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Notes and Comments

Elliot D. Samuelson, Editor

Should Enhanced Earnings Impact on the Award of Child Support?

There has been a spate of recent decisions and commentaries concerning the fixation of child support pursuant to the Child Support Standards Act that discusses whether the income utilized to compute enhanced earnings must be excluded when considering gross income available for support.

The first reported case was decided several weeks ago and concluded that since an award of equitable distribution to a spouse included a consideration of enhanced earnings, that portion of the income stream used to compute the value of a business or professional practice could not be used in the computation of gross income necessary to fix child support.[1] Justice Ross was scrupulously careful to allow the prescription to avoid "double dipping" frowned upon by the Court of Appeals in *Grunfeld v. Grunfeld* when fixing maintenance, and held that this rule should be extended to the fixation of child support as well. He succinctly explained his view as follows:

> The public policy implications created by such avoidable miscalculations warrant careful remediation of the dilemma. By recognizing the underlying redistribution of income "pushed" from the titled spouse to the non-titled spouse, "a court can assign the appropriate income to each parent so that the child support award reflects what has actually occurred." See, Tippins, Child Support as a Duplicative Award Part II, N.Y.L.J. January 16, 2003, p. 3. The distribution of marital property and the allocation of marital liability are necessarily part of an inter-related whole which must be addressed in a comprehensive decision. *Madori v. Madori*, 201 AD2d 859 [citing 3 Freed, Brandes & Weidman, Law and the Family, §1.1 at 9 (2d edition revised)]. See, also, Scheinkman, McKinney's Practice Commentaries, C236B:6A, West Group, 1999.
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> If the Court is to be "meticulous" in following the precept and maxim of guarding against duplication of awards (see, *McSparron*, *supra*), so, too, must it be especially vigilant in assuring that the resulting child support order in such cases be properly computed and applied with parity to the income of both parties, as is statutorily required [See, D.R.L.§240(1-b)].

Whether Justice Ross's case will be affirmed by the appellate court remains to be seen.

Another view was expressed by Justice Anthony Falanga, in an equally recent and thoughtful decision in *Bernstein v. Bernstein*,[2] which acknowledged a double dipping problem existed in fixing the award of child support,

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but determined in his case that it was not necessary to address it because:

> In order to avoid "double dipping," the Court must have information in the trial record distinguishing income that has been converted into and distributed as an asset from income that has not been converted and distributed, such as reasonable compensation as defined under Revenue Ruling 68-609, and or income produced by separate assets not subject to equitable distribution. As a general rule, it is in the interest of the business or practice owner spouse to produce proof at trial that the distribution of the business or the practice has reduced the income available to support an award of maintenance and or child support. The Court's ability to guard against "double dipping" is necessarily limited by the valuation and income evidence provided in the trial record. In the instant case, the record is devoid of any such proof and the Court therefore has not addressed any issue of "double dipping" with regard to child support.

This new rule requires that an offer of proof to the portion of income that impacted the valuation, must be given before the double dipping problem can be reached. Justice Falanga did not cite Justice Ross' case, so it is unclear whether he disagreed with the conclusions reached by Justice Ross, or simply viewed the facts of his case to conclude that gross income would remain unadjusted for the purposes of fixing child support. The *Bernstein* decision was otherwise notable as it appeared to be the first reported decision to hold that disability insurance funds are separate property, and not divisible upon divorce. Both cases should be read in their entirety.

Interestingly, following Justice Ross' decision, a letter to the editor sent by Sandra Jacobsen, a matrimonial practitioner, in April to the *New York Law Journal* postured the view that since the Child Support Standards Act failed to enumerate as a factor a credit for enhanced earnings computation, it was improper for the court to do so. This strict constructionist view of the statute may yet be endorsed by the appellate courts, but the ultimate decision is very much in doubt.

Although not yet addressed, it is interesting to postulate that by avoiding double dipping when maintenance is fixed there is no prejudice to a child of the marriage, but when fixing child support not only is the child prejudiced by such computation, but a business man or professional litigant is granted a corresponding benefit not granted to other wealthy individuals who are merely W-2 wage earners. If this be true, then a constitutional argument of failing to provide equal protection under the law might be proffered by a disgruntled parent that would effectively negate the holding in *Goodman, supra*. It is not difficult to imagine a scenario where two parents earn $1 million a year. One is a CEO of a major corporation (essentially a W-2 wage earner), the other a physician surgeon who earns a similar amount. Both marital estates have $10 million in assets. Here, the W-2 wage earner would have his or her entire gross income included in the computation, whereas the physician might be granted a considerable credit from his or her gross income if his or her license and practice were valued for equitable distribution purposes. This quandary gives further impetus to the growing clamor that the enhanced earnings doctrine, developed since the *O'Brien* case was decided by the Court of Appeals, needs to be repealed either by judicial pairing or legislative action.

It is clear that unless there be a definitive holding by an appellate court or a legislative enactment that will eliminate or modify the doctrine of enhanced earnings, the lower courts will tussle with this issue with uneven and at times unfair results, depending upon the financial circumstances of the parties. The problem really is of epidemic proportions and New York appears to be in the distinct minority of jurisdictions that permits such evaluations. Unfortunately when the *Grunfeld* decision was argued before the Court of Appeals, reversing *O'Brien* or modifying its resulting doctrine was not considered by the Court. Until such time as remedial legislation or a definitive holding by the Court of Appeals is made, the law will continue in a state of great flux and cause a polarization of the judicial departments that is bound to occur.

What should the practitioner who is faced with this dilemma do in a matrimonial litigation that encapsulates these issues? Certainly, in considering options, it would be wise to make a constitutional argument to prohibit the credit, or rely on the express language of the statute which does not specifically provide for such credit from gross income. In this way, both such arguments can be preserved for judicial review, and may be briefed and argued before an appellate court. On the other hand, citing Justice Ross' decision in *Goodman* would be the preferred tack if your client will be obliged to make an equitable distribution of his or her enhanced earnings.

Endnote

1. See *Goodman v. Goodman*, decided by Justice Robert Ross in a well-thought-out and erudite decision. *New York Law Journal*, February 21, 2003, p. 27.
2. *New York Law Journal*, April 8, 2003, p. 21.

Elliot Samuelson is the senior partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP and is included in "The Best Lawyers of America" and the "Bar Registry of Preeminent Lawyers in America." He has appeared on both national and regional television and radio programs, including *Larry King Live*. Mr. Samuelson can be reached at (516) 294-6666 or Samuelson@SamuelsonHause.com.

A Simple Proposal to Meet the Best Interests of Children Who Are the Subjects of Custody Disputes

By Sandra Arisohn

Life is, apparently, far more complex than it was in the days of King Solomon. Today's courts have few custody cases that can be determined by asking the parents if either is willing to let the child be cut in half. Although the media attracts an audience by reporting cases of outrageous neglect or abuse, anyone who practices family law knows that most cases do not follow a simplistic script in which there is one bad parent and one good parent.

On the contrary, most custody disputes are between ordinary people who are each, more often than not, capable of serving as a fit custodial parent. Indeed, long after custody has been awarded, both parents usually continue to be intimately connected to and involved with their children. Where there is neither hero nor villain, let alone divine assistance, the court's burden is extraordinarily difficult. It must decide which of two adequate parents should be awarded custody, according to the BIC standard—the best interests of the child.[1]

BIC has become a bright line rule in custody disputes, taking precedence ahead of all other considerations. Where an application for modification has been made, it is no longer even necessary for the court to find that unexpected circumstances have arisen that justify a reexamination of an earlier custody award. It is sufficient to show merely that modification now serves the child's best interests, changed circumstances or not. The proper standard is " . . . the totality of the circumstances, with the best interests of *each* child being the critical factor."[2]

In *Maute v. Maute*,[3] the custody of a teenage child had been awarded to his mother, five years earlier. Litigation regarding modification of custody ensued, but the mother continued as the custodial parent. The child, however, made his own feelings plainly known during the intervening years, in a manner that brought the appellate court to an astonishing and humble admission:

> Since that time, the teenage child's antagonism and hostility toward his mother, which was evident even then, has notably worsened. His academic performance is poor and his conduct is disturbing. He has demonstrated not only a lack of respect for his mother but has left home several times and has even threatened suicide. His intense wish to reside with his father remains constant. In view of the fact that *the custodial arrangement which we previously affirmed has apparently failed to serve this child's best interest*, we reverse finding that the father will be a more successful custodian.[4]

In other words, the court was wrong in its initial attempt to discover the child's best interests and it is now willing to face the consequences of its own well-meaning but inaccurate analysis:

> . . . ignoring the child's wishes and the failure of his present circumstances does nothing to remediate his deteriorating condition. . . . In circumstances such as these, where, notwithstanding the apparent good intentions of both parents, the custodial parent's efforts have not been successful, the child's wishes and the willingness of the other parent to take over should be accommodated.

Given the singular importance of BIC as the most relevant consideration in custody disputes, it is remarkable that the very procedure for determining these disputes is so often conducted in an atmosphere that is designed to elicit and exaggerate extremely adversarial conduct. A custody battle is often a no-holds-barred contest in which the adversaries try to establish the unfitness of the other parent, rather than the best interests of the child. In such an atmosphere, the children's interests are routinely ignored or obstructed by a process that creates and exacerbates intra-familial divisiveness, anger and hostility.

Is there a sentient adult who is unable to recall the feelings of a child who observes his parents in a fight? The angrier the disagreement the greater the awful feeling growing in the pit of the child's stomach. One needs no advanced training in child psychiatry or family dynamics to appreciate in one's gut that children who experience their parents fighting are children who are suffering. A custody dispute is the probably the biggest fight a pair of parents will ever have.

Unlike other litigation, custody disputes are inherently freighted with painful and fundamental emotional issues. Many litigants feel that they are being judged on their basic worth as human beings. Their identities may

be deeply invested in their roles as parents. At a time when the parties are extremely vulnerable and exposed, they must often deal with attacks that include significant, personal disparagement. The damage may have far-reaching effects on family interactions, which, we know, will continue long after custody litigation ends. Surely it is self-evident that no child's interests are served as a result of his or her parent being emotionally wounded or diminished by traumatic litigation.

It does not have to be this way. The courts can demonstrate concern with protecting the best interests of children, not merely by deciding their custodial placement, but by limiting the negative impact of litigation on their daily lives, both during the pendency of litigation and for all the years that will follow. A few changes that would not entail new legislation, cost additional money or inconvenience parties, attorneys, judges or courthouse employees, could change the atmosphere in which these proceedings are conducted. The only thing needed would be a willingness by the judiciary to enforce a minimally restrictive code of conduct in its own courtrooms.

I propose that courts hearing custody matters stop tolerating conduct by attorneys that is overly hostile, aggressive or personal in nature or that lacks any good-faith basis. Judges have a great deal of discretion in determining how individuals conduct themselves within their courtrooms. Consider this recent event:

The courtroom was crowded with lawyers and parties, appearing for a motion calendar call. In the midst of oral argument, a cell phone rang. The judge was, to put it mildly, very displeased and he warned the crowd to turn off all cell phones. A few minutes later, a cell phone rang again. The judge's reaction was swift. He immediately reprimanded the unfortunate cell phone owner and fined him $1,000.00!

I would be willing to bet that each and every person in that courtroom learned a simple lesson, immediately and permanently: turn off your cell phones when entering this courtroom.

Yet the courts tolerate far worse conduct by counsel in custody disputes without making any attempts to discourage it. Many motion papers and oral arguments in open court are studded with baseless, *ad hominum* attacks against parents, for which there is no good-faith basis. In my experience, the courts listen to such statements as if they are hearing proper, legal argument. It is rare for a judge to show displeasure in response to outrageous remarks made by some counsel, although these comments may be more appropriate for a supermarket tabloid than a court of law.

Every lawyer who litigates custody matters probably has his or her own list of horror stories and mine include an argument that a parent should not be awarded custody because his father, who lived on another continent, was convicted of manslaughter many years ago; an unsupported claim that a parent's application for modification was brought solely to evade child support payments; a declaration that a parent was insincere in seeking custody because he had not stated in papers that he loved his child; repeated allegations that a parent was a drug abuser, alcoholic and wife batterer, although there was not an iota of evidence supporting any of these charges. While some judges have cut off these comments, I have yet to encounter any attempt by a court to establish a regular policy of refusing to hear unsupported character assassination, masquerading as proper legal argument.

Litigators are, by nature, adversarial and perhaps the courts have become inured to the constant and intense adversarial atmosphere in which they spend their working days. However, the manner in which adversarial argument is presented can reflect attitudes that range from respectful disagreement to raw, personal hatred. Anyone who has observed argument before the United States Supreme Court knows that any position, on any matter, can be expressed in a courteous manner.

The scholarship reflected in Supreme Court cases is not going to be found in local custody disputes. However, there is no reason for these disputes to be conducted in an atmosphere that lacks fundamental decorum and civility. If the courts' goal is to determine the best interests of the child, they must stop tolerating argument from attorneys, whether verbal or written, which boil down to little more than unsupported defamatory attacks on either parent.

The first time a lawyer speaks of the adversarial parent in a manner that lacks minimal courtesy and respect, or accuses a parent of wrongdoing in the absence of a credible foundation, a warning from the court should immediately be issued. It would be useful if the court also explained to the parties that their attorneys speak for them and that they are presumed to express the thoughts and intentions of their clients.

If it happens a second time . . . the courts should react as if a cell phone was ringing.

Endnotes

1. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982).
2. *Morton v. Morton*, 158 A.D.2d 458, 458 (2d Dep't 1990) (emphasis added).
3. 228 A.D.2d 444 (2d Dep't 1996).
4. *Id.*, p. 444 (emphasis added).

Vacatur of Agreements—Oh, That Unsettling Feeling of "Reverse Duress"

By Elliott Scheinberg

Although spouses enter into agreements in hope of laying their disputes to rest with finality, there nevertheless seems to be a surfeit of proceedings to vacate settlement agreements long after both parties have complied with the terms of the agreements, to wit, the payor having met the required property transfers and support payments and the recipient having accepted them without protest or objection as to their appropriateness or adequacy. Typically, the recipient spouse, grimly aware of the imminent end to the stream of financial goodies and intensely motivated to prolong that ongoing current, suddenly comes-a-callin' on the payor-spouse demanding more money many years down the litigation road, long after the underlying differences which led them to divorce seem like ancient history. The allegations are always hinged on the payor's wrongdoing during the settlement negotiations many litigation eons ago. Rather than summarily dismiss the transparently unsubstantiated and unabashed actions, the bench, all too often, directs automatic knee-jerk hearings on the flimsiest of gravamen supported by the conclusory talismans "fraud," "duress," "overreaching," or, "unconscionability"; the greedy spouse just got a foot in the door.

A hearing on the issue of vacatur is usually the first infliction of escalated legal fees on the opposing party, often dwarfing the fees which she or he would have incurred had the case been tried in the first instance rather than settled. The resisting party must now not only defend against the action to vacate the agreement but also, possibly, litigate the entire financial aspect of the marriage. In opposing the tardy action to vacate the agreement, Herculean efforts, emotional and financial, will be expended to produce stale or no longer extant documents in the absence of which documents the defending spouse is assured an unfair and unjustly earned defeat and the greedy spouse an unjust reward.

Fear, spawned by the wildly reveling asset-devouring troupe of dancing litigation-cost demons on steroids which generate spontaneously upon the commencement of an action eagerly anticipating the voracious feeding frenzy on the feast table of the marital fisc, most likely motivated the original (now failed) settlement. This angst recurs upon the commencement of an action for vacatur, often resulting in the propertied spouse's making otherwise avoidable concessions if courts only summarily dismissed the disingenuously greed-driven proceeding. Such abuse of the judicial system by the avaricious spouse may appropriately be labeled "reverse duress" (or, the general rubric of "reverse wrongdoing") herein defined as pressure (duress) brought to bear upon the financially well-anchored former payor-spouse which pressure (duress) is mired in the misdirected notion that the mere incantation of the formulaic terms "fraud," "duress," "overreaching," or "unconscionability," can alchemically produce an upward renegotiation of goodies.

In a recent First Department case, *Gottlieb v. Such*,[1] the ex-wife, a corporate attorney, commenced an action to rescind the parties' separation agreement on the ground that it had been induced by fraud. In a very well-reasoned dissent Justice David Saxe cogently bemoaned "the prevalence of excessive post-divorce litigation" and the necessity "to find ways to discourage baseless post-judgment proceedings and offer instead protection against the enormous financial burden they entail."[2]

A Separation Agreement Is a Contract Subject to the Same Doctrinal Principles Governing Other Contracts

In the landmark decision *Christian v. Christian*,[3] the Court of Appeals created a fiduciary relationship between spouses posting a sentinel of equity to monitor settlement agreements; the preamble would become amongst the most oft-repeated language in interspousal settlement dispute literature:

> Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside. . . . Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions. Furthermore, when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one

> or more of the specific provisions as improvident or one-sided.
>
> If voidable, such an agreement may be set aside under principles of equity in an action in which such relief is sought in a cause of action or by way of affirmative defense. . . . Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. . . . There is a strict surveillance of all transactions between married persons, especially separation agreements. . . . Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract. . . . These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity.
>
> To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching. . . . In determining whether a separation agreement is invalid, courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution. If the execution of the agreement, however, be fair, no further inquiry will be made.

The Court of Appeals made three very significant pronouncements in *Christian*:

(a) that there is to be a "strict surveillance of all transactions between married persons, especially separation agreements,"

(b) that "equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract," and

(c) that courts may probe an agreement's purported invalidity by "look[ing] at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution."

The grounds for establishing vacatur can be further confusing because of the two other highly amorphous subjective standards set forth in *Christian* (beyond the traditional thresholds of fraud, duress, overreaching, etc.): (1) "unconscionability" whose definition is akin to the United States Supreme Court's definition of pornography (although it cannot define it, it knows it when it sees it):

> An agreement is unconscionable only if it is one "'such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other'" (Hume v. United States, 132 U.S. 406, 411, 10 S.Ct. 134, 33 L.Ed. 393), the inequality being "'so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense'" (Christian v. Christian, 42 N.Y.2d 63, 71, 396 N.Y.S.2d 817, 365 N.E.2d 849, quoting Mandel v. Liebman, 303 N.Y. 88, 94, 100 N.E.2d 149; see Giustiniani v. Giustiniani, 278 A.D.2d 609, 610-611, 719 N.Y.S.2d 139, lv. denied 96 N.Y.2d 706, 725 N.Y.S.2d 278, 748 N.E.2d 1074).[4]

and (2) the "manifest unfairness" of an agreement which an appellate court described as follows:[5]

> . . . in concluding that actual fraud need not be shown to set aside an agreement of this type—that it is enough if the terms are so "manifestly unfair" to one spouse as to support an inference of overreaching by the other . . . Supreme Court was not relaxing the standard of proof for demonstrating actual fraud but simply providing an alternative basis for vitiating an unjust agreement.

Although (as of the time of this writing) *Christian* has been cited in no fewer than 200 New York State cases none of the following questions has ever been clarified: What does strict surveillance mean? Does it create a higher evidentiary standard and, if so, what is it? What about "grounds that would be insufficient to vitiate an ordinary contract"; what are those additional grounds? Do those additional grounds create a higher evidentiary standard and, if so, what is it? As for searching for "even a negative inference of overreaching," does that create a lesser evidentiary standard? Isn't it a party's right to knowingly and alertly enter into what a court might deem an unconscionable or manifestly unfair agreement, irrespective of his or her

reasons? The aforementioned groundbreaking pronouncements to the contrary notwithstanding, decisional authority has, seemingly, adhered to the traditional grounds and to the traditional standards of evidence which are discussed below. Furthermore, since 1982 the area of law regarding vacatur further evolved dramatically via judicial fiat when the Court of Appeals carved out a principle of law called ratification of an agreement (see below) whose sole intended purpose was to minimize the almost *pro forma* rampant hair trigger vacatur of agreements; this principle coupled with an overview of prompt timing to vacate perceived flawed agreements (see below) has addressed the aforementioned questions.

Moreover, although the above strongly worded admonitions in *Christian* may appear to have lowered the bar for the vacatur of settlement agreements, the Court of Appeals has, nevertheless, repeatedly echoed the theme that a "settlement agreement is a contract subject to principles of contract interpretation," and is thus governed by the same doctrinal principles applicable to ordinary contracts;[6] "where the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument"[7] and the agreement is binding upon the parties until they are put aside.[8] One appellate court summed it up this way:

> DRL 236(B)(3) provides that "[a]n agreement by the parties, made * * * during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged." If, on its face, the agreement is signed by the parties and bears their notarized acknowledgments, there is a presumption of due execution, rebuttable only upon clear and convincing evidence (see, Smith v. Smith, 263 A.D.2d 628, 629, 694 N.Y.S.2d 194, lv. dismissed 94 N.Y.2d 797, 700 N.Y.S.2d 429, 722 N.E.2d 509 . . .[9]

The other traditional foundations and tenets of contract law also apply to settlement agreements in actions between spouses[10] including prenuptial agreements:[11] (1) "a court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction,"[12] (2) a court may not construe the language in such a way as would distort the contract's apparent meaning,"[13] (3) "the words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties," (4) "when a court analyzes a stipulation which has more than one possible meaning, and where one or more of the possible interpretations will result in a consequence which the proof might not sustain and which seems unusual in the circumstances of the case, the court should be careful not to apply the broader interpretation absent a clear manifestation of intent,"[14] (5) "where possible, a contract should be interpreted to avoid inconsistencies and to give meaning to all of its provisions, giving a practical and reasonable interpretation to the language employed and the parties' reasonable expectations with respect thereto,"[15] and (6) "a court cannot reform an agreement to conform to what it thinks is proper, if the parties have not assented to such a reformation."[16]

The First Department has developed a line of cases which state that "[W]hile the plain meaning of the express language of a matrimonial contract generally controls its construction . . . such a contract should not give one party an unfair or unreasonable advantage over the other. . . . Generally, no contract should be given a construction that would leave one party at the mercy of the other."[17]

Yet another basis for vacatur is mutual mistake. The standard for vacatur on this ground is particularly onerous: clear and convincing proof, not a preponderance of the evidence.

> To be sure, to vacate a stipulation of settlement on this particular ground, it must be demonstrated by clear and convincing proof that such mutual mistake existed when the agreement was made and is so substantial that the agreement fails to represent a true meeting of the parties' minds.[18]

In *Schultz v. Hourihan*[19] the Appellate Division underscored that not only must the mutual mistake have existed at the time of the contract but also it "'must be substantial' . . . since without a 'meeting of the minds' the contract is voidable."

Furthermore, the Court of Appeals has held that

> it is basic that, unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law.[20]

Waiver of Discovery

Common to settlement agreements is confirmational language of a mutual waiver to conduct further dis-

covery.[21] The clarity of such language cannot possibly speak any louder regarding the recipient spouse's alert and carefully weighed assent to terminate the discovery process. A knowingly executed waiver to the contrary notwithstanding, the greedy spouse, afflicted with sudden *lapsus memoria*, nevertheless, boldly steps forward to vacate the agreement by falsely alleging, *inter alia*, the wealthier spouse's willful failure to provide discovery. Logic dictates the impossibility of a willful withholding of disclosure once a party has knowingly and consciously declared his or her intention not to seek any or additional disclosure, or, at the very least, each party's awareness of the other's financial circumstances[22]—especially after having consulted with or having been represented by independent consul;[23] nor does it constitute a basis for recission because of either duress, coercion or overreaching.[24] For a waiver to be effective the party to be estopped had to have "been aware of certain facts and, being aware of them, elect not to take advantage of them" because "waiver will not be inferred from mere silence or inaction[25];" typically, the newly challenged agreement clearly evidences that the waiver was knowingly executed and not first sought to be procured by retroactive inference or operation of law. It has also been held that an inaccurate representation of a party's assets will not result in vacatur if the other party did not rely on the misrepresentation.[26]

The Absence of Counsel Does Not Vitiate an Agreement

The typical settlement agreement also contains language to the effect that the parties have been advised of their right to retain independent counsel. Litigants, myopically and in short-sighted hope of curbing litigation costs, ill advisedly agree to representation by one attorney. The Court of Appeals held that representation by one attorney, in and of itself, does not constitute a basis for vacatur,[27] although it may be a factor to be considered when reviewing an action to vacate an agreement:

> Nor does the fact that the same attorney represented both parties in the preparation of the agreement require an automatic nullification of the agreement. While the absence of independent representation is a significant factor to be taken into consideration when determining whether a separation agreement was freely and fairly entered into, the fact that each party retained the same attorney does not, in and of itself, provide a basis for rescission[28] (cites omitted).

A party's failure to seek counsel does not, in and of itself, serve as a predicate for vacatur of an agreement;[29] nor does a failure to be represented by counsel constitute overreaching.[30] Moreover, a settlement agreement signed by a lay person "is conclusively bound by the terms."[31]

Acceptance of Benefits Ratifies an Agreement

Ratification, a form of equitable estoppel,[32] is an affirmative defense which must be raised by the party arguing that ratification of the agreement has occurred.[33] Ratification may occur in one of three ways: (a) the passage of time, (b) the making of payments, or (c) the acceptance of benefits;[34] typically two of these three elements are present. Receipt of the benefits of the agreement results in a waiver of the right to challenge the agreement.[35]

In the landmark decision *Beutel v. Beutel*,[36] the Court of Appeals held that, even if the wife could have established incapacity at the time of the execution of the agreement, ongoing receipt of the benefits ratified the agreement. Acceptance of "substantial benefits" also constitutes a sufficient act of ratification.[37] Decisional authority subsequent to *Beutel* has adhered religiously to this principle.[38] There is absolutely no authority in support of the proposition that a party may rescind an agreement long after its execution simply because of regret over prior poor judgment; to hold otherwise is to open the floodgates to endless litigation over identical issues without any finality to contractual resolutions.

Ratification, Equitable in Nature, Applies to Void/Voidable Agreements; Displeasure With an Agreement Requires Prompt Action

Christian and its progeny hold that, even though an actual showing of fraud is not necessary, vacatur is, nevertheless, available if the agreement is "manifestly unfair" because of the other party's wrongdoing.[39] Ratification, as an equitable form of relief, applies even to void agreements or to those procured via the other's wrongdoing. Although one court noted that "there are no hard and fast rules regarding what is considered 'lengthy'"[40] challenges to such agreements must, however, be prompt.[41] Thus, it has been held that receipt of benefits, even under an agreement procured via wrongdoing, ranging amorphously from only "several months," "a considerable period of time,"[42] or "a reasonable period of time" is sufficient[43] to ratify it because such agreements are voidable and not void *ab initio* and, as such, may be ratified by the passage of time.[44] In *Silver v. Starrett*,[45] the court highlighted settled law with respect to settlement agreements

> If a party has indeed been placed under duress, then the forced agreement must be disavowed at the earliest possible opportunity. . . . Even when the statute of limitations is not involved, the law is clear that a party seeking to repudiate a contract procured by duress must act promptly to disavow it or the contract is deemed ratified and the defense waived (cites omitted).

Stacom v. Wunch[46] emphasized the importance of an early challenge to a perceived inappropriate agreement based on fraud, duress, etc:

> [A] party seeking to repudiate a contract procured by duress must act promptly lest he or she be deemed to have elected to affirm it. . . . For five years, plaintiff accepted the benefits of the Separation Agreement in silence, and she has not demonstrated that the alleged duress and coercion by defendant continued after she signed the Separation Agreement. Accordingly, plaintiff has effectively ratified the Separation Agreement. See Beutel v. Beutel, 55 N.Y.2d 957, 958, 449 N.Y.S.2d 180, 434 N.E.2d 249.

A notable exception occurred in *Murphy v. Murphy*[47] where the wife's action to modify a settlement agreement based on fraud nearly seven years after the execution of the agreement was held to have been prompt because she could not have discovered the fraud until almost seven years after its commission.

Furthermore, the party seeking vacatur must show that the wrongdoing which procured the agreement, such as duress or coercion, were ongoing even after the execution of the agreement.[48] The most significant lesson to be derived from governing authority is that the concept of fraud, duress, overreaching, or unconscionability do not exist in a vacuum; they must be viewed against the entire conduct of the parties including subsequent behavior to see whether they ratified an otherwise voidable agreement. In essence, ratification of an agreement negates the wrongdoing.[49]

A party may not tarry before bringing an action for vacatur; a prompt challenge to an unsatisfactory agreement is required lest it be deemed ratified by the party's inaction and ongoing receipt of benefits over a significant period of time.[50]

Unequal Agreements Are Not Automatically Void; Improvident Agreements Do Not Constitute a Basis for Vacatur

The party seeking to vacate the agreement will typically urge the court to automatically void the agreement (irrespective of the passage of time, receipt of benefits, or knowing waiver of discovery rights) simply because it is unequal or otherwise one-sided; such allegations, even if true, are not determinative of the issues of unconscionability, fraud or overreaching and vacatur may not be had for this reason alone.[51] Nor is vacatur available, simply over regrets that the agreement may have been improvident,[52] especially after having reaped the benefits thereof. Furthermore, one-sided agreements,[53] unwise agreements,[54] excessively generous agreements beyond governing law,[55] changes of heart,[56] the ability to negotiate a better deal,[57] or "a bad bargain"[58] do not constitute a basis for recission:

> While relief from a separation agreement may be granted upon a showing of good cause, courts may not intervene and redesign or vacate an agreement simply because "judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided" (see, Christian, supra).[59]

Vacatur Is Impermissible if the Allegations Are Grounded in Refusals to Negotiate Beyond an Offer, Badgering, Yelling or Pressure

The economically advantaged spouse's adamant refusal to make further concessions during settlement negotiations does not constitute a basis for vacatur because each party has the right to stand firm on his or her respective offer. Anger and threats of litigation are insufficient to conclude duress because such threats do not constitute a threat to commit an unlawful act:[60]

> To maintain a claim of duress, plaintiff must demonstrate that threats allegedly made by defendant "deprived [her] of the ability to act in furtherance of [her] own interests" . . . or deprived her of the ability to exercise her own free will. To accomplish this, plaintiff "must demonstrate that threats of an unlawful act compelled * * * his or her performance of an act which * * * he or she had the legal right to abstain from performing." A mere "threat to do that which one has the legal right to do does

> not constitute duress." Here, defendant, in the absence of an agreement, had the right to commence litigation, including custody litigation, and the fact that such litigation would be expensive does not convert this lawfully made statement to one which constitutes coercion or duress.

In *Lounsbury v. Lounsbury*,[61] the Appellate Division set forth the quantum of wrongdoing required to establish duress sufficient to vacate an agreement: "To prevail on a claim of duress, defendant must prove that plaintiff's alleged threats 'deprived [him] of the ability to exercise [his] own free will.'"

Springer v. Grattan-Arnoff[62] held that "badgering" or "pressure" do not set forth a basis for vacatur of an agreement:

> While the courts will examine carefully the circumstances surrounding the execution of a separation agreement between spouses, plaintiff may not defeat defendant's entitlement to summary judgment by the tender of conclusory or unsubstantiated allegations that his approval of the stipulation was occasioned by the "pressure" or "badgering" of defendant or another person acting on her behalf.

Lounsbury[63] reaffirmed the lack of legal value to the argument of threats to commence legal action in the event of failure to reach a settlement agreement: "Further, the fact that defendant allegedly felt threatened by a legal action which plaintiff had the right to commence does not constitute duress."

Actions to Vacate a Foreign Judgment of Divorce; Fraud in the Procurement or Intrinsic Fraud v. Extrinsic Fraud

Vacatur of an agreement incorporated in a valid bilateral foreign divorce judgment is played out in a different arena involving a different set of evidentiary rules. In the landmark decision *Greschler v. Greschler*,[64] the wife sought to vacate a separation agreement contained in a foreign divorce judgment. Noting that "a party who properly appeared in the action is precluded from attacking the validity of the foreign country judgment in a collateral proceeding brought in the courts of this State," the Court of Appeals held that, although not required to constitutionally do so,[65] New York will conduct a two-prong disjunctive inquiry: (a) was there a showing of fraud in the procurement of the foreign judgment, *or* (b) does recognition of the judgment do violence to some strong public policy of this State:

> The courts of this State generally will accord recognition to the judgments rendered in a foreign country under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States. (See, e. g., Schoenbrod v. Siegler, 20 N.Y.2d 403, 408, 283 N.Y.S.2d 881, 230 N.E.2d 638; see, generally, Restatement, Conflict of Laws 2d, § 98; Leflar, American Conflicts Law (3d ed.), § 84, pp. 169-171.) Absent some showing of fraud in the procurement of the foreign country judgment (Feinberg v. Feinberg, 40 N.Y.2d 124, 386 N.Y.S.2d 77, 351 N.E.2d 725) or that recognition of the judgment would do violence to some strong public policy of this State (see, e.g., Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597) . . .

"Absence of fraud in the procurement" is otherwise known as "a collateral attack"; without first overturning the validity of the foreign divorce decree, a party may not collaterally attack the divorce decree by challenging the provisions of the separation agreement incorporated therein.[66] The pivotal focus devolves about intrinsic fraud v. extrinsic fraud.

A seemingly daunting and complex distinction at first, various cases have spelled it out very simply. *Industrial Development Bank of Israel Ltd. v. Bier*:

> Intrinsic fraud is fraud which goes to the existence of a cause of action, and is held to be no defense. The American courts hold that a foreign judgment cannot be attacked on the ground that it was procured by false testimony. . . . "The fraud which will be available to a [party] in his attack upon a foreign judgment, in the main, is fraud which has deprived him of the opportunity to make a full and fair defense. There are many varieties of such fraud. Thus, where the defendant failed to present his case because the plaintiff agreed to drop the suit or to compromise the case or notified the defendant that the proceeding had been dismissed, or by any other agreement or promise lulled the defendant into a false security, the judgment may be attacked by the defendant." (Tamimi v. Tamimi, supra, at 203-204 [quoting 2 Beale, Conflict of Laws § 440.4].) Thus extrinsic fraud "must be in some matter other than the issue in controversy in the action. . . ."[67]

If intrinsic fraud is what lies at the heart of the dispute, such as a willful and fraudulent misrepresentation of a party's net worth, it may not later be challenged in New York on that basis alone—absent evidence of fraud in the procurement (extrinsic evidence).

In *Fickling v. Fickling*,[68] the Appellate Division rejected an appeal to vacate an Australian child support order, obtained on default because the father failed to establish extrinsic fraud; the facts demonstrated that the wife made no representations which would have caused the father to think that she would not move forward with the trial while negotiations remained ongoing.

An Action to Vacate an Agreement Must Set Forth a *Prima Facie* Case; Conclusory Allegations Are Dismissible Via Summary Judgment

Judicial policy to construe complaints liberally to the contrary notwithstanding, a complaint to vacate an agreement must set forth the allegations "in detail and with particularity"[69] "supported by an evidentiary showing,"[70] or be dismissed, like any other complaint, if it makes only general conclusory allegations:[71] ". . . the essential material facts supporting the cause of action must still appear on the face of the complaint or a plausible explanation provided for the failure to do so when the pleadings are challenged . . . the gravamen . . . must set forth with particularity."[72]

The mere incantation of "the words of indictment," i.e., "fraud," "duress," "overreaching," or "unconscionability," standing alone, does not rise to the level of a triable issue sufficient to warrant a hearing regarding vacatur and, as such, should be denied via summary judgment—conclusory allegations unsupported by evidence must result in dismissal.[73]

The Second Department recently held:

> Contrary to the plaintiff's contentions the evidentiary submissions of the defendant on his motion for summary judgment established his entitlement to judgment as a matter of law the plaintiff did not oppose the prima facie showing with evidence tending to establish the presence of a triable issue of fact (cites omitted). As a general rule, a stipulation of settlement made in open court by parties who are represented by counsel will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability (cites omitted). Here the record established that at the time the stipulation was executed, and during the negotiations leading up to it, the plaintiff was represented by counsel, who drafted the stipulation. The plaintiff voluntarily and knowingly entered into the stipulation in open court, and indicated that she was satisfied with the stipulation and her counsel's representation, and that her judgment was not impaired. Therefore, the Supreme Court properly granted the defendant's motion to dismiss the complaint.[74]

A Party Opposing a Summary Judgment Motion Must Lay Bare His or Her Case Via Evidentiary Proof of the Merits of the Case

A party defending a spurious action for vacatur whose complaint does not set forth a prima facie case is well advised to seek early and immediate dismissal via a motion for summary judgment.[75] Such an application, otherwise dubbed the poor man's discovery, offers two wonderful benefits: (1) it compels the opposing party to lay forth all of his or her evidence so that the strengths or weaknesses of his or her case may be better studied, thus enabling the party seeking summary judgment to determine whether to fight or settle, and (2) it provides a possible shortcut verdict which stops the financial hemorrhaging incurred during the defense of a baseless action. The court must probe the existence of triable issues of fact which issues must be presented *in evidentiary fashion* entitling them to a trial or else face summary dismissal:

> *Supporting proof; grounds; relief to either party* . . . The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. *The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party*. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact . . .[76]

Receiving the Opposing Party's Facts in the Best Light When Deciding a Motion for Summary Judgment Requires a Court to Apply Governing Law and Common Sense

Although a court must accept the facts of the party opposing summary judgment in the best light,[77] it may not, however, turn a blind eye to fact or governing law. The party seeking vacatur, as the opponent of the motion to dismiss the action, must lay bare the facts behind his or her case in an evidentiary manner:

> In opposing summary judgment, once defendant had made the requisite showing, it was incumbent upon plaintiff to lay bare her proof and set forth sufficient evidence of a non-conclusory nature to create a triable issue of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Since she has not done this, defendant is entitled to partial summary judgment with respect to the validity of the antenuptial agreement.[78]

Lounsbury clearly underscores the appropriateness of summary judgment in proceedings to vacate settlement agreements:

> A court may grant summary judgment upon its finding that a settlement agreement is valid only where the spouse opposing the validity of the agreement fails to state a triable issue of fact.

In his Practice Commentaries (p. 62, C3212:16), Prof. David Siegel expounds on the nature and degree of evidence which a party opposing summary judgment must lay bare in his or her papers:

> The summary judgment motion is not the occasion for the opposing party to pick and choose between the items of evidence to submit in opposition to the motion. . . . When the movant's papers make out a prima facie basis for a grant of the motion, the opposing party must "come forward and lay bare his proofs of *evidentiary facts* showing that there is a bona fide issue requiring a trial . . . [He] cannot defeat this motion by general conclusory allegations which contain no specific factual references." If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it.

Prof. Siegel emphasizes that the submission of a perfunctory knee-jerk opposition to the motion is insufficient to defeat the motion:

> Evasiveness in an opposing affidavit—indirect reference to the key facts, undue accent on immaterial points, and any other mode of behavior suggesting that the opposing party really can't deny the movant's evidence—will give it an aura of sham and increase the prospects of a grant of the motion (cites omitted).

Conclusion

The law is, thus, clear: (1) any agreement, irrespective of the tainted manner procured, may be ratified either by the passage of time or the acceptance of the benefits, and (2) actions to vacate agreements failing to plead facts with such specificity which, as a matter of law, would require a hearing on the issues, should receive early summary dismissals so as to avoid plummeting both litigants into an endless spiral of financially and emotionally exacting litigation. The mechanism for meting out sanctions against the movant of frivolous actions is in place and its deployment will send a chillingly sobering message that such actions are not only frowned upon but result in more than a simple slap on the wrist if the action fails, an idea not too dissimilar from Justice Saxe's recommendation in *Gottlieb v. Such*.

Endnotes

1. 293 A.D.2d 267, 740 N.Y.S.2d 44 (1st Dep't 2002).
2. *Id*. at 45.
3. *Christian v. Christian*, 42 N.Y.2d 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 (1977).
4. *Lounsbury v. Lounsbury*, __A.D.2d__, 752 N.Y.S.2d 103 (3d Dep't 2002).
5. *Hallas v. Moule*, 252 A.D.2d 767, 676 N.Y.S.2d 274 (3d Dep't 1998).
6. *Rainbow v. Swisher*, 72 N.Y.2d 106, 109, 531 N.Y.S.2d 775, 776; *Boden v. Boden*, 42 N.Y.2d 210, 397 N.Y.S.2d 701 (1977); *Scalabrini v. Scalabrini*, 242 A.D.2d 725, 662 N.Y.S.2d 581 (2d Dep't 1997).
7. *Fetner v. Fetner*, 293 A.D.2d 645, 741 N.Y.S.2d 256 (2d Dep't 2002), citing *Nichols v. Nichols*, 306 N.Y. 490, 496, 119 N.E.2d 351 (1954).
8. *Paruch v. Paruch*, 140 A.D.2d 418, 528 N.Y.S.2d 119 (2d Dep't 1988), citing 2 Foster & Freed, Law and the Family, p 476; *Schmelzel v. Schmelzel*, 287 N.Y. 21, 26; 2 Lindey, Separation Agreements and Ante-Nuptial Contracts [rev ed], § 36, subd 1, p. 36-3.
9. *Lounsbury v. Lounsbury*, __A.D.2d__, 752 N.Y.S.2d 103 (3d Dep't 2002).
10. *See supra* note 4.

11. *Spirt v. Spirt*, 289 A.D.2d 392, 734 N.Y.S.2d 232 (2d Dep't 2001); *Brassey v. Brassey*, 154 A.D.2d 293, 546 N.Y.S.2d 370 (1st Dep't 1989).

12. *Kalman v. Kalman*, 751 N.Y.S.2d 578, 2002 N.Y. Slip Op. 09428 (2d Dep't 2002), is noteworthy because the agreement in question had *not* been incorporated into the divorce judgment; *Cohen-Davidson v. Davidson*, 291 A.D.2d 474, 740 N.Y.S.2d 68 (2d Dep't 2002); *Scalabrini v. Scalabrini*, 242 A.D.2d 725, 662 N.Y.S.2d 581 (2d Dep't 1997).

13. *Cohen-Davidson v. Davidson*, *id.*; "Where . . . the language of the agreement is clear and unambiguous on its face, the court may not disregard the intentions of the parties and alter the contractual terms"; *Gallina v. Gallina*, 162 A.D.2d 219, 556 N.Y.S.2d 589 (1st Dep't 1990). *Kalman*, *supra* note 12; *Scalabrini*, *supra* note 12.

14. *Weiss v. Weiss*, 289 A.D.2d 498, 735 N.Y.S.2d 582 (2d Dep't 2001).

15. *Malleolo v. Malleolo*, 287 A.D.2d 603, 731 N.Y.S.2d 752 (2d Dep't 2001).

16. *Cohen-Davidson v. Davidson*, 291 A.D.2d 474, 740 N.Y.S.2d 68 (2d Dep't 2002); (*see also Cappello v. Cappello*, 286 A.D.2d 360, 729 N.Y.S.2d 175; *Tinter v. Tinter*, 96 A.D.2d 556, 557, 465 N.Y.S.2d 238; *Leffler v. Leffler*, 50 A.D.2d 93, 95, 376 N.Y.S.2d 176, *aff'd*, 40 N.Y.2d 1036, 391 N.Y.S.2d 855, 360 N.E.2d 355).

17. *Jacobsen v. Weiss*, 689 N.Y.S.2d 75, 260 A.D.2d 308 (1st Dep't 1999); *Haskin v. Mendler*, 184 A.D.2d 372, 584 N.Y.S.2d 851 (1st Dep't 1992); *Comras v. Comras*, 600 N.Y.S.2d 61, 195 A.D.2d 358 (1st Dep't 1993).

18. *In re Janet L*, 287 A.D.2d 865, 731 N.Y.S.2d 299 (3d Dep't 2001); "In order to establish the existence of a mutual mistake, plaintiff, as moving party, must overcome a heavy presumption and prove her position by clear and convincing evidence (see, *Clifton Country Rd. Assocs. v. Vinciguerra*, 195 A.D.2d 895, 897, 600 N.Y.S.2d 982, *lv. denied*, 82 N.Y.2d 664, 610 N.Y.S.2d 152, 632 N.E.2d 462)"; *Vermilyea v. Vermilyea,* 224 A.D.2d 759, 636 N.Y.S.2d 953.

19. 238 A.D.2d 818, 656 N.Y.S.2d 526.

20. *Dolman v. U.S. Trust Co. of N.Y.*, 2 N.Y.2d 110, 157 N.Y.S.2d 537 (1956); *Rosenkrantz v. Rosenkrantz*, 184 A.D.2d 478, 585 N.Y.S.2d 426 (1st Dep't 1992).

21. > The parties acknowledge that each is entitled to receive from the other a statement of Net Worth as well as the right to examine and review all financial records including but not limited to corporate and individual tax returns, partnership returns, brokerage statements, banking statements and records, credit card statements, balance sheets, lease agreements and records relating to the purchase or sale of real property. The parties acknowledge that they are fully familiar with the income, assets and value of such assets belonging to the other party. Each party expressly represents that they do not desire to incur any expense to secure disclosure of financial and property matters from the other. Each of the parties expressly waives any right to obtain discovery and disclosure of financial, property or income information from the other.

22. *Hallas v. Moule*, 252 A.D.2d 767, 676 N.Y.S.2d 274 (3d Dep't 1998); *Grubman v. Grubman*, 191 A.D.2d 194, 594 N.Y.S.2d 220 (1st Dep't 1993), *lv. to appeal denied*, 82 N.Y.2d 651, 601 N.Y.S.2d 580 (1993).

23. *McCaughey v. McCaughey*, 205 A.D.2d 330, 612 N.Y.S.2d 579 (1st Dep't 1994); *Grubman*, *supra* note 22; *Maier v. Maier*, 221 A.D.2d 193, 633 N.Y.S.2d 165 (1st Dep't 1995), *leave to appeal dismissed in part, denied in part*, 87 N.Y.2d 965, 642 N.Y.S.2d 193 (1996).

24. *Bonem v. Garriott*, 159 A.D.2d 206, 552 N.Y.S.2d 16 (1st Dep't 1990).

25. *Chapin v. Chapin*, 291 A.D.2d 473, 740 N.Y.S.2d 67 (2d Dep't 2002).

26. *Paruch v. Paruch*, 140 A.D.2d 418, 528 N.Y.S.2d 119 (2d Dep't 1988).

27. *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982) (it is poor practice to do so because the floodgates of trouble await the unsuspecting practitioner when he or she is called as a witness years down the road).

28. "In determining whether a separation agreement was freely and fairly entered into, the fact that the complaining party was not represented by counsel is a significant factor to be taken into consideration, but that fact, in itself, does not establish overreaching." *Tirrito v. Tirrito*, 191 A.D.2d 686, 595 N.Y.S.2d 786 (2d Dep't 1993); *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982); *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 654 N.Y.S.2d 904 (4th Dep't 1997), *Tchorzewski v. Tchorzewski*, 278 A.D.2d 869, 717 N.Y.S.2d 436 (4th Dep't 2000); *see Nasifoglu v. Nasifoglu*, 224 A.D.2d 504, 637 N.Y.S.2d 792 (2d Dep't 1996); *Chauhan v. Thakur*, 184 A.D.2d 744, 745, 585 N.Y.S.2d 482; *Zambito v. Zambito*, 171 A.D.2d 918, 919, 566 N.Y.S.2d 789, *appeal dismissed*, 78 N.Y.2d 1125, 578 N.Y.S.2d 881, 586 N.E.2d 64; *Chalos v. Chalos*, 128 A.D.2d 498, 512 N.Y.S.2d 426, *lv. denied*, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, *rearg. denied*, 70 N.Y.2d 927, 524 N.Y.S.2d 434, 519 N.E.2d 345; *Stampfel v. Stampfel*, 170 A.D.2d 595, 566 N.Y.S.2d 872 (2d Dep't 1991) (the fact that the plaintiff was not represented by independent counsel when the divorce agreements were executed does not, by itself, establish overreaching or require automatic nullification); *Wilson v. Neppell*, 253 A.D.2d 493, 677 N.Y.S.2d 144 (2d Dep't 1998) *lv. to appeal denied*, 92 N.Y.2d 816, 683 N.Y.S.2d 759 (1998)).

29. *Croote-Fluno v. Fluno*, 289 A.D.2d 669, 734 N.Y.S.2d 298 (3d Dep't 2001) (both parties were advised to retain counsel—that a party is not represented by an attorney is not fatal to its enforceability, especially where a conscious decision was made not to seek counsel); *Lavelle v. Lavelle*, 187 A.D.2d 912, 590 N.Y.S.2d 557 (3d Dep't 1992); *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 976, 654 N.Y.S.2d 904, 905 (4th Dep't 1997); *Tchorzewski v. Tchorzewski,* 278 A.D.2d 869, 717 N.Y.S.2d 436 (4th Dep't 2000); (wife advised by counsel of need to seek appraiser; the wife, an experienced businesswoman, elected to proceed without an attorney and to sign the agreement; she had ample opportunity to retain a different attorney had she so desired. *Amestoy v. Amestoy,* 151 A.D.2d 709, 543 N.Y.S.2d 141 (2d Dep't 1989); *Zambito v. Zambito*, 171 A.D.2d 918, 919, 566 N.Y.S.2d 789, *appeal dismissed*, 78 N.Y.2d 1125, 578 N.Y.S.2d 881.

30. *Warren v. Rabinowitz*, 228 A.D.2d 492, 644 N.Y.S.2d 315, 316 (2d Dep't 1996); *Chauhan v. Thakur*, 184 A.D.2d 744, 745, 585 N.Y.S.2d 482, 483 (2d Dep't 1992).

31. *Tirrito v. Tirrito*, 191 A.D.2d 686, 595 N.Y.S.2d 786 (2d Dep't 1993); a freely executed agreement, knowingly prepared by the other attorney, containing unambiguous terms, which could have been read and reviewed prior to signature negates overreaching or duress. *Dalpe v. Dalpe*, 96 A.D.2d 621, 464 N.Y.S.2d 587 (3d Dep't 1987).

32. *Chapin v. Chapin*, 295 A.D.2d 389, 744 N.Y.S.2d 181 (2d Dep't 2002).

33. *Stacom v. Wunsch*, 162 A.D.2d 170, 556 N.Y.S.2d 303, *lv to appeal dismissed*, 77 N.Y.2d 873, 571 N.E.2d 85, 568 N.Y.S.2d 915 (1991).

34. *Silver v. Starrett*, 176 Misc. 2d 511, 674 N.Y.S.2d 915 (N.Y. Sup. 1998); *Dwyer v. Dwyer,* 190 Misc. 2d 319, 737 N.Y.S.2d 806 (N.Y. Sup. 2001); *Niosi v. Niosi*, 226 A.D.2d 510, 641 N.Y.S.2d 93 (2d Dep't 1996).

35. *Bettino v. Bettino*, 112 A.D.2d 181, 491 N.Y.S.2d 407 (2d Dep't 1985); *Cook v. Cook*, 260 A.D.2d 160, 161, 687 N.Y.S.2d 368, 369 (1st Dep't 1999).

36. 55 N.Y.2d 957, 449 N.Y.S.2d 180 (1982).

37. *Gaines v. Gaines*, 218 A.D.2d 683, 630 N.Y.S.2d 941 (2d Dep't 1995); *Koch v. Koch*, 198 A.D.2d 701, 603 N.Y.S.2d 932, *leave to appeal dismissed*, 83 N.Y.2d 847, 634 N.E.2d 605, 612 N.Y.S.2d 109 (1994).

38. (a) Acceptance of benefits for *31 months*, *Lavelle v. Lavelle,* 187 A.D.2d 912, 590 N.Y.S.2d 557 (3d Dep't 1992); (b) acceptance of benefits for *almost five years*, *Star v. Star*, 260 A.D.2d 363, 687 N.Y.S.2d 698 (2d Dep't 1999); (c) plaintiff accepted the benefits of the agreement for *over three years* without objecting, *Wilson v. Neppell*, 253 A.D.2d 493, 677 N.Y.S.2d 144, 145 (2d Dep't 1998); (d) receipt of benefits for nearly *two years*, *Boyle v. Burkich*, 245 A.D.2d 609, 665 N.Y.S.2d 104 (3d Dep't 1997); (e) acceptance of benefits for *15½ months*, *Reader v. Reader*, 236 A.D.2d 829, 653 N.Y.S.2d 768 (4th Dept, 1997); acceptance of "substantial benefits" is deemed to have ratified the agreement, *Gaines v. Gaines*, 218 A.D.2d 683, 630 N.Y.S.2d 941 (2d Dep't 1995); (f) acceptance of benefits for *21 months*, *Luce v. Luce*, 213 A.D.2d 978, 625 N.Y.S.2d 765; (g) acceptance of benefits *for a considerable period of time, McKeown v. McKeown*, 237 A.D.2d 890, 654 N.Y.S.2d 549 (4th Dep't 1997); (h) acceptance of benefits for more than four years, *Capone v. Capone*, 148 A.D.2d 565, 539 N.Y.S.2d 35 (2d Dep't 1989); (i) despite the influence of cocaine at the time of the execution of the agreement and acquiescence in the agreement via receipt of the benefits for a considerable period of time subsequent to being under the influence of cocaine, his or her actions ratified the agreement, (j) *Glaser v. Glaser*, 127 A.D.2d 741, 512 N.Y.S.2d 132 (2d Dep't 1987); (k) *Chalos v. Chalos*, 128 A.D.2d 498, 512 N.Y.S.2d 426, *lv. denied*, 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, *rearg. denied*, 70 N.Y.2d 927, 524 N.Y.S.2d 434, 519 N.E.2d 345 (receipt of benefits *over three years*); (l) *Cross v. Cross*, 290 A.D.2d 920, 736 N.Y.S.2d 802 (3d Dep't 2002) "Further, with defendant failing to challenge the validity of the separation agreement for approximately one year after it was executed, a question regarding her ratification thereof remains extant"); (m) *Carlson v. Carlson*, 255 A.D.2d 873, 680 N.Y.S.2d 362 (4th Dep't 1998), receipt for *14 months*; (n) *Bettino v. Bettino*, 112 A.D.2d 181, 491 N.Y.S.2d 407 (2d Dep't 1985), receipt of benefits *for 32 years*; (o) *Giustiniani v. Giustiniani*, 278 A.D.2d 609, 719 N.Y.S.2d 139 (3d Dep't 2000), receipt *for 4 years*; (p) *Torsiello v. Torsiello*, 188 A.D.2d 523, 591 N.Y.S.2d 472 (2d Dep't 1992), receipt *for 2 years*; (q) *Mahon v. Moorman*, 234 A.D.2d 1, 650 N.Y.S.2d 153 (1st Dep't 1996); (r) *Koch v. Koch*, 198 A.D.2d 701, 603 N.Y.S.2d 932 (3d Dep't 1993).

39. *Christian*, *supra* note 3; *Kleinman v. Kleinman*, 289 A.D.2d 18, 733 N.Y.S.2d 417 (1st Dep't 2001); *Cardinal v. Cardinal*, 275 A.D.2d 756, 713 N.Y.S.2d 370 (2d Dep't 2000); *Frank v. Frank*, 260 A.D.2d 344, 686 N.Y.S.2d 309 (2d Dep't 1999); *Battista v. Battista*, 105 A.D.2d 898, 482 N.Y.S.2d 63 (3d Dep't 1984); *Terio v. Terio*, 150 A.D.2d 675, 541 N.Y.S.2d 548 (2d Dep't 1989); *Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001).

40. *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 654 N.Y.S.2d 904 (4th Dep't 1997).

41. *Weimer v. Weimer*, 281 A.D.2d 989, 722 N.Y.S.2d 328 (4th Dep't 2001); *Luftig v. Luftig*, 239 A.D.2d 225, 657 N.Y.S.2d 658 (1st Dep't 1997); *Luce v. Luce*, 213 A.D.2d 978, 625 N.Y.S.2d 765 (4th Dep't 1995); *Wasserman v. Wasserman*, 217 A.D.2d 544, 629 N.Y.S.2d 69 (2d Dep't 1995); *Stacom v. Wunsch*, 162 A.D.2d 170, 556 N.Y.S.2d 303, *lv to appeal dismissed*, 77 N.Y.2d 873, 571 N.E.2d 85, 568 N.Y.S.2d 915 (1991); *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 654 N.Y.S.2d 904 (4th Dep't 1997); *Luce v. Luce*, 213 A.D.2d 978, 625 N.Y.S.2d 765; *Sheindlin v. Sheindlin*, 88 A.D.2d 930, 450 N.Y.S.2d 88, *appeal dismissed*, 57 N.Y.2d 775 (1982); *Gloor v. Gloor*, 190 A.D.2d 1007, 594 N.Y.S.2d 471; *Groper v. Groper*, 132 A.D.2d 492, 518 N.Y.S.2d 379 (1st Dep't 1987); *Niosi v. Niosi*, 226 A.D.2d 510, 641 N.Y.S.2d 93 (2d Dep't 1996); *Weimer v. Weimer*, 281 A.D.2d 989, 722 N.Y.S.2d 328 (4th Dep't 2001).

42. *Wasserman v. Wasserman*, 217 A.D.2d 544, 629 N.Y.S.2d 69, 70 (2d Dep't 1995); *Sheindlin v. Sheindlin*, 88 A.D.2d 930, 450 N.Y.S.2d 88, *appeal dismissed*, 57 N.Y.2d 775 (1982); *Groper v. Groper*, 132 A.D.2d 492, 518 N.Y.S.2d 379 (1st Dep't 1987).

43. *Van Wie v. Van Wie*, 124 A.D.2d 353, 507 N.Y.S.2d 486 (3d Dep't 1986).

44. *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 976, 654 N.Y.S.2d 904, 905 (4th Dep't 1997).

45. 176 Misc.2d 511, 674 N.Y.S.2d 915 (N.Y. Sup., 1998).

46. 162 A.D.2d 170, 556 N.Y.S.2d 303, *lv to appeal dismissed*, 77 N.Y.2d 873, 571 N.E.2d 85, 568 N.Y.S.2d 915 (1991); *see also Wasserman v. Wasserman*, 217 A.D.2d 544, 629 N.Y.S.2d 69, 70 (2d Dep't 1995); *Luftig v. Luftig*, 239 A.D.2d 225, 657 N.Y.S.2d 658 (1st Dep't 1997); *Peters v. Peters*, 150 A.D.2d 763, 542 N.Y.S.2d 212 (2d Dep't 1989); *Kaufman v. Kaufman*, 135 A.D.2d 786, 522 N.Y.S.2d 899 (2d Dep't 1987).

47. 212 A.D.2d 583, 622 N.Y.S.2d 755 (2d Dep't 1995).

48. *Beutel v. Beutel*, 55 N.Y.2d 957, 958, 449 N.Y.S.2d 180, 434 N.E.2d 249 (1982); *Stacom v. Wunsch*, 162 A.D.2d 170, 556 N.Y.S.2d 303, *lv to appeal dismissed*, 77 N.Y.2d 873, 571 N.E.2d 85, 568 N.Y.S.2d 915 (1991).

49. *Chalos v. Chalos*, 128 A.D.2d 498, 512 N.Y.S.2d 426, *lv. denied,* 70 N.Y.2d 609, 522 N.Y.S.2d 109, 516 N.E.2d 1222, *rearg. denied*, 70 N.Y.2d 927, 524 N.Y.S.2d 434, 519 N.E.2d 345; *Hirsch v. Hirsch*, 134 A.D.2d 485, 521 N.Y.S.2d 269 (2d Dep't 1987).

50. *Hartcorn v. Hartcorn*, 749 N.Y.S.2d 441 (2d Dep't 2002); *Tchorzewski v. Tchorzewski,* 278 A.D.2d 869, 717 N.Y.S.2d 436 (4th Dep't 2000); *Silver v. Starrett*, 176 Misc. 2d 511, 674 N.Y.S.2d 915 (N.Y. Sup. 1998); *Stampfel v. Stampfel*, 170 A.D.2d 595, 566 N.Y.S.2d 872 (2d Dep't 1991); *Weimer v. Weimer*, 281 A.D.2d 989, 722 N.Y.S.2d 328 (4th Dep't 2001); *Sheridan v. Sheridan*, 202 A.D.2d 749, 608 N.Y.S.2d 582 (3d Dep't 1994); *Dwyer v. Dwyer,* 190 Misc. 2d 319, 737 N.Y.S.2d 806 (N.Y. Sup., 2001); *Lavelle v. Lavelle*, 187 A.D.2d 912, 590 N.Y.S.2d 557 (3d Dep't 1992); *Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001); *Stampfel v. Stampfel*, 170 A.D.2d 595, 566 N.Y.S.2d 872 (2d Dep't 1991).

51. *Croote-Fluno v. Fluno*, 289 A.D.2d 669, 734 N.Y.S.2d 298 (3d Dep't 2001).

52. *Croote-Fluno v. Fluno*, 289 A.D.2d 669, 734 N.Y.S.2d 298 (3d Dep't 2001); *Morris v. Kavaky*, 210 A.D.2d 383, 620 N.Y.S.2d 423 (2d Dep't 1994); *Amestoy v. Amestoy*, 151 A.D.2d 709, 543 N.Y.S.2d 141 (2d Dep't 1989); *O'Lear v. O'Lear*, 235 A.D.2d 466, 652 N.Y.S.2d 1008; *Warren v. Rabinowitz*, 228 A.D.2d 492, 644 N.Y.S.2d 315 (2d Dep't 1996); *Clermont v. Clermont*, 198 A.D.2d 631, 603 N.Y.S.2d 923, *lv. dismissed*, 83 N.Y.2d 953, 615 N.Y.S.2d 877.

53. *Amestoy v. Amestoy*, 151 A.D.2d 709, 543 N.Y.S.2d 141 (2d Dep't 1989); *O'Lear v. O'Lear*, 235 A.D.2d 466, 652 N.Y.S.2d 1008 (2d Dep't 1997).

54. *Lounsbury v. Lounsbury*, __A.D.2d__, 752 N.Y.S.2d 103 (3d Dep't 2002).

55. *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 654 N.Y.S.2d 904 (4th Dep't 1997); *Schoradt v. Rivet*, 186 A.D.2d 307, 587 N.Y.S.2d 794 (3d Dep't 1992); *Groper v. Groper*, 132 A.D.2d 492, 518 N.Y.S.2d 379 (1st Dep't 1987); *Gibson v. Gibson*, 284 A.D.2d 908, 726 N.Y.S.2d 195 (4th Dep't 2001).

56. *Warren v. Rabinowitz*, 228 A.D.2d 492, 644 N.Y.S.2d 315 (2d Dep't 1996).

57. *Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001); *Zagari v. Zagari*, 191 Misc. 2d 733, 746 N.Y.S.2d 235 (N.Y. Sup. 2002).

58. *McFarland v. McFarland*, 70 N.Y.2d 916, 524 N.Y.S.2d 392 (1987); *Turk v. Turk*, 276 A.D.2d 953, 714 N.Y.S.2d 566 (3d Dep't 2000); *Kaffenberger v. Kaffenberger*, 228 A.D.2d 743, 643 N.Y.S.2d 740 (3d Dep't 1996); *Barzin v. Barzin*, 158 A.D.2d 769, 551 N.Y.S.2d 361 (3d Dep't 1990), *appeal dismissed*, 77 N.Y.2d 834, 567 N.E.2d 982, 566 N.Y.S.2d 588 (1991); *Jackson v. Jackson*, 181 A.D.2d 638, 581 N.Y.S.2d 1005 (1st Dep't 1992).

> Defendant may not have negotiated the best terms for himself, but it cannot be said that "no [person] in his [or her] senses and not under delusion would make the [agreement] on the one hand, and * * * no honest and fair [person] would accept [it] on the other." (*Hume v. United States,* 132 U.S. 406, 411 [10 S.Ct. 134, 136, 33 L.Ed. 393]) (*Christian v. Christian, supra*, at 71, [260 N.Y.S.2d 817, 365 N.E.2d 849]; *Weinstock v. Weinstock*, 167 A.D.2d 394, 395, [561 N.Y.S.2d 807], *lv dismissed* 77 N.Y.2d 874, [568 N.Y.S.2d 916, 571 N.E.2d 86]; *see, Barzin v. Barzin, supra*, at 770, [551 N.Y.S.2d 361).

Hunt v. Hunt, 184 A.D.2d 1010, 1011, 585 N.Y.S.2d 259 (4th Dep't 1992); *see Krupski v. Krupski*, 168 A.D.2d 942, 564 N.Y.S.2d 896 (4th Dep't 1990), *appeal denied*, 77 N.Y.2d 804, 568 N.Y.S.2d 912 (1991).

59. *Amestoy*, 151 A.D.2d 709, 543 N.Y.S.2d 141 (2d Dep't 1989).

60. *Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001); *Mahon v. Moorman*, 234 A.D.2d 1, 650 N.Y.S.2d 153 (1st Dep't 1996); *In re Baby Boy O*, 289 A.D.2d 631, 733 N.Y.S.2d 768 (3d Dep't 2001); "To void a contract on the ground of duress, a party must establish that he or she 'was forced to agree to it by means of a wrongful threat which precluded the exercise of his [or her] free will * * *.' In order to form an element of duress, the threat must be wrongful."

61. __A.D.2d__, 752 N.Y.S.2d 103 (3d Dep't 2002).

62. 172 A.D.2d 1084, 1085, 569 N.Y.S.2d 263 (4th Dep't 1991); Prof. David Siegel, Practice Commentaries, C3212:7: "The summary judgment is available today in any kind of action. When the CPLR first came out, in 1963, the matrimonial action was an exception, but a 1978 amendment (effective January 1, 1979) eliminated the exception and today there are no generic exceptions at all" (except matters regarding reverse partial summary judgment).

63. __A.D.2d__, 752 N.Y.S.2d 103 (3d Dep't 2002).

64. 51 N.Y.2d 368, 434 N.Y.S.2d 194 (1980).

65. *See Feinberg v. Feinberg*, 40 N.Y.2d 124, 386 N.Y.S.2d 77 (1976).

66. "A party to a separation agreement may not attack the validity of the agreement collaterally after it has been incorporated, as it was here, in a valid, bilateral foreign decree of divorce" *Greschler v. Greschler*, 51 N.Y.2d 368, 376-377, 434 N.Y.S.2d 194, 414 N.E.2d 694; *Fink v. Goldblatt*, 18 A.D.2d 629, 235 N.Y.S.2d 56, *aff'd*, 13 N.Y.2d 957, 244 N.Y.S.2d 457, 194 N.E.2d 423; *see* 19 Carmody-Wait 2d, N.Y. Prac., p. 563); *Galyn v. Schwartz*, 56 N.Y.2d 969, 453 N.Y.S.2d 624 (1982); *Rabbani v. Rabbani*, 178 A.D.2d 637, 578 N.Y.S.2d 213 (2d Dep't 1991); *Bourbon v. Bourbon*, 751 N.Y.S.2d 302 (2d Dep't 2002); *Tal v. Tal*, 158 Misc. 2d 703, 601 N.Y.S.2d 530 (N.Y. Sup., 1993).

67. 149 Misc. 2d 797, 565 N.Y.S.2d 980, *aff'd*, 182 A.D.2d 570, 582 N.Y.S.2d 429 (1st Dep't 1992).

68. 210 A.D.2d 223, 619 N.Y.S.2d 749 (2d Dep't 1994).

69. *Van Wie v. Van Wie*, 124 A.D.2d 353, 507 N.Y.S.2d 486 (3d Dep't 1986).

70. *Perretta v. Perretta,* 203 A.D.2d 668, 610 N.Y.S.2d 374, *lv. to appeal dismissed*, 84 N.Y.2d 809, 645 N.E.2d 1218, 621 N.Y.S.2d 518 (1994).

71. *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 654 N.Y.S.2d 904 (4th Dep't 1997); *Carlson v. Carlson*, 255 A.D.2d 873, 680 N.Y.S.2d 362 (4th Dep't 1998); *Lavelle v. Lavelle*, 187 A.D.2d 912, 590 N.Y.S.2d 557 (3d Dep't 1992).

72. *Shalmoni v. Shalmoni*, 141 A.D.2d 628, 529 N.Y.S.2d 538 (2d Dep't 1988), *lv. to appeal dismissed*, 73 N.Y.2d 851, 534 N.E.2d 333, 537 N.Y.S.2d 495 (1988).

73. *Boyle v. Burkich*, 245 A.D.2d 609, 665 N.Y.S.2d 104 (3d Dep't 1997) (in order to state a cause of action based on fraud, there must be detailed factual allegations supporting the claim); *Sheridan v. Sheridan*, 202 A.D.2d 749, 608 N.Y.S.2d 582 (3d Dep't 1994); *Wilson v. Neppell*, 253 A.D.2d 493, 677 N.Y.S.2d 144 (2d Dep't 1998); *Carlson v. Carlson*, 255 A.D.2d 873, 680 N.Y.S.2d 362 (4th Dep't 1998); *Glaser v. Glaser*, 127 A.D.2d 741, 512 N.Y.S.2d 132 (2d Dep't 1987); *Kaufman v. Kaufman*, 135 A.D.2d 786, 522 N.Y.S.2d 899 (2d Dep't 1987); *McGahee v. Kennedy*, 48 N.Y.2d 832, 424 N.Y.S.2d 343 (1979); *Gloor v. Gloor*, 190 A.D.2d 1007, 594 N.Y.S.2d 471 (4th Dep't 1993); *Bull v. Bull*, 91 A.D.2d 766, 458 N.Y.S.2d 271 (3d Dep't 1982); (plaintiff's allegations that defendant, among other things, prevented her from obtaining independent legal counsel, selected her attorney and then attended the two cursory meetings between her and counsel, and did not reveal the extent of his assets, and that no negotiations between the parties were ever conducted and that she had no input into the document that was presented for her signature, are sufficient to state causes of action for rescission or reformation on the grounds of unconscionability, fraud and duress. *Packer v. Packer*, 225 A.D.2d 314, 639 N.Y.S.2d 9 (1st Dep't 1996)); *Carlson v. Carlson*, 255 A.D.2d 873, 680 N.Y.S.2d 362 (4th Dep't 1998); *Stacom v. Wunsch*, 162 A.D.2d 170, 556 N.Y.S.2d 303, *lv. to appeal dismissed*, 77 N.Y.2d 873, 571 N.E.2d 85, 568 N.Y.S.2d 915 (1991).

74. *Sgambati v. Sgambati*, 298 A.D.2d 514, 748 N.Y.S.2d 872 (2d Dep't 2002).

75. CPLR 3212.

76. CPLR 3212(b) (emphasis provided).

77. *Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001); *Cappuccilli v. Krupp Equity Ltd. Partnership*, 269 A.D.2d 822, 702 N.Y.S.2d 736 (4th Dep't 2000); *Gloor v. Gloor,* 190 A.D.2d 1007, 594 N.Y.S.2d 471 (4th Dep't 1993).

78. *Forsberg v. Forsberg*, 219 A.D.2d 615, 631 N.Y.S.2d 709 (2d Dep't 1995); *Brassey v. Brassey*, 154 A.D.2d 293, 546 N.Y.S.2d 370 (1st Dep't 1989).

Mediation—The Big Lie

By Catharine M. Venzon

In a perfect world, parties would not need attorneys to settle their family disputes. In this world, both Mom and Dad would have time for a career *and* a family, with both parents taking an equal role in childrearing. However, we do not live in a perfect world, and as a result, more than half of recent marriages will end in divorce.[1] Whether this separation is caused by financial woes, differing childrearing tactics, or any number of possible marital problems, safety in numbers does not do much to console a potential divorcee. Parties seeking a divorce need a compassionate advocate for their rights. Unfortunately, this is not always what they get.

In this age of lawyer bashing, slick entrepreneurs have found a new angel to exploit: Mediation for Matrimonial and Family Law. Sadly, mediation is not the one-size-fits-all, affordable, quick solution to resolving disputes that its proponents would have us believe. In fact, mediation can contribute to escalated court costs, exacerbate friction between the parties, and cause irreparable harm to all. Scary as this sounds, many are jumping on the Mediation bandwagon with little or no knowledge of the process and its pitfalls. As a result, Matrimonial and Family Law may lose its place in the Supreme Court as the domain for serious disputes involving families and children. If these issues are taken out of the Court system and given to untrained, non-professionals to decide, what does this do to the sanctity of the family? Supreme Court is a valuable resource to provide family matters with the safeguards that are given to all other serious litigation.

The core of mediation consists of one person's word against another. The mediator does not have to interview witnesses or gather facts. There is no investigation by a mediator to determine the information needed to make an intelligent, professional recommendation to the parties. In addition, there are no standard procedures that mediators are required to follow when guiding a husband and wife through a divorce proceeding (or any other type of proceeding for that matter). The end result can be highly detrimental to both parties.

Is Mediation Really Affordable?

Not necessarily. While a mediator may have lower hourly rates than, say, a brain surgeon or even an attorney, oftentimes you get what you pay for. In some cases the rates for a mediator may seem more reasonable than retaining an attorney, but it is important to consider what you will be getting for your hard-earned money. Mediation can actually cost upwards of $150 per hour. This amount is not much less than a typical divorce attorney. Considering the fact that mediators are not mandated to have an advanced degree and take a rather tedious examination before they can practice, this seems like an awfully high price.[2] Do you really want to pay this much to someone who does not have to tell you your rights? If you are arrested and are not read your Miranda Rights (that's when the police officer says, "You have the right to remain silent. Anything you say can and will be used against you in a court of law . . . ," etc.), statements that you make cannot be submitted in a court of law. In the same way, you would want to be aware of your rights in a divorce. However, a mediator is not required to tell a client about the rights that they have in a divorce. In addition, there is no requirement that information said to a mediator during consultation be kept confidential. Therefore, in theory, a mediator could meet with each spouse individually and reveal information that each told them in confidence to the other party. On the other hand, an attorney is required to keep all information conveyed in a client conference confidential. In fact, an attorney can face suspension or disbarment for violations of attorney-client privilege.

No Rules for Mediators—Just Proposals

In fact, the guides for mediation practices are only that—guides. There are no established standards that are binding on mediators that would enforce good ethical practices. The main source of guidance for mediators is the Model Standards of Conduct for Mediators, as prepared by the American Arbitration Association.[3] However, there are no punishments for mediators if they do not follow these guidelines. Since there is no license required to be a mediator, it follows that someone who is a bad mediator will not have any repercussions for any wrongdoing he or she might commit in the process of mediating your divorce. If there is no punishment for disregarding the guidelines, there is no incentive for a mediator to follow them.

According to the Model Standards of Conduct for Mediators, the mediation process relies on the "ability of the parties to reach a voluntary, uncoerced agreement." However, it seems as though if this were the case, third-party intervention would not be necessary. If a husband and wife could come up with an agreement on their own, a mediator would not be necessary. One would normally think of a mediator as someone to go to when you are having trouble settling a dispute and need a neutral third party to help out. Thus, the point

of using a mediator would be to help a husband and wife resolve issues that they were unable to resolve on their own. But, the Model Standard implies that the parties should be able to resolve things on their own. How do these opposite ideas make any sense?

According to the Model Standards of Conduct for Mediators, any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. These qualifications can be as many or as few as the parties desire. This means that literally anyone can hang up a shingle saying "Don't waste money on lawyers—hire a mediator." Would you really want your hair stylist, mechanic, or landscaper acting as a mediator for your divorce? Even a hair stylist must be licensed to do business in the state of New York. A bad haircut will grow back—botched mediation in a divorce is much more difficult and expensive to remedy.

In addition, a mediator is required to disclose all potential conflicts of interest, but the parties may still choose this mediator provided they all agree. An attorney can be used as a mediator, but if this is the case the attorney cannot draft and file the separation agreement and divorce papers for the parties jointly unless the attorney can prove that he or she is not affiliated with either party to the divorce. However, this is a requirement that only an attorney is held to because it is stipulated in the New York State Bar Association's ethical rules.[4] It would be a conflict of interest to allow an attorney to assist as a mediator and then represent both clients. This conflict takes place when an attorney attempts to represent both sides of a divorce action. It is typically not possible for an attorney to have the best interests of both parties in mind when the parties are as disparate as those in a divorce action. The only way that attorneys can get around this conflict is to ensure that they can satisfy the "disinterested lawyer" test as proposed by the New York State Bar Association. This test provides a standard that would only allow an attorney to represent both sides in very limited circumstances. The bottom line here is that if an attorney, with years of training and qualifications, is not allowed to represent both sides of a divorce action, then a mediator who has possibly had no training should not be allowed to do this either.

No Compulsory Financial Disclosure

Perhaps the most troubling problem with mediation in divorce cases is that mediation is not right for everyone. In some cases, where the separation is amicable and both parties have equal bargaining weight, mediation can be a valid alternative to litigation. However, in all too many divorce cases the bargaining weight of the two parties is not equal. One spouse is likely to earn more money, have more education, greater physical strength, or some other manifestation of power in the relationship. This person is the one for whom mediation will probably be the most beneficial. Because there is no discovery requirement or financial disclosure requirement in mediation proceedings, the spouse who traditionally controlled the money, held title to many of the assets of the marriage or supported the other spouse fully, can withhold valuable financial information from his or her partner. The mediator doesn't have to take steps to determine the financial assets of the couple. There is also no punishment if one party fails to disclose income.

This often results in an unfair agreement that leaves the weaker party in a detrimental financial situation. This weaker party, who had less of everything to begin with, will now have an unfair property settlement and maintenance award, which will further work to his or her detriment. This situation is a perfect example of the way that mediation can cause a greater cost to the parties in the long run. When weaker parties are unable to function with the resulting unfair agreement, they may be forced to bring an action to have their award or agreement modified. This will surely require the assistance of an attorney in court, which is a cost that the parties were trying to avoid in the first place.

Comparatively, in a standard divorce action financial disclosure is required before the court makes any kind of decision or recommendation. A standard form is filled out by each party which lists, in excruciating detail, all of the assets and liabilities of the parties. In addition the most recent tax documents and each party's W2 forms will be required. This means that both parties and the court will know exactly how much money is at stake in the matter, and be able to accurately determine how the parties should be compensated. This can be even more important when children are involved because there are standards in place which can be used to mandate child support amounts. By law, a formula is used to determine the percentage of the parties' income that is necessary for child support. The percentage used is essentially the same whether the combined income of the couple is $10,000 or $100,000. In order to have a different award of child support, the parties must acknowledge that they have been informed of the amount recommended by the Child Support Standards Act and have decided to disregard it. In mediation these standards may not even be brought to the parties' attention and child support awards can be grossly unfair to one party or both.

In addition to the disparities caused by nondisclosure of the parties' assets, there is also the likelihood that a mediator will not have the same knowledge of other aspects of the law as an attorney does. Since there is no required training or certification for mediators, chances are they will not be able to have the parties'

best interests in mind. For example, it is probably not common knowledge that a wife does not have to sign over her rights to her husband's pension during a divorce. In certain situations (particularly longer marriages and/or if the wife was not the sole earner) the wife can be entitled to a percentage of her husband's pension, even if the divorce takes place years before the husband is of retirement age. For someone who is financially disadvantaged this would make a big difference in the long run. If mediators are not aware of current domestic relations law they will not know what their clients are entitled to obtain.

Victims of Domestic Violence Further Abused

Concerns about inequality increase considerably when women have been the victims of domestic violence (this is not implied to discount the issue of male victims of domestic violence, but the overwhelming majority of victims at this time are women). Mediation does not take into account the special circumstances surrounding these victims. Women who are battered and abused may not be able to speak up for themselves in a mediation proceeding. Since they are silenced their views and needs will not be accounted for in the mediation process. Unlike an attorney, a mediator is not an advocate for either party. Thus, there is no one to represent the victim's side without prejudice. People in an unequal partnership need the guidance and undivided loyalty of an attorney who will defend their rights zealously. Battered spouses are at a disadvantage in mediation proceedings and may be pressured into settling on unacceptable terms. If represented by an attorney in litigation there is a much better chance for the victim of domestic violence to have their rights upheld. This is not to say that the victims will be forced to testify in court to the things that have been done to them. An attorney will be able to better represent a victim of domestic violence in a divorce action regardless of whether the victim decides to press charges against the abuser. The important aspect is that the attorney is aware of the victim's special needs and can consider them in preparation for the judgment.

Conclusion

In an ideal world a mediator would provide a valuable service to parties who are seeking a divorce which would allow them to go to their attorneys with a solution already in hand, rather than the usual battles that can ensue regarding custody and distribution of finances and other marital property. This would prevent the long, drawn-out battles between husband and wife over petty marital issues. In reality, the problem comes when parties attempt to sidestep the judicial process by using a mediator and the mediation process is not successful. Then the parties must go through the arduous divorce process with their attorneys and rehash all the issues that they attempted to settle in mediation. This is a frustrating ordeal for everyone involved and should be avoided at all costs. Instead it is advised that both parties retain an attorney at the outset to help the divorce process go as smoothly as possible.

Endnotes

1. *See* U.S. Census data, Report on Marriage and Divorce, *available at* <http://www.census.gov/prod/2002pubs/p70-80.pdf>.
2. Attorneys, on the other hand, spend at least seven years in college learning about the practice of law and must take a three-day-long bar exam before they are allowed to represent clients. In addition to all this, once a potential attorney passes the bar exam, he or she still must pass the Character & Fitness review, which consists of a required interview with a member of the bar committee. In this interview the candidate's criminal past will be examined to keep those with a questionable past from becoming an attorney.
3. *Available at* <http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPaid=37505>, see link to Model Standards of Conduct for Mediators.
4. *See* NYSBA Comm. on Professional Ethics, Formal Op. 736.

The Death of the CSSA Opting Out Agreement

By Michael P. Friedman

So, here's your lesson for the month. You are a noncustodial parent and you have a case before the Court of Appeals. The law is on your side. The facts are on your side. The Constitution of the United States of America is on your side. You will (a) lose your shirt once again, (b) turn over what's left of your paycheck to the mother of your child, (c) have the child support provisions of your validly executed Support Agreement ignored in favor of current CSSA guidelines, (d) wish you lived in any other state, (e) wonder what the hell your lawyer was doing when he drafted this dumb agreement and assured you it would keep Mom's mitts off your income for years to come, or (f) all of the above. Those of us who follow the tea leaves of the Court of Appeals opinions for the past 17 years could have answered the question as soon as we heard the term "noncustodial." It wasn't enough for the Court of Appeals to take the *future* earnings of professionals and give it to the former spouse (*O'Brien*,[1] *McSparron*[2]), and to allow custodial parents to move children away from a father who had weekly visitation with his children for many years (*Tropea*[3]). Now virtually all support agreements are eviscerated by the mere request for a Cost of Living Adjustment (COLA). I kid you not. What is all the more galling about this opinion is the exposure to matrimonial counsel who try to fashion agreements that are binding on our clients by strictly complying with the statutory directives of the CSSA.

What happened here? As we all know in order for an agreement to be binding, if it deviates from the "strict application of the Child Support Standards Act" (whatever that means), we must put into the agreement what the child support "would have been" (whatever that means) under the Child Support Standards Act guidelines and the reasons for the deviation. OK. So we put in this lengthy and flowery language going through the percentages based on income as it "is or should have been on the most recently filed income tax returns" (whatever that means). For the most part, parties bargain off assets, debts, maintenance and a variety of other things to get a fair child support amount so they can go on with their lives, not spend a lot of money on lawyers, and not have some judge decide these issues. But the statute says such agreements are binding and enforceable, and for the most part courts incorporate these agreements into judgments and orders. Everyone goes away fairly happy and we advise our clients that we have done our best to insure that these agreements will not be modified absent an unanticipated change in circumstances (*Boden*[4]) or a showing that the support plus the resources of the custodial parent are unable to meet the reasonable needs of the child (*Brescia*[5]). Since these are pretty high standards, the agreements for the most part stick, and our malpractice insurance carriers are none the wiser.

So this guy, Boyd Chamberlin, signs an agreement in 1991 setting forth the child support for his children. The custodial parent, Linda Chamberlin, receives her support through the Support Collection Unit. Thereafter the legislature amended the Family Court Act (Section 413-a) to provide a Cost of Living review of Child Support Orders that are more than two years old. If someone doesn't like the new proposed COLA increase, that must be at least 10%, then you can file objections and seek a new adjusted order "without a showing of a change in circumstances." Of course, we all thought that this language meant that the objections resulted in a finding that the COLA was appropriate or inappropriate. Never in our wildest dreams did we think that you could get a new child support order in derogation of a valid CSSA agreement or a showing of the *Brescia/Boden* standards. However, wild dreams are grist for the matrimonial mill of the Court of Appeals, and they did just that on February 13, 2003, in *Tompkins County Support Collection Unit on Behalf of Linda S. Chamberlin v. Boyd M. Chamberlin*. In a unanimous opinion authored by Judge Ciparick, the Court of Appeals allowed a *de novo* increase in child support based on filed objections regardless of the opting out language of a valid agreement, and without a showing of a change in circumstances! And what about the agreement? Judge Ciparick wrote, "We recognize that parties to support agreements that consciously deviate from the CSSA guidelines are concerned that the statutory review and adjustment procedures not eviscerate the purpose of these agreements, including the desire for certainty over time." No kidding. However, her only response to the Court of Appeals exenterating Boyd Chamberlin's agreement is to state that "parties to an agreement may demonstrate why, in light of the agreement, it would be unjust or inappropriate to apply the guidelines to the amount." Sure. How many of you have been successful in making an "unjust and inappropriate" argument based on an agreement to defeat the application of CSSA standards? Not many, I guess. The existence of an agreement is not even one of the deviation factors in the statute.[6] For my money, the mere fact that the parties have a valid agreement is reason alone to find that the application of the CSSA standards is unjust and inappropriate.

Mr. Chamberlin also argued that the Contract Clause of the Federal Constitution[7] would be violated by ignoring the bargain of his valid support agreement. Without citation, Judge Ciparick stated, "We perceive no impediment to the parties' right to contract." Of course not. Just because you are going to nearly triple Mr. Chamberlin's child support obligation by ignoring the contract amount doesn't mean you are impeding his right to contract. The Court went on to state that the support provisions of the contract can be ignored if "it is reasonable and necessary to serve an important public purpose." And what, pray tell, is the public purpose behind giving Mrs. Chamberlin more child support than she bargained for? The Court of Appeals said that the courts can ignore the child support contract in order to ensure that children receive adequate child support. I guess eviscerating child support agreements "is a reasonable and necessary means of accomplishing that goal."

So, what's a matrimonial lawyer to do? We have all drafted agreements that comply with the statute, but we cannot now guarantee that the child support provisions will hold in light of a COLA review and the filing of objections by the custodial spouse. Several things come to mind, but I'm not sure any of them would work. First of all, maybe we can have the custodial spouse waive the right to seek support collection services in the support agreement. Such services are available merely upon request in any support or modification proceeding. Also, one might provide that if there is a COLA adjustment that results in objections and new child support amounts in derogation of the agreement, then the custodial spouse must pay back the amount of support as some kind of distributive award. Or maybe we should just apply to practice in another state, increase our malpractice premiums and stay the course and keep our fingers crossed. As for me, I'm too old to think about practicing in another state, so I guess I'll try to put some penalty provisions in my agreements in the hopes that the Court of Appeals will not get a chance to review the viability of such clauses. For now, the result of such a review is predictable.

Endnotes

1. *O'Brien v. O'Brien*, 56 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).
2. *McSparron v. McSparron*, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995).
3. *Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575 (1996).
4. *Boden v. Boden*, 42 N.Y.2d 210, 397 N.Y.S.2d 701 (1977).
5. *Brescia v. Fitts*, 56 N.Y.2d 132, 451 N.Y.S.2d 68 (1982).
6. Domestic Relations Law § 240(1-b)(f).
7. U.S. Constitution Article 1, Section 10, Clause 1.

A Thing of Value Is a Joy Forever

By Sandra W. Jacobson

To continue the paraphrase:

> "Its value increases; it will never pass into nothingness."

How did New York get into this morass of valuing enhanced earning capacity? While there were a few conflicting lower court decisions before *O'Brien*,[1] we may take that as the sand upon which this shaky castle has been built.

A license, the Court of Appeals said, was a thing of value.[2] That a professional license had no market value was irrelevant.[3] What is its value? "[T]he enhanced earning capacity it affords the holder . . ."[4]

Note the word "capacity," and note, also, that so far as post-graduate legal and medical training go, it is largely a misnomer. All attorneys admitted in New York can practice tax law without an LLM in taxation. A doctor, to be licensed in New York, requires only one year of a residency. Thereafter, he or she can practice any kind of medicine the doctor desires. So far as capacity is concerned, there is no capacity to earn embodied in any training beyond the fundamentals.

What *O'Brien* also did, of course, was declare that not only are all internists created equal, they remain so. But we know that that is untrue for doctors, lawyers, accountants and even opera singers. The worth of a degree will vary with the gender, race and ethnic background of the holder.

Until the decay of the rust belt, a male with a high school diploma earned more than a female with a college degree. African-Americans and Hispanics earn less than non-Hispanic Caucasians, even adjusted for education.

You can find income figures for high school graduates adjusted for gender. It is harder to get such adjusted numbers for college graduates or to get income statistics adjusted for race and ethnicity. Obviously, if either the bottom or top number in the equation is not so adjusted, the result is inapplicable to the individual.

Beyond that, people with the same academic credentials do not necessarily make the same income. To the contrary, there may be a very broad spread between the bottom quartile and the top tenth percentile in any field of endeavor.

Customarily, we use median earnings to ascertain enhanced income capacity. By definition, while half of our statistical universe earns that or more, half earn that or less. Few of the readers of this article earn the income that a senior partner at Weil Gotshal & Manges takes home.

I recently tried a case involving the enhanced earning capacity of a plastic surgeon. The arithmetic mean income of the specialty from the tables used by both parties' experts was 27% higher than the median. The bottom quartile earned some 20% less than the median. The top ten percent earned more than two and a half times the median and over three times the income of the bottom quartile.

We have been instructed[5] that where the holder of a license has embarked on a career, his or her actual earnings should be used to measure enhanced earning capacity, which in itself demonstrates that a license does not embody enhanced earning capacity. For example, Smith and his classmate Jones were sworn in the same day. Their licenses are identical. Six years later, Smith is earning $100,000 and Jones $300,000. Did their licenses change?

This mythology might be amusing if it were not for the effect it has on human lives. As Justice Myer noted in his concurring opinion, equitable distribution awards cannot be modified. Short of declaring bankruptcy, as Dr. O'Brien threatened to do, if the licensee does not earn the projected sum, he or she must nonetheless pay it. The licensee can be locked into a career choice which proves unpleasant. Unfortunately, Justice Myer's appeal to the legislature to look into "the potential for unfairness"[6] this rigidity entails has gone unanswered.

Endnotes

1. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).
2. *Id.* at 583.
3. *Id.* at 589.
4. *Id.* at 588.
5. *E.g., Wadsworth v. Wadsworth*, 219 A.D.2d 410 (4th Dep't 1996); *Grunfeld v. Grunfeld*, 255 A.D.2d (1st Dep't 1999) *mod. in other respects*, 94 N.Y.2d 696.
6. 66 A.D.2d 591.

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.*, Spring/Summer 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.

Kenneth C. v. Keleen C., Supreme Court, Nassau County (Raab, Ira J., April 2, 2003)

For the Plaintiff: Samuel J. Ferrara, Esq.
Abrams, Fensterman, Fensterman, Flowers & Eisman, LLP
111 Marcus Avenue
Suite 107
Lake Success, NY 11042

For the Defendant: Kenneth J. Weinstein, Esq.
100 Garden City Plaza
Suite 408
Garden City, NY 11530

Law Guardian: Barbara Kopman, Esq.
183 Broadway
Hicksville, NY 11801

In this failed 16 year marriage, wherein the parties and four children enjoyed a lavish lifestyle, the defendant-wife is awarded *pendente lite* maintenance, without having to deplete her assets, in order to close the disparity in incomes. The Court imputes "downward" adjustments in the parties' claimed monthly expenses because of the financial realities of the terminating marriage. The Court also awards interim counsel fees to the defendant to help her defend the action. Finally, due to the apparent delay and reluctance of the plaintiff-occupier of the marital home to cooperate with its stipulated sale, the Court appoints a receiver to effectuate the sale and distribute the sale proceeds.

The Court has before it two Orders to Show Cause brought by defendant-wife, and submitted on February 25, 2003, after oral argument.

The first Order to Show Cause, dated December 12, 2002, seeks the following *pendente lite* relief:

a) directing plaintiff-husband to maintain existing health insurance plans and life insurance policies for the benefit of defendant, and to pay all unreimbursed health expenses;

b) directing plaintiff to pay to defendant $10,000 per month as non-taxable maintenance, or in the alternative;

c) directing plaintiff to distribute to defendant $10,000 per month from the parties' alleged cash and stock accounts; and

d) awarding defendant $25,000 in interim counsel fees.

The relief sought in "a" above was settled by written stipulation during oral argument. The relief sought in "c" above was withdrawn during oral argument.

The second Order to Show Cause, dated February 5, 2003, seeks the following relief:

e) directing the appointment of a Receiver to sell the marital residence located in Locust Valley, NY, and to hold the proceeds in escrow pending the agreement of the parties or the further Order of this Court; and

f) directing the unsealing of a safe deposit box at Fleet Bank of New York, which box was sealed by the Order of this Court on May 17, 2002.

During oral argument, the parties agreed to the sale of the marital residence. The parties disagreed as to the amount of the listing price and the need to appoint a Receiver. The relief sought in "f" above was settled before oral argument. Items "b", "d" and "e" remain for the Court to determine.

Family Background

This is a 16 year marriage. The parties separated in mid 2001. They have four children, ages 15, 14, 10 and 9. Plaintiff is an investment executive, and defendant is a housewife. The plaintiff has a bachelors degree and the defendant completed two years of college. The health conditions of the parties and the children are from good to excellent.

The jointly owned martial residence, presently occupied by plaintiff and the children, is located in Locust Valley, NY. It was purchased seven to ten years ago for approximately $670,000. The estimated current market value exceeds $2,000,000. The amount of the unpaid mortgage is approximately $650,000. Thus, the

marital residence has substantial equity which is available for distribution to the parties.

Maintenance (Item "b")

Under New York's Domestic Relations Law §236 Part B(6), a court may order temporary maintenance in a matrimonial action. The statute enumerates several factors that the court shall consider when awarding maintenance, and it requires the Court to set forth the factors it has considered in determining the award. With respect to a *pendente lite* award, it is well settled that it should reflect an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse. It is not a final determination of the correct ultimate distribution. *Pezza v. Pezza,* 300 AD2d 555, 752 N.Y.S.2d 550 (2d Dept., 2002). The purpose of such award is to ensure that the needy spouse is provided with funds for support and reasonable needs pending trial, taking into account the parties' pre-separation standard of living. *Viola v. Viola,* 294 AD2d 493, 742 N.Y.S.2d 845 (2d Dept., 2002).

This Court has before it documentation in the form of the plaintiff's net worth statement, dated January, 2003, and the defendant's net worth statement, dated March, 2002. In addition, the defendant has provided jointly filed federal income tax returns for the years 1997 through 2000.

It is clear that these parties enjoyed a relatively affluent lifestyle during the marriage. The joint federal income tax returns reveal that the parties' income was as follows: 1997, $1,254,313; 1998, $558,479; 1999, $982,922; 2000, $509,133. In addition, the plaintiff states that he currently pays monthly expenses for private school tuition for the children, a club for the children ("Beaver Dam Club"), charges for a marina, and membership for a club ("Piping Rock Club"). Such "extra" expenses assist the Court in making the required determinations about the parties' true standard of living during the marriage, and the plaintiff's financial ability to pay temporary maintenance to the defendant.

The plaintiff's 2002 W-2 Statement indicates that his gross wage was $17,391.30. An "Earnings Statement" from the plaintiff's employer states that plaintiff earned $23,516.95 in commissions for a two-week period ending January 15, 2003. This Court can conclude that the plaintiff's annual earnings consist of $17,391 in wages and $611,442 in commissions, for a total of $628,833. The plaintiff's monthly expenses total approximately $31,020. The plaintiff's assets, less the marital residence and other assets for which he has not assigned a current value, is $107,179. The plaintiff currently pays for all of the expenses of the four children of the marriage, which are reflected in the monthly expense total. The plaintiff states that his approximate personal debt is $76,800. Numerous assets on the plaintiff's net worth statement were listed as "subject to valuation", including the marital residence and the furnishings contained therein.

The defendant's 2002 net worth statement reveals that her net worth was $2,462,727, including the marital home valued at $2,500,000 and subject to a $600,000 mortgage. The net worth statement indicates that the defendant has $262,727 in checking and savings accounts. In her affidavit, the defendant claims to have expended sums of money for counsel fees, totaling $27,500 (see paragraph 8). The defendant also claims she expended $10,000 to Dr. William H. Kaplan for forensic evaluations, and $4,150 for psychological counseling (paragraph 19). If this Court deducts these sums, and the defendant's total annual expenses ($189,116 per the 2002 net worth statement) from the value of the defendant's cash accounts for March, 2002 until March, 2003, it finds that the defendant's cash accounts contains approximately $31,961.

The defendant cannot continue to subsist on the balance of her cash accounts, nor is she obligated to spend down the entire value of her assets before seeking a temporary maintenance award. See *Charpié v. Charpié*, 271 AD2d 169, 710 N.Y.S.2d 363 (1st Dept., 2000).

The defendant's 2002 W-2 statement reveals that her gross wage was $256.00. The defendant indicates that this wage was for a two-month period, and that she works part time, earning $8.00 per hour.

The defendant has demonstrated that she is unable to meet the obligations of her own household expenses. She has rented a house, which this Court finds to be a reasonable accommodation for her four children to have comfortable parenting time. The defendant's salary is clearly insufficient to provide her with any level of self support. She is apparently able to work outside the home, and is just entering the work force. She has been a "stay at home mom" for the duration of this sixteen year marriage to raise the children of the marriage. It appears that the defendant is in possession of some funds which she can use towards her own support.

The plaintiff has continued to live in the marital home, and his net worth statement includes expenses he pays for the support and education of the children of the marriage. The plaintiff is now employed, after a period of unemployment, but he earns less than he had earned in previous years (1997-2000). During the period of unemployment, the parties lived off of their assets. From the plaintiff's net worth statement, it appears that his monthly expenses are $31,000.00 for his own support, for carrying costs of the marital residence, and for

the support of the four children of the marriage. The plaintiff has demonstrated a gross monthly income of $50,954.00.

The Court has considered the monthly expenditures as disclosed by each of the parties on their respective net worth statements. The financial reality in this case is that because of the cost of separate residences for the parties and because the plaintiff's decrease in salary from previous years, both parties must necessarily decrease their expenditures. This Court has therefore imputed downward adjustments to both of the parties' monthly expenses to moderate those expenses that are excessive. The Court has assumed these adjustments to reach the required accommodation between the reasonable needs of the defendant and the financial ability of the plaintiff.

Considering the above factors, and the length of this marriage, the wife's low salary and very recent entry into the workforce, and the previous lifestyle of the parties, the Court finds that there is a disparity in the amount of the income earned by the parties. It is therefore,

ORDERED, that the plaintiff pay to the defendant *as pendente lite* maintenance, the amount of five thousand ($5,000.00) dollars per month, taxable.

Interim Counsel Fees (Item "d")

The Court has considered all financial circumstances of the parties, together with all of the factors enumerated above, in deciding whether to award the defendant interim counsel fees. It is within the discretion of this Court to award such fees to help enable the defendant to defend the action even though the defendant does possess her own assets, and is able to use some of those assets to pay counsel. *Charpié v. Charpié*, supra. See also *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879, 518 N.E.2d 1168, 524 N.Y.S.2d 176 (1987).

For the foregoing reasons, it is also,

ORDERED, that the defendant's application for interim counsel fees from the plaintiff is granted, to the extent of an award of the sum of twelve thousand five hundred ($12,500.00) dollars.

Appointment of a Receiver (Item "e")

The defendant has petitioned this Court to appoint a receiver to effectuate the sale of the marital home. The defendant argues that the parties had stipulated to the sale of the home, and that several bona fide offers to purchase the home were made. The defendant claims that because the plaintiff Afailed to properly respond" to these offers, they were withdrawn. Claiming financial hardship, the defendant is anxious for the sale of the marital residence so that the proceeds of the sale may be distributed to the parties.

The parties did in fact agree to place the marital residence on the market, by stipulation dated October 21, 2002. Because the plaintiff resides in the home, it follows that he has a greater role in the showing of the home and in communicating with realtors and prospective buyers. It is apparent that the longer the delay in the sale of the marital home, the longer the plaintiff will reside therein. This accounts for the reluctance of the plaintiff to timely respond to offers. The defendant has an interest in the marital residence, and in the proceeds of the sale thereof, but she is not in control of the events which must necessarily precede a sale.

It is within the discretion of this Court to appoint a receiver to effectuate the sale of the home, pursuant to the stipulation between the parties, *Bock v. Bock*, 170 AD 423, 566 N.Y.S.2d 520 (2nd Dept., 1991). It is therefore,

ORDERED, that Jeffrey W. Toback, Esq., 18 Franklin Ave., Hewlett, NY 11557, (516) 792-0785, is appointed as a receiver in this case, for the purpose of effectuating the sale of the marital residence and distributing the proceeds of the sale pursuant to the parties' agreement or an Order of this Court.

All further requested relief not specifically granted, is denied.

This constitutes the decision and Order of the Court.

Dated: April 2, 2003
Mineola, NY

SO ORDERED

* * *

Burdett L. v. Terese M., Supreme Court, Nassau County (Schaffer, Lawrence M., Special Referee, February 3, 2003)

Attorney for Plaintiff: Heidi Harris, Esq.
Sheresky, Aronson
& Mayefsky
750 Lexington Avenue
New York, NY 10022

Attorney for Defendant: Alexander Potruch, Esq.
Michael C. Daab, Esq.
170 Old Country Road,
Ste. 301
Mineola, NY 11501

This matter is before the Court pursuant to referral by the Honorable Ira J. Raab. The parties and counsel stipulated that the undersigned could hear and determine the matter. The issue before this Court essentially

arose when the defendant (hereinafter "wife") sought discovery of the business, R., C. and L. (hereinafter "the business"). The plaintiff (hereinafter "husband") resisted discovery of the business, as did the other named principals. Plaintiff asserted that, notwithstanding the fact that his name is on the masthead of the business, he owns no corporate stock, and has no equitable interest in the business. Defendant asserted that although her husband did not own stock in the business, he is a partner and that his interest is therefore subject to equitable distribution.

Findings of Fact

Initially the business was incorporated as R. Design Associates, Inc. in 1984. Over the course of the last 18 years though the business' name has changed since its initial incorporation, plaintiff (who worked with R. and the company throughout all the name changes of the corporation) has acted and been treated as a partner. Testimony established that plaintiff was fully involved with the hiring and firing of staff, he was consulted, when the business obtained a line of credit and signed the lease for office space, solicited customers and business, negotiated fees on projects and had the authority to sign contracts for and on behalf of the business. Plaintiff attended the management meetings of the business and acknowledged, as did R., that these meetings were called "partners' meetings." Plaintiff had access to the records of the business, was involved in the company's computerization and was involved in preparation of the operating budget of the business. Plaintiff had credit card privileges, charged personal and business expenses to the credit cards, with the business paying some of his personal charges on the business credit card. The proof presented by the defendant establishes joint management, joint control and a pattern of cooperative business activity from which this fact finder concludes there was an intent to create a partnership. No one factor is determinative.

Plaintiff acknowledged in his testimony that he had an agreement with R. (8/8/02, pg. 55), this agreement provided for the sharing of profits of the company (8/8/02, pgs. 54-57 and 111-112.) Based on the agreement he has shared in the profits equally since 1986, with a pro rata reduction now, for his reduced days. Plaintiff acknowledges that in 1986 he entered into an agreement with R., where his duties changed, how he was paid changed (6/6/02 pgs. 48-52), with a concomitant agreement that they would share profits on an equal basis (6/6/02 pg. 100, 6/7/02 pgs. 168-71.) R. also acknowledges that in 1986 or 1987, it was agreed that L. would receive the same compensation as he did and have equal participation in the company with him. (6/10/02, pgs. 38-9.) Though plaintiff now seeks to distance himself from this "agreement" by stating that R. could change and amend the agreement as owner of the company, so too does any partner have the authority to end a partnership at any time. Plaintiff and R. assert that these agreements are simply employment agreements, however, agreements to share profits coupled with joint management, joint control and a pattern of cooperative business activity bespeak a partnership relationship rather than an employer-employee relationship.

Though plaintiff asserted that he did not have check writing ability above $10,000, one of the few checks to which defendant did have access was for an amount over $10,000. This check was signed by only the plaintiff and thereafter tendered by the bank. Again, though asserting that plaintiff only had authority to enter into contracts below a sum certain, the one contract that defendant had access (i.e. with the Sheresky firm) was for an amount above this sum certain. Although plaintiff now asserts that it was not the business who entered into this agreement with the Sheresky firm, but that he entered into it personally on his own behalf, and that he was merely using the business' stationery and resources, the business is referred to by name throughout the agreement. It states for example "R., C. and L. will create . . . ," "our offices responsibilities," "We . . . ," "R., C. and L. will develop". The contract as such had the weight, authority and backing of the business and bound the business.

Conclusions of Law

An earnings analysis was provided to the Court (Exhibit P in evidence). Upon inspection of the document, the Court finds that until this matrimonial action reared its head, Peter R. and plaintiff had comparable earnings. Some years R. earned slightly more and in some years plaintiff earned slightly more. All three partners received W-2's. "In determining the existence of a partnership 'the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business' (Partnership Law § 11(4)." *Weil v. Cho*, 120 AD2d 781. A sharing of losses is also part of the criteria used in determining a partnership.[1] Here, although there were no losses over the course of any one year, the one time R. and C. did not get paid for a period of weeks, plaintiff also did not get paid (6/7/02 pg. 176-7.) Of critical importance is how the profits of this business were handled throughout the years. Although it has been profitable for 18 years, the "corporation" has never declared or given any dividends to its two named shareholders, Peter R. and Mecca C. Rather than giving dividends at any time, the profits have been divided based upon work done, which is the hallmark of a partnership rather than a corporation. Plaintiff has always shared in such profits.

Although the business has a corporate form in the sense that there are shares and they file corporate income tax returns, in all other aspect they have disregarded the corporate form and functioned as a partnership. Though it is asserted that the business is truly a corporation, there is no evidence of any corporate meetings or minutes, by either the shareholders, officers or board of directors except on the three occasions when the name of the corporation was changed. "The Courts do have the authority to look beyond the corporate form where necessary to prevent fraud or to achieve equity." (See, *Port Chester Electrical Construction Corp. v. Atlas,* 40 NY 2d 652).

Although not determinative on its own, the fact that plaintiff's name was on the masthead is an indication of the intent of the business to convey to the world that plaintiff was an owner and partner of such business. Although, plaintiff testified that he never said he was a partner or owner he did testify that it was his intent to implicitly represent that he was a partner and/or owner and did not correct those who introduced him as such. In sworn documents he represented himself as a principal of the business. The Court finds as incredible plaintiff's testimony that he never introduced himself to anyone as a partner, especially in light of Holland's testimony (who was plaintiff's witness) that he did so, and his own testimony that he allowed it to be implicitly known that he was a partner. R. also acknowledged "partners' meetings" and references to "partners' bonuses." The plaintiff (and the business) having held L. out as a partner in circumstances such as these must accept the consequences of their decision (see *Weil v Cho, supra*) in this matrimonial action for the purposes of discovery.

Plaintiff contends that his failure to buy shares or to make a capital contribution insulates him from the status of being a partner. The plaintiff's failure to make a capital contribution does not necessarily affect his partnership status. It is not necessary that the partners be proportionate joint owners or contributors of its assets (see *Missanv Schoenfeld*, 111 Misc. 2d 1022). Nor must there be shares in a partnership, R.'s agreement with L. to share profits is sufficient. In this instance the corporate form was established to insulate them from liability while R., C. and plaintiff have agreed to maintain a partnership between them.

For sixteen years plaintiff and the business deceived the world that plaintiff was a partner. This was done for his and their financial benefit; now he seeks to distance himself from such relationship. Now when his wife says that she is entitled to an equitable share, plaintiff claims that not only is he not a partner but that he was only implicitly part of such deception. Where plaintiff and the business have acted in a manner more consistent with a partnership than a corporation and disregarded the corporate form the Court will recognize a partnership.

Stated simply and with finality, the principals acted as a partnership. For the Court to find such based on the evidence herein is not to create a new judicial concept. Since the question is not between the corporation and an outsider, this Court in an application of its equitable jurisdiction disregards the corporate form of R., C. and L., deals with the relationship as one not wholly impersonal and treats the business as a defacto partnership for the purpose of further discovery (See, *In Re Ostwald's Estate*, 20 Misc. 2d 1001.)

Plaintiff has had access to the business' records in the past (6/6/02 pg. 68). Although plaintiff and Ross maintained plaintiff did not have access to corporate tax returns these documents were produced for this hearing in an effort to show plaintiff's lack of interest in the business. Plaintiff, R. and C. may not agree to limit plaintiff's responsibility for document production for the purpose of limiting defendant's right to obtain disclosure to enable a forensic expert to value plaintiff's interest in the business. Where here the plaintiff and the company are resistant to further disclosure of the appropriate documentation and such is exclusively in their control and knowledge (see, *Szot v Saridis*, 204 AD2d 885), and in light of the policy of liberal disclosure in matrimonial matters, further discovery is necessary and appropriate in this matter.

Defendant has presented sufficient evidence to support the Court's finding that there is a defacto partnership. The principals, R., C. & L. have treated the business as a partnership. Testimony from a forensic evaluator on the issue of plaintiff's share therein will be necessary. Therefore, further discovery by defendant or the appointment of an independent forensic evaluator is imperative and essential.

Counsel shall appear on February 14, 2003 at 9:30 a.m. to enable this Court to make further determinations consistent herewith.

This constitutes the decision and order of this Court.

Endnote

1. Partners must also share losses, however, there has never been a loss in this business and their "corporate form de jure" insulates them personally from such until tested upon a loss.

* * *

S. v. S., Supreme Court, Nassau County (Justice O'Brien, October 2, 1990)

This action is brought by the plaintiff for a judgment of divorce based upon the constructive abandonment of the plaintiff by defendant.

The issue came on for trial before the Court without a jury on June 18, 19, 20, 21 and July 10, 1990, and the parties having presented their oral and written proofs, the Court makes the following findings and conclusions.

Jurisdiction

Pursuant to Domestic Relations Law § 230, the Court finds that this action may be maintained on the grounds that the parties were married in this State and either party is a resident thereof when the action was commenced and has been a resident for a continuous period of one year immediately preceding the commencement of the action.

Findings

The plaintiff and the defendant were both over 18 years of age and were married in Cedarhurst, New York, on May 18, 1974.

There are two children born of the marriage: Peter born August 29, 1977; and Matthew born August 1, 1979.

The defendant, without cause or justification and without plaintiff's consent, constructively abandoned the plaintiff by refusing to engage in sexual relations with the plaintiff although he was capable of doing so and the plaintiff was willing to do so, for a period in excess of one year prior to the commencement of the action.

Conclusions

Upon the foregoing proof, the Court awards a Judgment of Divorce to the plaintiff against the defendant forever dissolving the bonds of matrimony between them.

Maintenance

With respect to maintenance, the Court awards the plaintiff-wife the sum of $120 per week to be paid by cash or check on Friday of each week at the marital residence or such other place as the plaintiff-wife may designate in writing. The Court notes that the maintenance award is fully deductible to the defendant-husband and included by the plaintiff-wife as income. The defendant's obligation to pay maintenance shall terminate upon the plaintiff-wife's death, her remarriage, or five years next following the date of Judgment, whichever event shall first occur.

In awarding maintenance, the Court has taken the following factor into consideration: The parties were married almost 16 years at the commencement of the action. The husband's age is now 41 years and the wife's age is now 38 years; the health of the parties is good.

The defendant-husband is employed as a certified public accountant and currently earns an annual gross income of $48,000.

The plaintiff-wife is employed as a teacher and currently earns an annual gross income of $39,000. She obtained a leave of absence for Child Care in January 1990 and will return to full-time employment in September 1990.

The proof showed that for many years the defendant-husband had been employed by the plaintiff's father's business, Data Computing Corporation, as an accountant and office supervisor salaried most lately at $64,980 annually. In addition, he received medical coverage and a car allowance until the parties separated in 1987 when the employment ended. Defendant was thereafter employed as Vice President of Finance and Administration at Telerate Sports Inc., publicly held corporation commencing in April 1987 at a starting annual salary of $70,000, plus the same benefits he had received in his former employment. In 1989, he was earning a salary of $73,000 annually, but became redundant in the spring of 1989 due to company cut-backs and received separation pay equivalent to six months' salary. Since that time, he claims that he is unable to secure full-time employment and had been working for other CPAs on a per diem basis at $200 a day. Defendant testified that he works varying four-day and five-day weeks and currently earns approximately $48,000 annually.

It appears that the parties enjoyed a higher standard of living in the past than the defendant's current income would allow at the present time. While the Court is entitled to make an award based upon the wife's proof of her needs, *Orenstein v. Orenstein*, 26 AD2d 892; *Zy v. Zy*, 13 N.Y.S.2d 415, it is the law that the marital standard of living provides only a benchmark for maintenance and such awards may not exceed the husband's financial ability to pay. *Terrell v. Terrell*, 232 N.Y. 224; *Hearst v. Hears*t, 3 AD2d 706, aff'd N.Y.2 967, cited with approval in *Kay v. Kay*, 37 N.Y2d 632; *Rosenberg v. Rosenberg*, 155 AD2d 428, 431. We must, therefore, determine the defendant's ability to support the award made and we find that it does and is limited based upon his current income.

The future earning capacity of both parties is good. The plaintiff, as a school teacher, can expect annual increases in salary and with future educational credentials will enhance her earring capacity.

In addition, the Court has considered the restriction of marital property made under Domestic Relations Law § 236, subdivision 5, as hereinabove provided; the presence of the children of the marriage in the homes of the respective parties the tax consequences to each party; and, the contributions of the plaintiff-wife as a spouse, parent, wage earner and homemaker, and her career potential.

Custody and Visitation

The parties stipulated at the trial that plaintiff be awarded sole custody of the infant issue of the marriage, Peter and Matthew, and the Court finds that the plaintiff's custody of the children is in the best interests of the children. Custody is awarded to the plaintiff.

Visitation by the defendant-father was agreed to at the trial and a schedule of visitation stipulated on the record will be incorporated in the Judgment as set forth in the trial transcript.

Child Support

The plaintiff-mother is awarded $115 per week per child for a total of $230 weekly in child support. This shall be paid by cash or check on Friday of each week at the marital residence or such other place as the plaintiff-mother may designate in writing.

In making an award of child support, the Court has considered the financial resources of the custodial and non-custodial parent, and those of the children; the physical and emotional health of the children and their educational or vocational needs and aptitudes, as well as the standard of living the children would have enjoyed had the marriage not been dissolved; and, the non-monetary contributions that the parents will make toward the care and well-being of the children in custodial and visitation periods.

The Court has also considered the tax consequences of the child support award and allows the deduction from income on account of the children to the plaintiff-mother. The defendant is directed to execute any documents required to assure the plaintiff this tax credit.

Inasmuch as the children have previously enjoyed attendance at summer camp for most of the recent years at local day camps and, most recently, at sleep-away camps, the defendant-father is directed to pay 50 percent of the cost for the continuation of such summer camp activities for the children beginning the summer of 1991.

In addition to the foregoing, the Court makes the following provisions for special relief pursuant to Domestic Relations Law § 236, Part B, subdivision 8.

The plaintiff is insured by her employer for health and hospital care insurance and does not require any further benefit. The cost of health and hospital care insurance for the infant issue of the marriage shall be provided for by defendant during the period child supports payable.

The defendant-father shall purchase a policy of term life insurance on his life in the amount of $125,000 designating the children of the marriage as irrevocable beneficiaries and continue in effect for the length of time the defendant is required to make child support payments.

In addition, the defendant-father shall purchase a policy of term life insurance on his life in the amount of $25,000 designating the plaintiff's irrevocable beneficiary to continue in effect for the length of time maintenance is required to be paid.

Incidental Relief

The plaintiff is awarded $6,090 for the cost of the children's summer camp incurred in 1989.

Plaintiff's application for necessaries is denied. While there exists a common law right for such a benefit, *Altman v. Altman*, 518 N.Y.S.2d 763 (Sup. Ct. Kings Cty. 1987); *Carter v. Carter*, 58 AD2d 438 (2nd Dept. 1977), it is not indicated here. The evidence disclosed that while the husband's contribution to the wife's needs for maintenance and child support were not grand, they have been made voluntarily and in proportion to his diminished income. The wife claims she has expended $100,000 for necessaries to support herself and the children in the last several years, that she has borrowed that sum from her parents to pay these expenses. On the eve of trial, a mortgage on the marital residence was given by plaintiff to the plaintiff's parents for $100,000 to indemnify them for these expenditures. While the Court has no doubt that the generosity of the plaintiff's parents has enabled her to maintain the standard of living previously encouraged by the parties, circumstances have so changed that the plaintiff's claim ignores reality and the principles of law previously enunciated, *Kay, supra; Hearst, supra; Rosenberg, supra*.

The mortgage on the marital residence, now a lien against the marital residence, should be released and discharged. While the Court does not have jurisdiction of the plaintiff's parents who hold the mortgage, the failure or refusal to discharge the mortgage shall not diminish the defendant's equity in the marital residence as hereinafter provided and if not discharged will be satisfied by a lien against the plaintiff's interest therein.

Equitable Distribution

With respect to marital property of the parties, the Court makes distribution thereof pursuant to Domestic Relations Law § 236, Part 8, subdivision 5, as follows.

The marital home located was purchased in August of 1977. The contract was signed in 1977 and the closing took place in May, 1978, and a total consideration of $96,890 was paid. These funds were received from plaintiff's father. The money was intended to buy a home for the plaintiff and her family, but the clear intent of the donor was to make a gift to his daughter.

As a condition of the gift, the selection of the home to be purchased was to be approved by plaintiff's father and title was to be placed in the plaintiff's name, and this was done. It was clear that the defendant understood this and the defendant's father, an attorney, also aware of these conditions, represented the parties at the closing.

At the trial, the parties stipulated that the value of the marital residence was $420,000. Based on the evidence, the Court concludes that the enhanced value of the marital residence consists of two components which are mathematically severable.

One is the appreciation of the plaintiff's dollar investment of the gifted purchase money to remain her separate property. This element of enhanced value "is not due, in any part, to the efforts of the titled spouse but to the efforts of others or to unrelated factors including inflation or other market forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art, the appreciation remains separate property, and the nontitled spouse has no claim to a share of the appreciation." *Price v. Price*, 69 NY2d 8, 18 (1987). That component is plaintiff's separate property.

The second element of appreciation in the value of the marital home is due in part to the direct and indirect contributions of the nontitled spouse. While inflation and other market factors may have contributed, the efforts of the defendant in maintaining the marital home, building the patio, walkway and lawn were factors in the enhancement of its value. That appreciation during the marriage was a product of the marital partnership over which the "court retains the flexibility and discretion to structure [a] distributive award equitably. . . ." *O'Brien v. O'Brien*, 66 NY2d 576, 588, cited with approval in *Price, supra*.

Since the date of purchase of the marital home in 1977, the value, or purchasing power, of the dollar has depreciated and an inflationary adjustment for 1977 dollars (base dollars) must be made to determine the appreciation of plaintiff's separate property. It is the determination of this Court that the dollar equivalent of the 1977 purchase money of $96,890 projected to June 1990, based upon the Consumer Price Index (for All Urban Regions All Items, Northeast: Sector) published by the U.S. Department of Labor, is 211.2 percent over base dollars, or $203,630. Accordingly, it is determined that the plaintiff is entitled first to a credit of that sum or dollar equivalent for purchase money of the marital residence and one-half of the balance of the enhancement of the value of the real estate. The defendant is entitled to the other half of that equity as follows:

Present value of Marital Residence—$420,000; Plaintiff's Share for Dollar Enhancement on Original Investment—$204,630; Plaintiff's Share of Real Estate Equity—$l07,685; Plaintiff's Total Share—$312,315; Defendant's Share—$107,685.

The marital estate lacks the liquidity to fund the defendant's share of his equity in the marital home as set forth above and considering the need of the plaintiff to occupy the marital home with the children of the marriage, the funding of the defendant's share must await the time when the youngest child shall have reached the age of 21 years or be sooner emancipated. At that time, the property shall be sold at the highest price obtainable in the marketplace and the plaintiff shall pay to defendant 25.5 percent of the net proceeds of that sale. In the alternative, if the plaintiff be so advised and any funds become available to her, she may within 90 days of Judgment purchase the defendant's equity for the sum of $107,685, and thereby extinguish the defendant's right to a percentile of the net proceeds of sale as hereinabove provided.

Other property of the parties consisting of stock, IRA accounts, and savings accounts as now held by the respective parties being roughly equivalent in value, balanced by the value of the household furnishings awarded to the plaintiff, shall continue to be titled in the respective parties as heretofore without claim or offset by either party against the other.

Professional Licenses

Both parties address the professional license of the plaintiff as a teacher in the public school of our state and the defendant's license as a certified public accountant as marital assets pursuant to Section 236(B)(5), (6), (9). *O'Brien v. O'Brien*, 66 NY2d 576, 583. In the case at bar, we do not consider these credentials as marital assets. The decision in *O'Brien, supra*, is not controlling here and must be limited to its facts, *McGowan v. McGowan*, 142 AD2d 355 (2d Dept. l988); *DeStefano v. DeStefano*, 119 AD2d 793 (2d Dept. 1986). Under the statute as construed by the Court, it intends, ". . . that an interest in a profession or professional career potential is marital property. . ." when there is "direct or indirect contributions of the non-title holding spouse including financial contributions and non-financial con-

tributions made by caring for the home and family." (*O'Brien, supra*).

The testimony disclosed that the parties were married in May of 1974 by which time plaintiff had graduated from Hofstra University with a B.A. degree and was eligible to teach, as she did, earning a Master's Degree in Education during the first two years of the marriage. The cost of this education was paid for by her parents. Plaintiff was first employed as a school teacher in September 1974 and was tenured in 1977. Except for the child-bearing years, from 1977 to 1979, plaintiff continued to be so employed until January 1990 when she took a child care leave and is to resume her employment in September, 1990. All during the years of her employment the plaintiff contributed her earnings to the household of the parties. Given the circumstances of the case, it cannot be said that defendant made any financial contribution to the plaintiff's license to teach and received the benefits incidental to and flowing from her attainment. The Court concludes that plaintiff's efforts were a personal attainment to which defendant made no meaningful contribution. During these early years, there were no children born to the marriage. Both parties were employed in their respective careers, the household responsibilities were shared equally and defendant made no financial contribution to the plaintiff's educational program. Nor can it be said that the defendant made a non-financial contribution "by caring for the home and family" during this time while plaintiff was acquiring her credentials and contributing equally with defendant to the home.

In all the subsequent years, the defendant received the benefit of the plaintiff's "enhanced earnings" as a school teacher and cannot expect to reap any further benefit now.

A pattern similar to that discussed exists with respect to the defendant's license as a Certified Public Accountant. The defendant graduated with honors from the University of Rhode Island with a degree in accounting two years before the marriage. New York State requires a two-year internship of employment with a recognized accounting firm before an examination for certification can be taken by a candidate for such a license. The defendant, after completing his educational requirements in 1972, was employed by Ernst and Whinney, a nationally recognized accounting firm for two years. At the time of his marriage to plaintiff, he was eligible to take the CPA exam for certification. The parties were married in May, 1974 and he continued to work as a salaried accountant, took the examination, and was licensed as a CPA in November 1975. He continued to work as a CPA for Ernst and Whinney until 1977 when plaintiff's father made him an offer he couldn't refuse. In July of that year, defendant became employed as an accountant, office manager and chief operating officer of his father-in-law's company. This employment continued until the parties separated in 1987. At this time, defendant was making about $64,000 with benefits. Following the termination of defendant's employment with plaintiff's father, he was employed as Vice President for Finance and Administration with Telerate Sports, Inc., a publicly-held company. In the Spring of 1989, he became redundant because of this firm's cutback in staffing. Since that time defendant has been a freelance accountant working for other CPA firms on a per diem basis.

Plaintiff claims the defendant's license, his professional career, and "enhanced" earnings are marital assets. Expert testimony at trial has valued this asset at $385,470 and plaintiff claims a 50 percent share. Applying the threshold standards of *O'Brien, supra*, we must find ". . . that an interest in a profession or professional career potential is marital property when represented by direct or indirect contributions of the non-titleholding spouse including financial contributions and non-financial contributions made by caring for the home and family."

The facts in the case at bar do not support the threshold requirements for such a claim. By the time the marriage took place in 1974, the defendant had completed all educational and internship requirements to take the CPA exam for a license and certification. While formal licensing occurred shortly after the marriage, these circumstances, in the Court's view, represented a personal attainment by defendant in acquiring the knowledge and experience to enable him to pursue his chosen career. The prior and subsequent history of his employment as previously noted does not fall within the parameters of the statute as construed by *O'Brien, supra*, to qualify the defendant's license as a CPA and his professional career as a marital asset.

The facts in *O'Brien, supra*, are readily distinguished. There, the defendant contributed to plaintiff's obtainment of his license to practice medicine; she funded his education, supported him, traveled abroad to nurture and comfort him, and sacrificed and limited her own career potential during seven years of marriage to accomplish their common goal.

Plaintiff was licensed to practice medicine in October 1980. Two months later plaintiff sought to divorce defendant. While defendant labored in the vineyard for seven years, at harvest time the gates were closed to her.

By no logical review of the facts here can we equate them to *O'Brien*. The parties' requests for the equitable distribution of their respective professional credentials are denied.

Counsel Fees

The application by plaintiff for counsel fees is denied.

Expert Fees

The application by plaintiff for expert fees is denied.

Any prayer for relief requested by either party and not specifically provided for herein is in all respects denied.

The foregoing constitutes the Decision and Order of the Court.

Submit judgment.

* * *

Rose A. V. v. Joseph C. V., Family Court, Broome County (Ray, Herbert B., December 19, 2002)

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY, AFTER COURT HEARING, RESULT IN YOUR CONFINEMENT TO JAIL FOR A PERIOD OF UP TO SIX MONTHS FOR CONTEMPT OF COURT.

NOTICE: PURSUANT TO §1113 OF THE FAMILY COURT ACT, AN APPEAL MUST BE TAKEN WITHIN THIRTY DAYS OF RECEIPT OF THE ORDER BY THE APPELLANT IN COURT, THIRTY FIVE DAYS FROM THE MAILING OF THE ORDER TO THE APPELLANT BY THE CLERK OF THE COURT, OR THIRTY DAYS AFTER SERVICE BY A PARTY OR LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

Appearances:

Attorney for Petitioner: Stephanie G. Beck, Esq.

Attorney for Respondent: Alan M. Zalbowitz, Esq.

Law Guardian: Edward T. Waples, Esq.

The above matter having duly come on before the Court at this time in regard to petitions filed pursuant to the Family Court Act as follows:

Petition	Date Filed	Petitioner
Custody	July 29, 2002	Rose A. V.
Custody	July 30, 2002	Joseph C. V.

Rose A. V. (hereinafter "Mother) and Joseph C. V. (hereinafter "Father") are the parents of Gregory F. J. V., born February 12, 2002. Both parties have filed petitions with this Court seeking custody of the child. The parties appeared with counsel and the Law Guardian for trial of the petitions on November 27, 2002 and on December 19, 2002.

Mother testified at trial that the parties separated on July 27, 2002. Mother works Monday through Friday from 8:00 until 5:00 and the child attends day care four days per week and the maternal grandmother watches the child on the fifth day. It is Mother's position that she has been the primary caretaker of the child. She asserts that the child will be better off with her because it is instinctive for a mother to give care to a baby.

Mother has been concerned about the care provided for the child by Father. Mother testified that there was a bruise and a rash on the child after visiting with Father. Mother stated that she has had three speeding tickets in the last five to seven years. She also testified that she has heated the child's formula in a microwave oven without removing the formula from the container, even though the container clearly states that this practice is dangerous.

Mother states that if she receives primary custody of the child, she will continue to work the same schedule that she now works. Mother would like joint custody with primary residence with her, visitation to Father on alternate weekends from Friday at 7:15 until Sunday at 12:00 noon, Wednesday nights, and alternating Wednesday to Thursday morning.

Mother's witnesses all indicated that she was a good mother to the child and that she provided most of the care for the child when the parties were together.

Father has two other children, a daughter 15, and a son, 14. Father has a very flexible schedule with his employment. He testified that he took the first week off from work when the child was born and that he was involved in the care of the child from the time the child was born at the hospital. Father frequently takes time off from work to be with his children. Father is currently in counseling and although he asked Mother to participate in counseling, she refused. Father is very active in his church and in his community.

Mother tried to keep Father from seeing the child when the child was in day care, even though it was Father's habit to stop by and visit the child on a daily basis. On one occasion, when Father was holding the child, Mother physically attacked Father and struck him in the back of the head. Father testified that he fed the child breakfast ninety-five per cent of the time when they were together.

Father is concerned that Mother will not provide appropriate nutrition for the child and he is concerned for the child's safety when the child rides in the car with Mother. Father stated that Mother has been very rigid and chintzy with visitation since they have been separated, so he is concerned that if Mother receives primary residence of the child she will not provide lib-

eral visitation. Father has asked the Court for joint custody of Gregory, with primary residence with Father. Father testified that if he receives primary placement, he will be very flexible regarding visitation.

Father's witnesses established that Father was a good parent and capable of caring for the child. It also appears that Father is well known in the community for his volunteer activities.

The court must always look to the best interests of the child when deciding a custody dispute. The best interests of child standard is based upon the court giving consideration to the totality of circumstances. The factors which the court must consider are the quality and stability of the respective homes, the parent's past performance, the relative fitness of the parent, and the parent's ability to provide for and guide the child's intellectual and emotional development. (see, *Marino v. Marino,* 659 N.Y.S.2d 335 [Third Dep't 1997]).

After considering all of the appropriate factors, the court finds that the best interests of the child will be met by granting joint custody of the child to the parties and primary residence to Father. This decision was very difficult to make. Both of these parents are loving and capable. Father's actions and words demonstrate to the Court his willingness to be flexible regarding visitation and contact with Mother. Mother has demonstrated by her actions that she does not intend to be flexible and liberal with visitation. Mother would suggest to the Court that a baby belongs with his Mother, an argument often referred to as the "tender years doctrine." This approach to custody decisions has been thoroughly rejected in this state. This court is convinced that the child will be safer and will have more interaction with both parents if the child resides with Father.

Accordingly, it is

ORDERED, that joint custody of the child, Gregory, born February 12, 2002, is hereby granted to Rose A. V. and Joseph C. V., with primary residence granted to Joseph C. V., with visitation to Rose A. V. as follows:

1. Alternate weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m., with an additional 24 hours of visitation if a holiday, other than Christmas and New Year, falls on the Monday immediately following the Sunday of her visitation weekend;
2. Alternating Wednesdays on the weeks that there is no weekend visitation from 5:30 p.m. to 7:30 p.m.;
3. Christmas Day at 12:30 p.m. until December 26 at 6:00 p.m.;
4. New Year's Day at 12:30 p.m. until 6:00 p.m.;
5. Easter Day from 12:30 p.m. until 6:00 p.m.;
6. Mother's Day to Rose A. V. and Father's Day to Joseph C. V.;
7. Summer vacation from July 1 at 6:00 p.m. until August 15 at 6:00 p.m., during which time Joseph C. V. may exercise alternate weekend visitation and alternate Wednesday visitation just as Rose A. V. exercises during, the rest of the year;
8. Such further and additional visitation, if any, as the parties may agree; and it is further

ORDERED that Rose A. V. shall provide all transportation, and it is further

ORDERED that Rose A. V. shall provide 24 hours notice in advance of the visitation if she will not be exercising her visitation.

REQUEST FOR ARTICLES

The *Family Law Review* welcomes the submission of articles of timely interest to members, in addition to comments and suggestions for future issues. Please send to:

Elliot D. Samuelson, Esq.
Samuelson, Hause & Samuelson
300 Garden City Plaza
Garden City, New York 11530

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

Recent Decisions and Trends

By Wendy B. Samuelson

Author's Note: *Last issue's column focused on issues relating to the children. This issue, the focus is on property issues and equitable distribution.*

Second Department Changes Calendar Rules in Matrimonial Cases

Effective January 1, 2003, New York Rules of Court 670.4 was amended to provide that the Second Department will expedite certain types of cases, including matrimonial cases, by allowing its clerk to issue scheduling orders to speed up the perfection of appeals. The active management program will expedite appeals from Family Court orders, custody and visitation issues raised in Supreme Court orders and judgments, and Surrogate's Court orders and decrees concerning the termination of parental rights or the adoption of children. The purpose of the rule is to protect children and prevent them from being kept in limbo. In addition, the new rule provides for prompt transcriptions of Family Court proceedings by the clerk of the appellate division coordinating with Family Court personnel.

In addition, New York Rules of Court 670.8 was amended to permit extensions of time to file an appeal by stipulation rather than by motion. This is a one-time opportunity to stipulate to a 60-day extension to perfect an appeal, a 30-day extension to file an answering brief, or a 10-day extension to file a rely brief. In the alternative, a party may apply by letter (rather than by motion) to the clerk for an extension if he or she can show a reasonable ground for the extension.

Post-judgment Accident Disability Pension Subject to Equitable Distribution

Driscoll v. Driscoll, **N.Y.L.J., Jan. 2, 2003, p. 17, col. 1 (Richmond Co., J. Sunshine)**

The parties' judgment of divorce incorporated the terms of their stipulation of settlement, which included, *inter alia*, that the wife was entitled to 50% of the husband's pension at the time of his retirement. Three years later, the ex-husband suffered an injury which caused him to retire and to receive additional income from his pension. The ex-husband brought a post-divorce judgment motion, seeking to modify the QDRO, and claimed that the unanticipated post-judgment personal injury which resulted in additional compensation should not be subject to equitable distribution. The court held that the QDRO should not be altered, and followed the Second Department's holdings in *Moran v. Moran*, 289 AD2d 522, and *Pollak v. Pollak*, 287 AD2d 201, which refused to revise the QDROs since the stipulation did not explicitly prohibit additional benefits that may accrue as a result of post-divorce judgment acts.

Author's Note: *The courts are mandated to adhere to strict contract interpretation. In order to protect your client's future rights, the attorney should draft a clause in the stipulation that specifically excludes any post-divorce judgment benefits that may accrue as a result of post-divorce judgment acts.*

Child Support Arrears Canceled Based on Grave Injustice

Giray v. Cruey**, N.Y.L.J., Jan. 13, 2003, p. 22, col. 2 (N.Y. Co. Fam. Ct., J. Jurow)**

The father brought a motion to cancel all arrears that accrued prior to the mother's abduction and secretion of the parties' children to a foreign country. He was prevented from having any communication and visitation with his children for approximately four years, despite his extensive efforts to find them. The court held that despite the general rule pursuant to FCA 451 and DRL 241 prohibiting cancellation of pre-application child support arrears, "under the extreme and unique circumstances of this case, to require the respondent to pay the arrears that accrued subsequent to the mother's disappearance with the children . . . would constitute a grievous injustice." In addition, the court determined that the father must pay the arrears that accrued prior to the mother's abduction; however, if the funds remain uncollected, the father may make application to the court to retrieve the funds upon showing that he diligently searched for the mother.

Editor's Note: *Was this judicial legislation?*

Equitable Distribution Award of 95% of the Marital Assets Based on Husband's Attempted Murder of Wife

Havell v. Islam**, 751 N.Y.S.2d 441 (1st Dept. 2002),** ***rearg. denied*****, 2003 N.Y. App. Div. LEXIS 2561 (1st Dept., Mar. 6, 2003)**

The parties were married 21 years and had six children. They accumulated assets worth approximately $13 million. Nine years prior to the divorce action, the wife was the sole wage earner as a successful bonds trader, and the husband never sought employment after being laid off from his banking job. Several days after the wife told the husband she wanted a divorce, the

husband brutally attacked her with a barbell and attempted to murder her. She suffered severe injuries including multiple contusions, a broken nose and jaw, broken teeth, multiple lacerations and neurological damage, and she required multiple oral and facial surgeries. Despite her incredible suffering, the wife was able to return to work part-time three weeks later. The husband was indicted for attempted murder, pled guilty to murder in the first degree, and was sentenced to eight years in prison.

The court awarded the wife 95% of the parties' marital assets, and based its decision, in part, on the husband's egregious marital fault. DRL 236B(5)(d) provides that marital fault is a factor to be considered in determining equitable distribution. Under the *Blickstein* test, the marital fault must be "so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that shocks the conscience of the court thereby compelling it to invoke its equitable power to do justice between the parties."

The husband was also denied attorney's fees, and the court reasoned that it would be unjust to do so since it would, in essence, condone his murderous attack on his wife.

Interestingly, in a related decision, *Havell v. Islam*,[1] the court permitted the children to change their surnames particularly since the father committed a brutal assault against his former wife, which was witnessed by three of the minor children. "Appellant has no absolute right to perpetuate his name in his children, whereas the welfare of the children will be substantially promoted by dissociation from the 'shame and disgrace of [their] father's crime.'"

Author's Note: *Apparently, the courts will only consider fault as a factor in equitable distribution where there is an attempted murder. Not much else seems to shock its conscience.*

Divorce Settlement Rescinded as a Result of Failure to Rebut Inference of Overreaching

***Tuccillo v. Tuccillo*, N.Y.L.J., Jan. 21, 2003, p. 17, col. 2 (Nassau Co., J. Mahon)**

The parties were married for 13 years and had four children. When the marital relationship broke down, the husband sent the wife to his attorney's office (a grade school friend who represented him in several real estate transactions and issues relating to his business), and the attorney acted as mediator for both parties. The husband paid the legal fees. The attorney failed to advise her as to applicable law or what she would be entitled to. No discovery was conducted, no net worth statements were exchanged, no review of the stipulation of settlement was had, nor were changes made. The wife simply told the attorney she wanted to live in the marital residence with the children, and needed more than $450/week in child support. The wife was given a financial statement prepared by the husband's accountant that revealed and purported that his net worth was $3.9 million, which included vast real estate holdings and businesses. None of these assets were valued prior to the signing of the agreement, and the wife waived her interest to all of these assets. The wife was also in the dark as to the husband's income, which was approximately $1.5 million per year.

The parties signed a separation agreement that directed the husband to pay the following: $600/week child support, all household expenses until the children are emancipated, the wife's car lease, and all health and dental expenses for the children. She received no assets of the marriage except for the marital residence.

The wife moved to set aside the judgment of divorce and stipulation of settlement based on fraud, unconscionability and duress. The court rescinded the agreement, and found a clear inference of overreaching based on the fact that the wife was not represented by independent counsel, the husband received virtually all of the marital assets of substantial value, the wife was not properly advised of the pertinent financial issues and did not have any discovery, and she had but superficial knowledge of the husband's assets and income. The husband failed to rebut the presumption of overreaching.

Editor's Note: *This case reminds us that unless there be full disclosure and a party exercises reasoned judgment, a stipulation will not resist an attack of overreaching.*

Ex-Fiancee Receives Reimbursement for Wedding Preparation Expenses

***DeFina v. Scott*, 755 N.Y.S.2d 587 (New York Co., 2003) Justice Diane A. Lebedeff**

When the couple got engaged, the fiancee gave the woman an expensive engagement ring from Tiffany's, and they agreed that she would pay for the wedding expenses of their formal affair at the UN Plaza Hotel, and that he would transfer to her prior to the marriage, a one-half ownership of his condominium that was to be the marital residence. After the engagement broke off, the woman sought reimbursement of the wedding expenses totaling $16,000, and the man sought the return of the engagement ring and to be restored to full ownership of his condo.

The court held that the man was entitled to return of the engagement ring based on general New York case law that an engagement ring is the property of the male donor when an engagement is terminated, since the donee receives only the right of possession, and

ownership passes only upon the performance of the marriage. The court cautioned that the ring may not be returned where there were reasons other than a contemplated marriage, such as part of a birthday or holiday celebration.

In addition, the woman was entitled to reimbursement of the wedding expenses based on contract principles. The court determined this case "calls for application of contract-based theories to the maximum extent possible, a legally novel approach, but one particularly suited to couples of this type and to contemporary society."

Civil Rights Law 80-a bars actions for breach of a contract to marry since 1935; however, CRL 80-b, enacted in 1965, permits the courts to direct a return of gifts given solely in contemplation of a marriage which did not occur. The court followed the direction in the Court of Appeals' case *Gaden v. Gaden*[2] that the formerly engaged are to be returned "to the position they were in prior to their becoming engaged, without rewarding or punishing either party for the fact that the marriage failed to materialize."

Since the parties agreed that the woman's outlay on the wedding expenses were sufficient contribution for a transfer of one half of the ownership interest in the condo, this expenditure was considered a lien. Therefore, the man was entitled to resume full ownership of the condo, subject to the lien of the wedding expenses. The court reasoned that a contract regarding formerly engaged couples should not be treated any differently than any other contract, including prenuptial agreements, antenuptial agreements, or domestic partners agreement.

Author's Note: *This case was ironically decided on February 14th, and the parties became engaged on that date as well.*

Editor's Note: *Equity once again triumphs, and the courts are not rendered impotent by mere rules of law.*

Divorce Attorney Awarded Fees from Parties' Escrow

***Wels v. Wels*, N.Y.L.J., Mar. 3, 2003, p. 28, col. 6 (Nassau Co, J. Jonas)**

The wife sought to recoup more than $84,000 in counsel fees and litigation expenses, and an award of $146,332 in outstanding counsel fees. The court awarded her the entire counsel fees requested, but denied recoupment of the amount already paid. The parties sold the marital residence for $1.4 million, which funds remained in escrow. The court directed that the wife receive her one-half share of the proceeds of sale, and in addition, that the counsel fees awarded be paid from the husband's share of the escrowed funds. The court reasoned that the wife was entitled to the fees awarded because during the parties' 33-year marriage, the husband was the sole wage earner, and had three S-corporations, with revenue in the millions. The husband's report of only $25,000 a year in income on his tax returns was found unbelievable based on his expenses and the absence of any debt. In addition, fees were awarded because of the husband's obstructionist tactics and efforts to obscure his true finances, particularly since he plead the Fifth Amendment during his deposition regarding questionable financial transactions in the business.

Author's Note: *There appears to be a trend emerging of judges protecting attorneys' fees by fashioning creative methods of payment, including awarding fees from a client's escrow account. Kudos to these judges for understanding the grave difficulty of matrimonial attorneys collecting the fees awarded.*

Endnotes

1. 2003 N.Y. App. Div. LEXIS 3544 (1st Dep't Apr. 3, 2003).
2. 29 N.Y.2d 80, 88, 323 N.Y.S.2d 955, 272 N.E.2d 471 (1971).

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 can be contacted at (516) 294-6666 or WBSesq1@aol.com.

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.

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

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