period of time as if there were no attainment, and then tax-impact that difference along with reducing that difference to present value based upon certain rates of interest.[6] Over the years, experts and courts have tweaked these valuation procedures, as well as the rates of interest which they have taken into consideration. They have further added a concept of possible disability. However, almost every case has continued with one facet that remains the core of the problem, and that is when valuing these enhanced earnings, a period of time is considered from the date of valuation (usually the date of commencement of the matrimonial action), and extended *to the end of his or her working life* (usually meaning until some date that, with selected variations, comes close to 65 years of age). It is here where the concept transforms itself, even to those who advocate this concept, to a state of incredulity. Valuations associated with enhanced earnings attainments have not only reached unrealistic levels, but they have created hardships on titleholder payors and have diluted the integrity of the entire concept of equitable distribution.

Michael O'Brien received his medical license when he was 36 years old. When Loretta O'Brien's expert valued that medical license, he considered all of Michael's projected increased earnings from that age to age 65, a period consisting of some 29 years. The furor that was created with *O'Brien* revolved around whether the attainment should or should not have become marital property in the first place, which furor remains to this day. One should remember that Dr. O'Brien never retained a valuation expert at all. The only expert testimony as to valuation was that given by Mrs. O'Brien's expert. To this day, many of the objectors to the *O'Brien* principle object to the concept that this attainment was characterized as marital property. There has not been, for the most part, serious objection made to the methodology utilized in *O'Brien*, and therein lies, in the eyes of this writer, the crux of the problem.

Let us revisit Harry the plumber. For those of you who would adopt the premises propounded by this author, you would agree that Jack's plumbing business was worth somewhere between 1 and 6 times the excess earnings of $25,000, or a value between $25,000 and $150,000. I would venture to say that most of you would probably agree that the example of ten times those earnings would have been an excessive amount to pay. But if I asked what your opinion might be if Harry had to pay Jack 29 times those excess earnings in order to purchase Jack's business, or $725,000, you would and should send Harry to his psychiatrist to have him committed. To put it differently, that would result in Harry working for a period of 29 years and giving up every dollar of excess earnings during that period of time before he was able to retain any of those dollars for himself. It would also mean that Harry would be receiving a rate of return of slightly more than 3% ($25,000 ÷ $725,000), a return that is ludicrous even when reflecting upon interest rates that are existent today, and which historically are at lifetime lows. And yet, that is exactly what the valuation experts in courts are testifying to today, what the courts are accepting, if not requiring, and that is what is in need of correction.

There should be little difference in concept between the valuation of a business interest on the one hand and the enhanced earnings attainment on the other. If a titled spouse were to commence a business during the course of the marriage and thereby create a stream of earnings within which to support his or her family, there would be little doubt that were there to be a dissolution of the marriage, the business would be characterized as marital property, would be valued utilizing concepts discussed earlier in this article, and the non-titled spouse in turn would receive an equitable share of the value of that business. If instead of starting a business, that same individual, during the course of the marriage, embarked upon the securing of a degree or license that also created an increased stream of earnings that would be utilized to support the family, upon dissolution of the marriage, this should also be considered marital property. Many practitioners having the experience of living and negotiating settlements under the umbrella of *O'Brien* might disagree with its conclusion, but there would be far less disagreement if the earnings attainment was valued similarly to that of the business as contrasted to what has actually evolved. It is respectfully suggested that the methodology of valuation may be the real issue at hand, and less so the concept of whether the attainment should be marital property or not. To put it more succinctly, there is no valid reason why the underlying concepts accepted by the real world and necessarily the marketplace in valuing going businesses should not be identical to the valuation attributable to any kind of enhanced earnings capacity. If Harry purchased Jack's business and that business might reasonably be valued at $75,000, if Jack found himself in the throes of a divorce, an evaluator could reasonably value that business at $75,000. That amount would be distributed equitably between Jack and his wife. Assuming that his wife received 50% of its value, or $37,500, the $25,000 of excess earnings earned by Jack over the next 1½ years would be distributed, in essence, to his wife as her distributable share of the value of that business. If Jack instead went to school and secured a degree which allowed him to earn an additional $25,000 per year, why, in the name of good common sense, should this be treated any differently than Jack's business? Why should a court in this instance ask Jack to pay his wife 50% of the excess earnings not for 1½ years, but perhaps for 10 or 20 years, depending on Jack's age and his remaining work life?

And so, with the problem having been expressed, we move now to the more difficult part, and that is how to arrive at a reasonable solution to the dichotomy at hand. Let us consider first what will not work. As set forth earlier, the legal community felt for sure that the Court of Appeals would relent when finally faced with the proverbial Pandora's box created by *O'Brien* over its then ten-year existence. However, when *McSparron*[7] came before the court for its consideration, as we well know, the court not only reaffirmed *O'Brien*, but enhanced it with even greater resolve. Any hope then of reversing the concepts of *O'Brien* as being marital property by the Court of Appeals, is, in the eyes of this writer, without the realm of probability.

In recent months, both the New York Chapter of the American Academy of Matrimonial Lawyers as well as the Executive Committee of the Family Law Section of the New York State Bar Association have discussed various ideas to eliminate *O'Brien* by legislative means. One of those ideas proffered was to consider enhanced earnings created during marriage as separate rather than marital property as a matter of law. However advisable these movements may be, one must realize that outside of the Bar itself, there is no clamor to reverse or eliminate *O'Brien*. The public-at-large has shown little outrage for its existence. Therefore, although this alternative certainly remains a possibility, again, in the eyes of this author, it does not rise to the heights of probability. There is, however, a realistic solution, one that this author believes to be more viable than the alternatives discussed above, and almost accidentally, an avenue that resolves many of the frailties associated with awards based upon enhanced earnings generally. That solution, and the ramifications associated with it, shall be discussed in Part II of this article, to appear in the next issue of the *Family Law Review*.

Endnotes

1. *Brien v. O'Brien*, 498 N.Y.S.2d 743 (Ct. App. 1985).
2. Notes and comment, "Is it Time to Reverse *O'Brien*?" by Elliot D. Samuelson, NYSBA Family Law Review, Vol. 34, No. 3, pp. 2-3.
3. Revenue Ruling 59-60, 1959-1 CB 237. Revenue Ruling 68-609, 1968-2 CB 327.
4. *O'Brien*, *supra* note 1.
5. *McSparron v. McSparron*, 639 N.Y.S.2d 265 (Ct. App. 1995); *Grunfeld v. Grunfeld*, 709 N.Y.S.2d 486 (Ct. App. 2000).
6. *McGowan v. McGowan*, 535 N.Y.S.2d 990 (A.D. 2d Dep't 1988) at 992.
7. *McSparron*, *supra* note 5.

Stuart A. Gellman is an accountant and attorney in Buffalo, New York, and an adjunct professor of law at the State University of New York at Buffalo, where he teaches a course entitled "The Financial Aspects of Matrimonial Law." He lectures frequently and is an author on issues involving the valuation of closely held corporations, professional practices and licenses, and testifies to same in equitable distribution cases.

Letter to the Editor

Dear Mr. Samuelson:

I wish to briefly respond to Michael P. Friedman's thoughtful article that appeared in the Spring/Summer 2003 issue of the *Family Law Review*. In the article Mr. Friedman discusses the recent Court of Appeals case of *Tompkins County Support Collection Unit on Behalf of Linda S. Chamberlin v. Boyd M. Chamberlin* (99 N.Y.2d 328, decided on February 13, 2003) and the potential impact same has on parents' rights to enter into child support agreements. I wish to address several points made by the author.

First, the underlying legislation that was basically upheld in *Chamberlin* (section 413-a of the Family Court Act, which authorizes cost-of-living adjustments, commonly COLA, to child support Orders by the Support Collection Units) is not new and did not appear unannounced. The legislation was effective on January 1, 1998. The legislation and its potential effects was debated by various groups, including the Office of Court Administration's Family Court Advisory and Rules Committee and, I suspect, the Family Law Section of the New York State Bar Association. Moreover, this legislation was presaged by legislation commonly known as "Review and Adjustment" in the early '90s. Thus, the theory (and practice) of a mechanistic modification of child support Orders has been around for some time.

Secondly, even if family law practitioners were aware of the pendency of the COLA legislation at that time and raised the "hue and cry," it is unlikely that COLA could have been averted. COLA and its predecessor were legislated because of federal mandate. All states were required to legislate mechanisms for periodic "adjustment" of child support obligations in order to bring them up to the percentages mandated by the states or face monetary penalties. That was the purpose of the "Review and Adjustment" legislation, which would still be with us if its mechanics were not so unwieldy. COLA lends itself more easily to a computerized approach, thus allowing mass "adjustments" to be easily done.

One difficulty with the COLA legislation is the rather surreptitious way in which it was drafted and reads. It looks and smells like an innocuous cost-of-living adjustment, one that your great aunt might get periodically in her Social Security check (and who can argue with that?), but upon closer look it demonstrates itself as what Mr. Friedman calls a way "to get a new child support in derogation of a valid Child Support Standards Act agreement or showing of *Boden/Brescia* standards."

So, now we have COLA. As Mr. Friedman queries, "What's a matrimonial lawyer to do?" One suggestion Mr. Friedman made is to have the custodial party waive the right to seek support collection services. Not a bad idea. However, I think the local support agencies will and must accept an application from a custodial parent no matter what an agreement says. Also, I suspect that such an agreement may run afoul of the federal child support statutes and state public policy concerns.

Further, it was suggested that agreements might be crafted to force the custodial parent to "pay back" support as a distributive award if the custodial parent ultimately sought support services and received a *de novo* support Order, contrary to what was set forth in the agreement. I would be wary of this potential solution, though. This, too, raises public policy issues; and the courts are traditionally reluctant to order return of monies overpaid.

So, "What's a matrimonial lawyer to do?" Maybe, when the matrimonial lawyer works through the matrimonial, he or she should just advise the non-custodial parent to pay guidelines, thus removing that issue from the matrimonial negotiating menu. Or maybe counsel shouldn't give too much up in exchange for a break in the child support obligation, just in case the COLA mechanism is later sought (incidentally, a letter advising the client of the possibility of COLA at a future date might not be a bad thing for the malpractice carrier to find in the file).

Let me suggest another approach. The statute says that upon the filing of an Objection to the COLA, the Hearing Examiner (now Governor Pataki has made us "Support Magistrates"!) has two options. The first is to issue a new Order in accordance with the Child Support Standards Act (that is, ignore the parties' agreement). The second option, though, is to issue an Order of *no adjustment* if "where application of the child support standards . . . results in a determination that no adjustment is appropriate." Wouldn't the fact that the parties worked out an extensive and integrated agreement in the context of an involved matrimonial with many *quid pro quo*s (including the amount of the child support) give reason to argue that an Order of *no adjustment* is appropriate? Isn't that the argument (perhaps laced with constitutional "right to contract" language) that should be made and then re-made on appeal if rejected? I

submit to you that most Support Magistrates have experience and background in matrimonial law. We know what it takes to work out an agreement, we are aware of the give and take involved, and we understand the sanctity of the finished product, both in present and historical context. Moreover, most Support Magistrates, I submit, are uncomfortable with legislation that takes away in, a back-door way, their authority to hear and decide a traditional modification case and will listen to creative presentations that experienced counsel such as Mr. Friedman might make.

One more thing. I suspect that COLA is not the end of federally driven initiatives (and those not driven by the Feds) in the child support area. Every year seems to bring something new and exciting. As practitioners in the child support courts it is incumbent on us to stay ahead of these new initiatives (via our NYSBA Family Law Section, our local bar associations, OCA's Family Court Advisory and Rules Committee, and wherever else we get information) and make our voices heard. Even if the legislators are going to give us COLA and other child support adventures anyway, they should know that we are an informed, experienced and caring group of practitioners.

Sincerely,

John J. Aman, Esq.

Support Magistrate
Family Court, Erie County

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.*, Fall/Winter 2003) 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.

***Amy L. C. v. Bruce C.*, Supreme Court, Monroe County (Lunn, Robert J., November 21, 2001)**

Attorney for Plaintiff:	Maureen A. Pineau, Esq. 1411 Chili Avenue P.O. Box 10687 Rochester, New York 14624
Attorney for Defendant:	Sharon Kelly Sayers, Esq. 30 West Broad Street Suite 506 Rochester, New York 14614
Law Guardian:	Margaret A. Schiano, Esq. of Counsel Panzarella & Coia 1411 Chili Avenue, Suite 100 Rochester, New York 14624

This is an action for absolute divorce commenced by plaintiff, Amy L. C., against defendant, Bruce C. The trial was held before this Court on the following dates: August 13th, 14th and 15th, and 21st, 2001. The plaintiff was represented by Maureen A Pineau, Esq. The defendant was represented by Sharon K. Sayers, Esq. Margaret A. Schiano, Esq. was the duly appointed law guardian, who made a written recommendation to the Court following the close of proofs. The law guardian report is dated September 12, 2001. Proposed findings and final submissions from counsel were received through September 13, 2001. The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received. The Court has further had an opportunity to observe the demeanor of the various witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court now makes the following findings of fact and conclusions of law:

I. Findings of Fact

A. Grounds:

1. The parties were married on September 7, 1996, in Amherst, New York.
2. The action was commenced on January 25, 2001.
3. The plaintiff is presently 31 years old, born on January 5, 1970. The defendant is 34 years old, born on October 24, 1967. Both parties appear to be in good health and capable of full employment without restriction. Both parties are found to be self-supporting. The plaintiff was employed as an engineer at Alliance, Inc. with earning capacity of approximately $64,000 per annum. Defendant is employed as an engineer at Siewart Equipment with earning capacity of approximately $67,000 per annum.
4. There is one child of the marriage, to wit, J., age 2, born May 3, 1999.
5. At the time of the commencement of this action, both plaintiff and defendant were residents of the State of New York, and both had continuously resided in the State of New York for a period in excess of one (1) year. Neither the plaintiff nor the defendant are in the military service of the United States, and there is no judgment or decree of divorce, separation or annulment granted with respect to this marriage by this Court or any other court of competent jurisdiction. No other actions are pending at the present time.
6. The parties continue to reside together with their child, J., at 127 B. Road, Honeoye Falls, New York. This is the marital residence which was purchased on April 1, 1997.
7. Plaintiff brought this divorce action upon the grounds of cruel and inhuman treatment. The action was vigorously defended by the defendant over several days of trial.
8. From the date of marriage, and through August 2000, the parties lived together without significant dissension or discord. Plaintiff and defendant equitably divided marital chores with the husband working primarily outside the marital residence and the wife working primarily inside. Each helped the other from time to time with their respective tasks. For example, the wife assisted in planting trees and other outside work. The husband cooked, did after-meal cleanups, and some household cleaning. The parties shared the household finances and the responsibility of bill paying. They maintained retirement accounts, an investment account and established a college fund for their son. The defendant managed the accounts in

the months immediately preceding the advent of marital discord.

9. At no time prior to the sudden deterioration of the marriage relationship did the plaintiff complain about the manner in which the finances were managed, or the way in which the money was spent. In fact, the proof at trial established that the parties lived within their budget, took vacations, and easily afforded the purchases they chose to make while saving for their future and their child's education.

10. There was absolutely no evidence of physical violence by defendant toward the plaintiff or in her immediate vicinity. At best, the proof established that on one isolated occasion, the plaintiff observed her husband outside the marital residence engaged in a "one on one" altercation with the parties' push lawnmower. She observed him throw the lawnmower in apparent frustration. According to the defendant's testimony, the lawnmower was a "mismatch" for their rather large lawn. Although plaintiff testified that this incident made her nervous, she immediately went outside the residence and engaged the defendant in conversation suggesting they go purchase a riding mower at Sears. On another occasion, the defendant became frustrated with a set of blinds and a closet door in one of the bedrooms of the marital residence. Defendant apparently ripped the blinds down and left them on the floor. He later replaced them. Plaintiff was not present in the room at the time. The remainder of the testimony consisted essentially of recounting the parties constant arguing about parenting issues, finances, and joint decision making. Plaintiff complained that nothing she did was ever good enough for her husband and that she was the target of chronic criticism by him. Plaintiff testified that she was often given the "silent treatment" by defendant following arguments. The parties ultimately settled into a pattern of poor communication and ceased having sexual relations. In August 2000, the proof established that the husband actively tried to rehabilitate the relationship by offering to give up all his outdoor hobbies, including camping, hunting and fishing in order to spend more time at home. In addition, he sent multiple affectionate e-mails to her. He wrote dozens of "love notes" to her and placed them in such places as her day planner, laptop computer, and purse. On September 7, 2000, defendant brought her flowers. The efforts were unavailing. Plaintiff related that her feelings had changed and she didn't feel the relationship would work; that "she needed space." At or about this same point in time (fall of 2000), the proof established that plaintiff began an intimate and romantic relationship with a work colleague by the name of Michael H. Mr. H. testified at trial. He acknowledged exchanging numerous e-mails with plaintiff on a daily basis and sending her a series of romantic cards with handwritten love notes. Both Mr. H. and plaintiff admitted that they had engaged in sexual relations at the marital residence on June 2, 2001.

11. The evidence establishes at best only strained relations and incompatibility which are insufficient as a matter of law to sustain a divorce upon the grounds of cruel and inhuman treatment. *Matthews v. Matthews,* 238 A.D.2d 926 (4th Dep't 1997); *Green v. Green,* 127 A.D.2d 983 (4th Dep't 1987). Whether the third party relationship between Mr. H. and plaintiff precipitated the marital discord or the converse is largely irrelevant. Under either scenario, the proof fails to establish grounds sufficient to grant a divorce upon the grounds of cruel and inhuman treatment. *See also*, *Gulisano v. Gulisano*, 214 A.D. 999 (4th Dep't 1995). (Numerous arguments, apathy, lack of communication, and where husband struck a couch and a door with his fist causing wife to fear for safety does not constitute cruel and inhuman treatment). No medical proof was presented to establish that defendant's conduct adversely affected plaintiff's health. *Gulisano, supra.* Plaintiff is on no medications other than birth control.

12. While the Court recognizes this is a relatively short-term marriage, there is nonetheless a minimum threshold of proof which must be met to raise such conduct above a finding of incompatibility or irreconcilable differences. The State of New York remains a fault ground jurisdiction and until the legislature amends or modifies Section 170(1) of the Domestic Relations Law, the Court declines to lower the legal standard necessary to plead and prove a divorce upon the grounds of cruel and inhuman treatment.

B. Custody and Child Support:

13. An equally contentious issue during the course of this matrimonial proceeding and trial was the issue of custody. There is, as previously noted, one child of this marriage, J. C., born May 3, 1999. The child is in good health with no identifiable special needs.

14. In all child custody determinations, the best interests of the child remain the absolute, paramount consideration of the Court. *Friderwitzer v. Friderwitzer,* 55 N.Y.2d 89 (1982); *Eschbach v. Eschbach,* 56 N.Y.2d 167 (1982). The testimony at trial established, and the Court finds, that during the child's early years and through the date of trial, both par-

ents were extensively involved in the nurturing and care of their child, J. Both plaintiff and defendant care very deeply for their child.

15. Both parties enjoy an extended family who remain involved in the child's life. Plaintiff was raised in the Jewish faith. Defendant was raised in the Christian faith. Neither party practiced their religion with any degree of intensity. There had always been an agreement between them to expose their child to both faiths and to celebrate their respective major religious holidays, their son to make a choice of religious affiliation upon reaching the age of majority.

16. Joint custody is clearly not an option for the Court in this case. Joint custody is primarily encouraged "as a *voluntary* alternative for relatively stable, amicable parents behaving in a mature civilized fashion." *Braiman v. Braiman*, 44 N.Y.2d 584 (1978) (emphasis added). It necessarily pre-supposes a civilized level of communication and discourse which would allow both parents to engage in the decision making process for the benefit of their child. Joint custody should not be judicially imposed on embattled parents who appear either unable or unwilling to put aside their differences in making decisions relating to their children. *Matter of Buffy E. v. Lance C.*, 643 N.Y.S.2d 280 (4th Dep't 1996). There is nothing in this record to suggest that these parties are even minimally capable of making joint decisions with respect to their child, notwithstanding this Court's finding that both parties are otherwise fit and loving parents who care a great deal for their son.

17. Both parents have the ability to provide for the child's emotional and intellectual development. Both parents are able to provide a quality home environment and give appropriate parental guidance, and stability to their child. *See Milton v. Dennis*, 96 A.D.2d 628 (3d Dep't 1983); *Cornelius C. v. Linda C.*, 123 A.D.2d 536 (1st Dep't 1986).

18. The Court concurs with the findings and recommendation of the law guardian to award sole custody to the defendant, father. Defendant testified at trial that he was fearful his wife would be overly controlling and attempt to shut him out of the decision making process in the upbringing of their son; that he was equally fearful that his wife would accept absolutely no input from him with respect to major decisions affecting their son. The evidence at trial supports that conclusion. The Court finds that the defendant is more likely to involve plaintiff in these decisions and related issues and to remain flexible if he is awarded sole custody. Likewise, the Court finds that defendant is more likely to actively support the relationship between J. and his mother than the converse arrangement. It is significant that the plaintiff in her testimony found considerable fault with the defendant's ability to parent their child, but made no such complaints during the early months of shared parenthood. Plaintiff continues to retain intense residual anger toward defendant, which in the Court's opinion, adversely affects her parenting skills and the ability to promote a healthy relationship between their son and the defendant. This includes the finding by the law guardian that plaintiff used corporal punishment with respect to J. and was more inclined to yell and scream while disciplining their child. The evidence at trial supports that finding. In addition, plaintiff engaged in frequent loud outbursts of profane name calling directed toward defendant in the presence of the child.

19. The Court finds that the best interests of the child will be served by awarding sole custody to the defendant with liberal rights of visitation as hereinafter set forth to the plaintiff.

20. The award of child support is made in accordance with Domestic Relations Law § 240(1-b) and is based upon the following findings:

    (a) The child of the marriage entitled to receive parental support is J.C., age 2, born May 3, 1999.

    (b) The gross income of the plaintiff who is the non-custodial parent is $64,000 per annum per year. Social Security and Medicare taxes are 7.65% of gross income.

    (c) The gross income of the defendant who is the custodial parent is $67,000 per year. Social Security and Medicare taxes are 7.65% of gross income.

    (d) The applicable child support percentage is 17%.

    (e) The basic child support obligation of the first $80,000 of combined parental income is $261.54 per week. There is no evidence in the record sufficient to support a finding as to the actual needs of the child to permit this Court to award child support based upon combined parental income in excess of $80,000. *See*, *Matter of Dower v. Niewiadowski*, 233 A.D. 847 (4th Dep't 1997). Plaintiff's basic child support obligation is the same percentage as each parties' income is to the combined parental income. DRL § 240,1-b(c)(2) which on this record is 49%.

(f) The non-custodial parent's pro rata share of the basic child support obligation is calculated as follows:

(i) 49% of $261.54 or $128.15 per week;

(ii) 49% of future reasonable health care expenses not covered by insurance.

(iii) 49% of all reasonable and necessary child care expenses incurred as a result of defendant's employment.

(iv) 49% of medical insurance expense for the child.

(g) The non-custodial parent's pro rata share of the basic child support obligation is neither unjust nor inappropriate. This award is made without prejudice to defendant making the requisite showing in either Family Court or Supreme Court to support an award of child support above the first $80,000 of combined parental income.

C. Defendant and Plaintiff's Application for Counsel Fees:

21. The Court finds both parties to have adequate and sufficient financial resources to pay their own counsel fees.

II. Conclusions of Law

A. That jurisdiction as required by § 230 of the Domestic Relations Law has been obtained and the requirements of Domestic Relations Law have been met.

B. The Plaintiff has failed to prove legally sufficient grounds for divorce upon the grounds of cruel and inhuman treatment. DRL § 240(1). Plaintiff's action for divorce is dismissed and judgment for divorce denied.

C. The Court finds that the best interests of the child will be served by awarding sole custody to the defendant with liberal rights of visitation as hereinafter set forth to the plaintiff.

D. Plaintiff shall pay child support to the defendant in the amount of $128.15 per week, plus 49% of future reasonable health care expenses not covered by insurance, plus 49% of all reasonable and necessary child care expenses incurred as a result of defendant's employment, plus 49% of any medical insurance expense for the child. Pursuant to DRL § 240(2)(b)(2), child support shall be paid by income deduction order through the New York State Office of Temporary and Disability Assistance, P.O. Box 15365, Albany, New York 12212-5365. The parties have continued to cohabit in the marital residence and have shared expenses. Child support shall therefore commence December 1, 2001 with no retroactive support owed by plaintiff to defendant.

E. Defendant is awarded exclusive use and occupancy of the marital residence and shall be responsible for all payments, expenses, and carrying charges of the marital residence during his period of occupancy. Plaintiff shall vacate the marital residence within thirty (30) days from the date of this decision. The award of exclusive use and occupancy to defendant is made notwithstanding the judgment dismissing the complaint. DRL § 234; *DeCillis v. DeCillis*, 157 A.D.2d 822 (2nd Dep't 1990). The Court concludes that an award of exclusive use and occupancy to defendant is in the best interest of the child.

F. Plaintiff shall be granted liberal visitation with the child, J., upon mutual agreement of the parties, but not less than the following periods of time:

1. Alternate weekends from Friday at 5:00 p.m. through Sunday at 8:00 p.m.

2. During the week immediately prior to plaintiff's weekend visitation, one weekday to be agreed upon by the parties with due regard to their respective work schedules and the schedule of the child. This weekday visit shall commence immediately following plaintiff's work day until the commencement of day care or school for J. the following morning.

3. During the week immediately preceding a non-weekend visitation, plaintiff shall have two weekdays as agreed upon by the parties with due regard to their respective work schedules and the schedule of the child. The visitation for the two weekdays shall commence immediately following plaintiff's work day until 8:00 p.m.

4. Plaintiff shall have four (4) weeks (not more than two (2) weeks consecutively) visitation during the summer months and shall notify defendant not later than May 1st of each year as to which weeks she has selected.

5. The parties shall alternate major secular holidays, being defined as New Years Day, Memorial Day, 4th of July, Labor Day and Thanksgiving. Each party shall celebrate their own respective religious holidays with the child. Plaintiff shall have the child for New Years Day 2002 and commence alternating the above holidays thereafter.

6. Holiday visitation shall take priority over other regular scheduled visitation.

7. Summer visitation period shall not be scheduled so as to interfere with the other party's scheduled holidays.

8. The plaintiff shall have the child on each and every Mother's Day and the defendant shall have the child on each and every Father's Day. Plaintiff shall have the child on her birthday. Defendant shall have the child on his birthday.

9. Plaintiff and defendant shall alternate the February/Winter school recess and the Spring/Easter school recess upon their child reaching school age. Plaintiff shall be entitled to the February/Winter recess in the even numbered years and defendant in the odd numbered years. Defendant shall be entitled to the Spring/Easter recess with the child in the even numbered years and plaintiff shall have the child in the odd numbered years.

10. The parties shall share time with the child on the child's actual birthday.

11. Such other and further periods of time as the parties may mutually agree upon.

G. Plaintiff shall be provided reasonable access to all of the child's health, dental and education records.

H. Plaintiff and defendant shall each have continuous reasonable telephone access to the child while with the other parent.

I. The parties shall alternate their child as a dependency exemption for federal and state income tax purposes. Defendant shall be entitled to claim head of household filing status. Both parties shall fully cooperate with the other by executing all necessary papers and forms to permit the filing of the exemption, including without limitation IRS Form 8332. Plaintiff shall be entitled to claim J. for the tax year 2001.

J. Neither party is entitled to an award of maintenance as against the other.

K. Defendant shall maintain a minimum of $100,000 life insurance on his life naming the child as irrevocable beneficiary until the child is emancipated. Plaintiff shall maintain a minimum of $100,000 life insurance on her life naming the child as irrevocable beneficiary until the child is emancipated.

L. Each party shall be solely responsible for their own counsel fees.

M. The law guardian, Margaret Schiano, Esq., shall be compensated by the parties for legal services rendered on behalf of the child. The law guardian shall submit an affirmation of services upon notice to plaintiff's defendant's counsel. The Court shall thereafter fix the award and allocate payment between plaintiff and defendant.

This constitutes the decision and order of the Court. Let Judgment enter accordingly.

* * *

*In the Matter of *Rachel S., Martin S. v. Annette R.*, Family Court, Kings County (Karopkin, Martin G., July 17, 2003)

Attorney for Petitioners:	Kenneth Kanfer, Esq. of Counsel Snitow, Kanfer, Holtzer & Millus, LLP 575 Lexington Avenue New York, New York 10022
Attorney for Respondent:	Barry R. Bondorowsky, Esq. 26 Court Street Brooklyn, New York 11242
Law Guardian:	Carol Sherman, Esq. Children's Law Center 44 Court Street Brooklyn, New York 11201

Petitioners filed a petition by order to show cause on June 11, 2002, seeking grandparent visitation pursuant to DRL § 72. Respondent moves to dismiss the petition on the grounds that the operative portion of DRL § 72 is unconstitutional in light of the United States Supreme Court decision in *Troxel v. Granville*, 530 U.S. 57 (2000) and therefore the petitioner grandparents lack standing to bring the instant petition.

The petitioners are the paternal grandparents of the subject child who was born on September 13, 1990. The father is deceased having died on September 15, 2002. The child resides with the respondent mother. The child's parents were never married to each other.

Domestic Relations Law § 72 provides in pertinent part that:

> Where either or both parents of a minor child, residing within this state is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply . . . to the family court pursuant to subdivision (b) of section six hundred fifty one of the family court act; and on the return

> date thereof, the court, by order, after due notice to the parent . . . may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents [in] respect to such child.

The issue of the constitutionality of DRL § 72 has come before the Appellate Division Second Department in a slightly different context in the case of *Hertz v. Hertz*, 291 A.D.2d 91 (2002). There the Appellate Division reversed a finding by the trial court that the *Troxel* decision rendered DRL § 72 unconstitutional. Despite that ruling, respondent urges this court to distinguish the instant case and find the statute, as applied, unconstitutional. Respondent's principle argument is that under the statute when one parent dies both sets of grandparents are given standing to move for visitation. Respondent argues that while it might make sense to give the parents of the deceased standing, it makes no sense to give both sets of grandparents automatic standing. Respondent contends that, as a result, this is the kind of sweepingly broad statute held unconstitutional in *Troxel*.

While this court disagrees with the assertion that such an interpretation of the statute renders it "sweepingly broad," the argument raises a more fundamental issue that needs to be addressed and that is the meaning of *Troxel*. The Supreme Court's decision in *Troxel* was accompanied by two separate concurring opinions and three separate dissenting opinions. Some of the discussions among the justices highlight the issue before this court. Before the United States Supreme Court was a Washington State statute which allowed anyone to apply for visitation and set only the best interest of the child as the criteria for determining if visitation should be ordered. The Supreme Court of Washington, that state's highest court, relying on the Federal Constitution held that the statute unconstitutionally infringed on the fundamental rights of parents to raise their child. The United States Supreme Court affirmed the Washington Supreme Court, but on narrower grounds; ". . . we rest our decision on the sweeping breadth of [the statute] *and the application of that broad unlimited power in this case,* (emphasis added) we do not consider the primary constitutional question passed on by the Washington Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Troxel supra*, 73.

In the majority decision the Court takes note of the proliferation of nonparental visitation statutes throughout the nation and attributes it to the realities of the changing nature of the American family. Moreover, the Court recognized that such statutes are a necessary part of American life. *Troxel*, *supra*, 64.

In his dissenting opinion Justice Stevens observes that the author of the majority decision, "Justice O'Connor would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. This is undoubtedly correct as Justice O'Connor notes that "[W]e do not, and need not, define today the precise scope of the parental due process right in the visitation context . . . the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are at best 'elaborated with care.'" Noting that all 50 States have statutes that provide for grandparent visitation; Justice O'Connor further notes that "we would be hesitant to hold that specific nonparental statutes violate the Due Process Clause as a *per se* matter." *Troxel*, *supra*, 73.

In holding the statute unconstitutional the Washington Supreme Court turned to the state legislature to draft a better statute. In a manner of speaking, the United States Supreme Court turned to the Washington Court and noted that it could have found the statute constitutional had it given the statute a narrower interpretation. This is in fact what the Appellate Division Second Department did when it held that Domestic Relations Law § 72 can and has been interpreted to accord deference to a parent's decision, although the statute itself does not require such deference. *Hertz*, *supra*, 94.

Troxel can be most misleading. It is a case which invalidated a nonparental visitation statute and therefore might seem to undermine the validity of grandparent visitation. However, a careful reading of the case leads to quite the opposite conclusion. The four justices who joined in the majority opinion implied that such a statute could be valid, if validly applied; the three dissenting justices explicitly held that such a statute could be valid and neither dissenting opinion ruled out that possibility. There is every reason to believe that a properly applied nonparental visitation statute would meet with the Supreme Court's approval. What *Troxel* clearly does tell us is that to meet constitutional muster a nonparent visitation statute must be applied in a manner that recognizes the presumption that fit parents act in the best interest of their children and that the court must accord some special weight to the parents' own determination of their child's best interest.

Accordingly, this court finds that DRL § 72 properly affords the petitioner grandparents standing to bring a visitation petition. Respondent's motion is denied.

Motion denied.
So Ordered.
Notify Attorneys.

***NAMES CHANGED TO PROTECT THE CONFIDENTIALITY OF THE PARTIES**

This decision has been edited for publication.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

Jobs and Growth Tax Relief Reconciliation Act

On May 28, 2003, the federal government enacted the Jobs and Growth Tax Relief Reconciliation Act, which is retroactive to January 1, 2003. The changes will significantly affect clients who are going through a divorce.

The marginal tax brackets were reduced as follows: 27% to 25%, 30% to 28%, 35% to 33%, and 38.6% to 35%. Since clients who receive maintenance are required to pay quarterly estimated taxes, and since they may have overpaid in the first two quarters, they may be required to pay substantially less for their third and fourth quarter installments.

The child tax credit of $600 was increased to $1,000. Therefore, a matrimonial attorney negotiating a settlement agreement will want to consider the importance of the new legislation and the tax impact to his client.

The marriage tax penalty is reduced for 2003 and 2004 only. Joint filers can take the basic standard deduction for twice that of a single taxpayer.

Alternative minimum tax exemption amount is increased to $58,000 for married taxpayers, and to $40,250 for unmarried taxpayers.

The lowering of tax rates and expansion of tax brackets increases cash flow and will affect the division of assets, the structuring of child and spousal support, and the claiming of dependency exemptions.

Same-Sex Marriages

In Ontario, Canada, the Court of Appeals held that it is unconstitutional to prohibit same-sex marriages, which ruling has caused many gay Americans to cross the border to legalize their union.

Vermont is the only state in America that allows same-sex marriages pursuant to Vt. Stat. Ann. Tit. 15, Sec. 1201, et seq., regardless of the parties' residency. When the parties return to their home state, and thereafter wish to divorce, they may find that the state where they reside will not recognize their marriage and therefore will not take jurisdiction over their case. Therefore, in order to divorce, one or both of the parties may have to move to Vermont for a year in order for Vermont to have jurisdiction over the marriage.

Survivor of Vermont Same-Sex Civil Union May Pursue Wrongful Death Action as a Spouse in New York

***Langan v. St. Vincent's Hospital of NY*, N.Y.L.J., Apr. 15, 2003, p. 23, col. 3 (New York Co., J. Dunne)**

A gay couple married in Vermont under the state's same-sex civil union laws. The couple moved to New York, where the partner died after having been treated in the hospital for a broken leg after being hit by a car. After the spouse initiated a wrongful death suit, the trial court found that, under the principles of full faith and credit, New York was obligated to recognize Vermont's same-sex union laws for the limited purpose of determining that the plaintiff was a "spouse" under the wrongful death statute. The court reasoned that New York had not adopted a state version of the federal Defense of Marriage Act (DOMA), 1 U.S.C.S. § 7; 28 U.S.C.S. § 1738C, which in response to Vermont's civil union statute, declares that a marriage is a union between a man and a woman, and that no state shall be required to give effect to a same-sex union.

The court pointed out that New York public policy does not preclude recognition of a same-sex union entered into in a sister state, and listed many examples. Under New York law as it now stands, if the plaintiff were a registered domestic partner, he would be able to succeed to a rent-controlled apartment as a "family member," see *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201, 211, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989); he would be able to recover had his partner been lost in the September 11 tragedy, see New York City, N.Y., Local Law No. 24 Int. 114-A (2002); he would be eligible for the derivative employment benefits of a city or state employed partner, including death benefits, see *Slattery v. City of New York*, 266 A.D.2d 24, 697 N.Y.S.2d 603, *appeal dismissed*, 94 N.Y.2d 897, 727 N.E.2d 1253, 706 N.Y.S.2d 699; New York City Administrative Code § 3-244; he would be eligible to adopt his partner's biological child, see *In re Jacob*, 86 N.Y.2d 651, 668, 636 N.Y.S.2d 716, 660 N.E.2d 397; and he would be entitled to be free from discrimination on the basis of sexual orientation under the civil rights and executive law, see New York State amended Civil Rights Law § 40-c regarding equal protection to prohibit discrimination on the basis of sexual orientation (Laws of 2002, Ch. 2, § 15), and Executive Law § 291 to prohibit discrimination in employment, education and housing accommodations (Laws of 2002, Ch. 2, § 2).

A same-sex partner would not, however, be able to recover as a spouse under the wrongful death statute based upon the holding of *Raum v. Restaurant Assoc*., 252 A.D.2d 369, 675 N.Y.S.2d 343 (1998), *appeal dismissed*, 2 N.Y.2d 946, 704 N.E.2d 229, 681 N.Y.S.2d 476 (1998). At the time *Raum* was decided however, there was no state-sanctioned union equivalent to marriage, and therefore, the passage of the Vermont civil union statute provided a basis to distinguish *Raum*.

Amendments to C.P.L.R. Discovery

Effective September 1, 2003, C.P.L.R. 2305(b), 3120, 3122 have been amended and C.P.L.R. 3122-a has been added regarding document production from a non-party. Below is a summary of these sections, and the practitioner is cautioned to read the specific statutes in their entirety.

C.P.L.R. 2305(b): Subpoena duces tecum; attendance by substitute

A subpoena duces tecum may be joined with a subpoena to testify at a trial, hearing or examination or may be issued separately.

This eliminates the requirement that, in the absence of a non-party deposition, a party must obtain a court order before being permitted to take discovery and inspection of non-party documents or things. A subpoena duces tecum is now sufficient. The attorney will no longer need to continue a longstanding but unauthorized practice of serving the non-party with a subpoena for a deposition and sending an informal suggestion that the witness can avoid appearing at the deposition by mailing copies of the documents to the attorney prior to the deposition.

C.P.L.R. 3122: Objection to disclosure, inspection or examination; compliance.

The rule is amended to include objections to, not just a notice for discovery and inspection, but also a subpoena duces tecum. A non-party, rather than making a motion to quash, may now make written objections, and place the burden on the requesting party to make a motion to compel disclosure.

In addition, a subpoena duces tecum requesting the production of a patient's medical records must be accompanied by a written authorization by the patient, otherwise, the doctor does not have to respond or object.

Also, if the subpoena duces tecum does not specify the production of original documents, it is sufficient that the custodian of record deliver copies. The party seeking discovery must pay for the reasonable production expenses of the non-party witness.

C.P.L.R. 3122-a: Certification of business records

The purpose of this new rule is intended to simplify the methods of obtaining discovery of documents such as routine business records from non-party witnesses and procuring their admission into evidence. For example, if your client requires the credit card statements of the opposing party, the custodian of the records will not be required to appear at the trial with the records if they provide a certification and if there are no objections to same.

Business records produced pursuant to a subpoena duces tecum under 3120 must be accompanied by a certification in affidavit form by the custodian of the records that, *inter alia*, the records or copies are accurate versions of the documents described in the subpoena duces tecum, that they represent all of the documents requested, or an explanation of which documents are missing and a reason for their absence; that they were made in the regular course of business and that it was the regular course of business to make such records.

A party intending to offer business records authenticated by certification at trial or hearing shall give 30 days notice of such intent and specify the place where such records may be inspected. No later than 10 days before the trial or hearing, a party may object to the offer of business records by certification stating the grounds for such objection. If there is no objection, then the document that is certified satisfies the requirements of C.P.L.R. 4518a.

New Court Fees Legislation

C.P.L.R. 8020(a) was amended to raise filing fees in Supreme and County courts, effective July 14, 2003. The increases are as follows:

Type	Was	Is
Index Number	$185	$210
RJI	$75	$95
Note of issue	$100	$125 (where no RJI filed)
Note of issue	$25	$30 (where RJI has been filed)
Demand for jury	$50	$65
Notice of appeal	$50	$65
Motions	$0	$45

These fees are to be paid to the county clerk's office in advance of filing. Only the Supreme and County courts are required to collect the motion fee, whereas Surrogate's Court and the state's lower courts are exempt.

Suspension of Driver's License for Nonpayment of Support Not Applicable to Orders of Maintenance Only

***Di Santo v. DiSanto*, N.Y.L.J., June 16, 2003, p. 23, col. 6 (Nassau County, J. Ross)**

The wife sought contempt and other remedies for the husband's failure to pay court-ordered *pendente lite* spousal maintenance in excess of $240,000. The court denied the motion for contempt and instead awarded her a money judgment in the amount of the arrears since there were other effectual remedies available to her. The court determined that the alternative remedy of suspension of driver's license was not available under D.R.L. 244-b, which only applies to child support orders or combined maintenance and child support orders, and not spousal maintenance. The court urged the legislature to amend that statute in order to protect the dignity of the judicial system and compel respect for its mandates, and because the statute unfairly discriminates between enforcement of child support orders and maintenance-only orders.

Author's note: New York's Support Enforcement Bureau will only enforce child support orders or combined child support and maintenance orders. A spouse who has no children or children who are emancipated cannot take advantage of filing their maintenance order with the bureau and the automatic enforcement remedies made available to the bureau, such as automatic suspension of licenses (driver, professional or recreational), and automatic collection of tax refunds. Justice Ross' decision highlights a much-needed change in the law.

This column is dedicated to my husband, Jeffrey Brian Winick, in honor of our recent marriage on August 24, 2003.

Wendy B. Samuelson is a partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP, and 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. She has also appeared on the local radio program, "The Divorce Law Forum." Ms. Samuelson may be contacted at (516) 294-6666 or WBSesq1@aol.com. The firm's Web site is www.matrimonial-attorneys.com.

Start Saving Time on Document Preparation!

AUTOMATED FORMS

New York State Bar Association's Family Law Forms

Automated by HotDocs

■ AUTHORITATIVE

Developed in collaboration with LexisNexis, New York State Bar Association's Family Law Forms is the most authoritative and efficiently automated set of forms in this field. **Included are the official forms promulgated by the New York State Office of Court Administration (OCA), as well as model matrimonial law forms drafted by the distinguished Willard H. DaSilva,** a veteran matrimonial law practitioner at DaSilva, Hilowitz & McEvily LLP.

■ CONVENIENT

Enter case-specific information once and it is automatically inserted throughout the form where that information is required. After completing a form, save the data you enter into an "answer file" and use it to automatically complete other forms.

■ QUICK & ACCURATE

The forms are fully automated with industry-leading HotDocs® software so everything is complete and accurate in a fraction of the time it used to take. You can dramatically reduce your proofreading time thanks to Smart Formatting, which performs all formatting and calculations automatically.

Say good-bye to cutting and pasting, and the increased chance of error that goes along with traditional document preparation.

Now there's a better way...
the New York State Bar Association's Family Law Forms.

To order or for more information

CALL 800/582-2452
or go to www.nysba.org/familyforms.
Mention source code CL1998 when ordering.

List Price:
$359*
1 compact disc (single-user, annual subscription)
PN: 6260
Annual Renewal $276

Member Price:
$311*
1 compact disc (single-user, annual subscription)
PN: 6260
Annual Renewal $240

* Multi-user pricing is available. Please call for details.
Price includes $35 for sales tax, shipping and handling.
Prices subject to change without notice.

NYSBA

Model Forms by Willard H. DaSilva

Statement of Client's Rights and Responsibilities

Retainer Letter (Separation Agreement)

Statement of Net Worth

Client/Attorney Certification

Letter to Spouse

Request for Preliminary Conference

Verified Complaint (UD-2)

Verified Complaint (Blank Form with Instructions) (UD-2)

Verified Answer (Uncontested Divorce)

Verified Answer (Contested Divorce)

Acknowledgment of Service By Attorney

Notice to Take Deposition

Statement of Proposed Disposition

Judgment (Uncontested Action)

Plaintiff's Affidavit in Support of a Judgment of Divorce and Support Collection Unit Information

Child Support Enforcement Services Affidavit

Part 130 Certification

Letter to Other Party's Attorney

Letter to Client re: Proposed Separation Agreement (Confidential)

Letter to Attorney re: Proposed Separation Agreement (Open)

Letter to Client re: Tax Consequences

Separation Agreement and Memorandum of Separation Agreement

Prenuptial Agreement

Uniform Uncontested Divorce Packet

Uncontested Divorce Packet: This Divorce Packet May Not Be For You

Introduction: What You Need to Know Before Starting Your Divorce Action

Summons with Notice (UD-1)

Summons with Notice (Blank Form with Instructions) (UD-1)

Summons (UD-1a)

Summons (Blank Form with Instructions) (UD-1a)

Affidavit of Service (UD-3)

Affidavit of Service (UD-3) (Blank Version)

Affidavit of Service (Blank Form with Instructions) (UD-3)

Sworn Statement of Removal of Barriers to Remarriage (UD-4)

Sworn Statement of Removal of Barriers to Remarriage (Blank Form with Instructions) (UD-4)

Affirmation (Affidavit) of Regularity (UD-5)

Affirmation (Affidavit) of Regularity (Blank Form with Instructions) (UD-5)

Affidavit of Plaintiff (UD-6)

Affidavit of Plaintiff (Blank Form with Instructions) (UD-6)

Affidavit of Defendant (UD-7)

Affidavit of Defendant (Blank Form with Instructions) (UD-7)

Child Support Worksheet (UD-8)

Child Support Worksheet (Blank Form with Instructions) (UD-8)

Support Collection Unit Information Sheet (UD-8a)

Support Collection Unit Information Sheet (Blank Form with Instructions) (UD-8a)

Qualified Medical Child Support Order (UD-8b)

Qualified Medical Child Support Order (Blank Form with Instructions) (UD-8b)

Note of Issue (UD-9)

Note of Issue (Blank Form with Instructions) (UD-9)

Findings of Fact/Conclusions of Law (UD-10)

Findings of Fact/Conclusions of Law (Blank Form with Instructions) (UD-10)

Judgment of Divorce (UD-11)

Judgment of Divorce (Blank Form with Instructions) (UD-11)

Part 130 Certification (UD-12)

Part 130 Certification (Blank Form with Instructions) (UD-12)

Request for Judicial Intervention (RJI) (UD-13)

Request for Judicial Intervention (RJI) (Blank Form with Instructions) (UD-13)

Notice of Entry (UD-14)

Notice of Entry (Blank Form with Instructions) (UD-14)

Affidavit in Support of Application to Proceed as Poor Person

Affidavit in Support of Application to Proceed as Poor Person (Blank Form with Instructions)

Poor Person Order

Poor Person Order (Blank Form with Instructions)

Post Card — Matrimonial Action

Post Card — Matrimonial Action (Blank Form with Instructions)

Certificate of Dissolution of Marriage

Certificate of Dissolution of Marriage (Blank Form with Instructions)

Notice of Settlement

Notice of Settlement (Blank Form with Instructions)

Income Deduction Order

Income Deduction Order (Blank Form with Instructions)

New York State Case Registry Filing Form

New York State Case Registry Filing Form (Blank Form with Instructions)

Child Support Summary Form (UCS-111)

IRS Forms

Request for Copy or Transcript of Tax Return (4506)

Release of Claim to Exemption for Child of Divorced or Separated Parents (8832)

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should do so on a 3½" floppy disk (preferably in WordPerfect or Microsoft Word), which includes the word processing program and version used, along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

Correction

The author of the article "A Simple Proposal" in Vol. 35, No. 1 of the *Family Law Review* was erroneously listed as Sandra Arisohn rather than "Sharon" Arisohn.

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

ISSN 0149-1431

NYSBA

Family Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155