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Notes and Comments

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What Ever Happened to Dissents in Matrimonial Appeals?

To those practitioners who have been fortunate enough to have begun their practice forty years ago, they were able to read an appellate decision that recited at length the facts upon which the decision was based, the points counsel made, and a lengthy discussion of the law as it applied to the facts. Memorandum decisions were infrequently utilized.

Today, not only have the Appellate Courts failed to share with the bar the facts upon which they have based their opinions in post-judgment cases, but dissenting opinions have all but disappeared in matrimonial cases. For example, the Second Department, beset by an avalanche of work and an unbearable work load, has followed the course of least resistance, reducing to bare bones the rationale, omitting lengthy fact patterns, and reaching unanimous decisions. The statistics speak volumes. In the past five years, there have only been three dissents in the Second Department, five in the First Department, and none in the Third or Fourth Departments in matrimonial appeals.

The cases in the First Department where dissents appeared include *Bloomfield v. Bloomfield*[1] (involving the validity of a pre-nuptial agreement), Justice Friedman dissented in a four to one decision; *Anonymous v. Anonymous*[2] (involving Mayor Giuliani's ability to have his girlfriend at mayoral functions), Justices Rubin and Buckley dissented in a three to two decision; *Gottesman v. Gottesman*[3] (determining whether an arbitration award can be modified by the court), Justice Rubin dissented in a four to one decision; *Ober v. Rogers-Ober*[4] (determining what constitutes sufficient cruelty for divorce), Justice Saxe dissented in a four to one decision; *Blau v. Blau*[5] (determining whether a temporary award was adequate and the production of requested documents justified), Justices Buckley and Rosenberger dissented in a three to two decision.

The Second Department dissents appeared solely in *Minnick v. Minnick*[6] (concerning the proper division of the marital residence), Justices Goldstein and Townes dissented in a three to two decision; and *Covington v. Walker*[7] (determining whether the statute of limitations precluded the divorce complaint), Justices Feuerstein and Krausman dissented in a three to two decision, which resulted in the Court of Appeals reversing the majority opinion and *Frankel v. Frankel*[8] (determining former counsel's right to individually apply for recovery of legal fees), Justice Altman dissenting with concurrence by Justice Prudenti, which also resulted in a reversal by the Court of Appeals.

Based upon this paucity of dissent, one cannot resist the conclusion that rubber stamp justice is the expedient for crushing burdens and overcrowded calendars. There is no question that the work loads of the Appellate Courts should be reduced and new divisions created, but that result will be subject to the vagaries of politics and

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economics, and the odds of that occurring appear to be slim.

If this assessment is correct, then it becomes far more important to create precedents that are meaningful to the matrimonial bar, and revive the dissenting opinion to place new vitality in the courts. Surely, not every case that is heard before a four-judge panel should result in an unanimous opinion without a contrary view.

Our survey to determine the number of dissenting matrimonial opinions in the four judicial departments in this state, in the past five years, revealed but seven. That is unacceptable, considering that hundreds of matrimonial cases each year are decided by the courts. It appears that less than 2% of all matrimonial cases heard contained dissenting opinions.

Why is dissent so vital? Justice Renquist once remarked that a meaningful judiciary must explore every aspect of an appeal to make certain that justice is done. If our Appellate courts were to do so, it would certainly engender a greater volume of dissents.

The Court of Appeals has also been guilty of unanimous justice in the past several years. Until Judges G.B. Smith and Robert Smith joined the court and dissented respectively in *Rupert v. Rupert*,[9] *O'Connell v. Corcoran*[10] and *Holterman v. Holterman*[11] in which Judge Read concurred with the dissent, every opinion deciding a matrimonial appeal by the high court was unanimous. Of particular vexation was the *Holterman* appeal, where not one of the seven judges thought it was time to overrule the *O'Brien* doctrine, and agreed it was proper to value a law license, as well as a law practice, despite the fact that a license cannot be transferred or sold, nor for the most part, an interest in a law practice.

We all know that every case is subject to varying interpretations and different decisions at the trial level, depending upon which judge hears the case. It is most difficult to prognosticate to a client what result will be reached, when it is clear that it will depend upon the judge who hears the matter and his or her philosophical bent, whether he or she seems to favor husbands or wives, and his or her economic background and upbringing. Why then does this not occur in the Appellate Court, where there is a wide diversity of judges, male and female, all of whom were trial judges in the Supreme Court, and who reached varying decisions in the courts below based on essentially the same fact pattern?

Justice Cardoza, one of the most eloquent jurists to ever sit on the New York Court of Appeals, and the U.S. Supreme Court, had the ability to analyze the most complex fact patterns, and in a few words reach the heart of the matter. Who can forget his terse commentary in *Wagner v. International Railway Co.*,[12] where he explained, "Danger invites rescue!" Modern jurists would be well to emulate his decisions, analysis and recitation of the facts, which have enabled members of the bar to determine how to try a case in the court below, and decide after trial whether an appeal would prove fruitful. Certainly, a comprehensive decision expressing dissenting views would actually reduce appeals and litigation in the lower courts, and encourage settlements. Courts believing that it is important to reduce the number of appeals must tutor the bar through comprehensive analysis of fact patterns, when deciding cases. Terse decisions, without exploring lengthy fact patterns, only serve to increase congestion, not reduce appeals.

The perfect solution to these ills is for the legislature and the governor to enact new laws that will create at least three more judicial departments to hear appeals and eliminate the backbreaking loads of the Appellate Courts in matrimonial appeals. One can surely commiserate with courts that handle hundreds of appeals in 2005 with an insufficient number of justices. It is no wonder that decisions are shortened and do not receive the attention they deserve. Justices should not be faulted for taking such practical approaches to complex issues under these circumstances, but should also appreciate the dilemma created by their expediency in deciding matrimonial cases. The solution to such pressing concerns is for the courts to be relieved of overwhelming appellate calendars. Only the legislature can provide such relief. If they fail to act, voters should look for candidates that recognize these problems and are willing to solve them.

Endnotes

1. 281 A.D.2d 301 (1st Dep't 2001).
2. 286 A.D.2d 656 (1st Dep't 2001).
3. 290 A.D.2d 201(1st Dep't 2002).
4. 287 A.D.2d 282 (1st Dep't 2001).
5. 3 A.D.3d 167 (1st Dep't 2004).
6. 294 A.D.2d 473 (2d Dep't 2002).
7. 307 A.D.2d 908 (2d Dep't 2003).
8. 309 A.D.2d 65 (2d Dep't 2003).
9. 97 N.Y.2d 661 (2001).
10. 1 N.Y.3d 179 (2003).
11. 3 N.Y.3d 1 (2004).
12. 232 N.Y. 176 (1921).

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Wechsler v. Wechsler: Discretionary Vacatur of Stays Under CPLR 5519(2)

By Elliott Scheinberg

The issue in *Wechsler v. Wechsler*[1] was whether a trial court could lift an automatic temporary statutory stay on the payment of an interim counsel fee award once the payor has posted an undertaking under CPLR 5519(a)(2). The subject issue directly impacts the landscape of matrimonial litigation as part of the ongoing evolution of the importance of making counsel fees available to financially disadvantaged spouses.

"Wechsler serves and enhances public policy by permitting the wife, the typically non-monied spouse, to participate meaningfully in a divorce action . . . not catapulting her back to an era where wives were required to scavenge for fees or be relegated to capitulation in their divorce actions."

It is the premise of this monograph[2] that the trial court acted properly within the purview of governing law in its lifting of the automatic stay resulting in the immediate payment of the ordered fees. The legislative intent behind DRL § 237 coupled with decisional authority regarding counsel fees, both expressed in terms of public policy, support the vacatur of the automatic stay.

Wechsler serves and enhances public policy by permitting the wife, the typically non-monied spouse, to participate meaningfully in a divorce action within the framework of the legislative intent in its enactment of DRL § 237(a), as well as decisional authority, by not catapulting her back to an era where wives were required to scavenge for fees or be relegated to capitulation in their divorce actions.

Facts

The Supreme Court had rendered an interim order directing the husband to pay $475,000 toward the legal and professional fees already incurred by the wife. At the time of the fee award, the case was mid-trial, with 25 days of testimony having already been completed. The award was significantly less than what the wife claimed were her actual arrears. The court's decision expressly provided that the award was subject to reallocation at trial and could ultimately be chargeable to the wife's share of equitable distribution.

The husband filed a Notice of Appeal and posted $475,000 with the county clerk, which, under CPLR 5519(a)(2) entitled him to an automatic stay of the order, pending his prosecution of the appeal. Pursuant to CPLR 5519(c), the court granted the wife's motion to vacate the stay.

After noting that the counsel fee award was affordable to the husband, representing a minimal amount of the marital estate and easily recoupable in the event that he prevails on appeal on the ultimate question as to the size of the fee award, the court addressed the underlying mischief of seeking protection under CPLR 5519(a)(2):

> It is important to note that while defendant seeks to place a restriction on plaintiff's ability to pay her experts and her attorneys as this case proceeds, he feels no such compunction to restrict himself. Since this award was made, defendant has made at least two applications to this court for permission to hire additional experts to revalue Wechsler and Co., Income., based on a different valuation date. In each of these applications no claim was made that he could not or would not pay such experts.
>
> In short, this case presents a quintessential scenario, which concerns both trial and appellate courts, about the outcome a divorce litigation being influenced by one party's greater ability to bankroll it. By taking advantage of the automatic stay provision in CPLR § 5519(a) defendant has done indirectly what he could not do directly, that is, prevent the plaintiff from receiving interim professional fees. Since the automatic stay provision is completely unnecessary to protect defendant's rights, even were he to succeed on appeal, and it greatly prejudices plaintiff to have to wait for the money awarded, the stay is vacated.

Counsel Fee Awards Are the Non-Monied Spouse's Failsafe Against Economic Disparity in Matrimonial Litigation

Counsel fee awards are grounded in public policy which fosters the socially beneficial philosophy that financial imbalance between spouses not be permitted to tip the scales in divorce litigation in favor of the monied spouse. The essence of this notion is captured in the statutory phrase, "to enable that spouse [typically the wife][3] to carry on or defend the action or proceeding."[4]

In its most recent pronouncement on the issue of counsel fees, the Court of Appeals, in *Frankel v. Frankel*,[5] prevented regressive steps away from legislative and judicial evolution. Although factually different from *Frankel, Wechsler* addresses the identical underlying concern, to wit, the preservation of the non-monied spouse's access to not only retain experienced counsel but, very critically, to maintain such counsel during the pendency of complex actions without being exhausted in a financial war of attrition. *Frankel* made several critical comments in its concern over the impact of a monied spouse's ability to frustrate and thwart the statutory intent, as expressed by the Legislature:

- Counsel fee awards have helped reduce what would otherwise be a substantial advantage to the monied spouse.
- . . . more frequent interim counsel fee awards would prevent accumulation of bills . . . '[t]he practice of many judges to defer [pendente lite counsel fee applications] to the trial court essentially delays the awarding of fees until the final settlement or judgment, and often compromises the nonmonied spouse's ability to adequately litigate the case' . . . if applications for legal fees are denied or deferred, 'the attorney for the nonmonied spouse is left not only without payment for services rendered but without reasonable expectation as to how or whether payment will be made. Considering the protracted nature of divorce actions, both client and attorney are left in limbo for an indefinite period of time, a circumstance which can drive a wedge between attorney and client' (cites omitted).
- [In *O'Shea v. O'Shea*[6]] We explained that giving courts the power to order a spouse to pay the other's counsel fees is designed to redress the economic disparity between the monied spouse and the non-monied spouse and ensure that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.
- As amicus American Academy of Matrimonial Lawyers points out, the realities of contentious matrimonial litigation require a regular infusion of funds. Although this is a regrettable byproduct of divorce, interpreting the statute to preclude applications like the one at issue here would confound the collection process and discourage attorneys from representing nonmonied litigants.

Progressive legislation and decisional authority have historically combined to shield the non-monied spouse from capitulation by taking ameliorative strides towards economic parity to make experienced counsel equally accessible to both parties. In *Hinden v. Hinden*,[7] one of the earliest forerunners on this issue, the trial court emphasized the fundamental disadvantage imposed upon the dependent spouse:

> In a matrimonial action . . . there should be rough equality in the resources available to each party in the course of the contest . . . should one spouse have substantially greater economic leverage during the litigation (and negotiation) process than the other, that fact may have a profound effect on the ultimate resolution both because of its psychological impact on the parties and because of its effect on their ability to finance the litigation. It is particularly unfair to "nickel and dime" a wife in the period (now frequently very protracted) prior to trial just because her husband presently has control of the purse strings. . . . However, if that tyranny is allowed to continue up to the date of final judgment, the legislative purpose will, in many instances, have been defeated. Consequently, a rough economic equality prior to trial should be maintained so that the negotiations of the parties are truly free of duress and overreaching and "are arrived at fairly and equitably.

In *O'Shea v. O'Shea*[8] the Court of Appeals emphasized the significance of balancing economic endurance throughout the litigation. Its analysis of the evolution of the statutory scheme into its present state is fashioned to redress the prevalent dilemma visited upon the non-affluent spouse, the wife: "This advanced the objective that marital litigation is best shaped not by the power of the bankroll but by the power of the evidence." *O'Shea* further stressed the importance of continuing in the direction of its precedent *DeCabrera v. Cabrera-Rosete*,[9] which held that "flexibility and judicial discretion are essential devices in adjusting financial disparities in litigation:"

> . . . [DRL § 237], which has deep statutory roots, is designed to redress the economic disparity between the monied spouse and the non-monied spouse. Recognizing that the financial strength of matrimonial litigants is often unequal—working most typically against the wife—the Legislature invested Trial Judges with the discretion to make the more affluent spouse pay for legal expenses of the needier one. The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.

Charpie v. Charpie[10] also took aim at the social realities of dependent wives and the imminent harm resulting from unequal financial stations:

> Recognizing the economic realities that women frequently earn less than their husbands . . . when divorcing spouses have vastly different access to funds, a spouse who lacks financial resources may not be able to obtain the necessary assistance so as to achieve a just resolution of the issues. . . . Counsel fees are awarded to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the evidence (citing *O'Shea)*.

In *Gober v. Gober*[11] the First Department affirmed atypically high counsel fee awards in seemingly rapid succession "to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation."

Wechsler is no different in principle from *Frankel* or any of the other aforementioned cases and cannot be confined to a vacuum because embattled spouses in complex matrimonial actions require experienced counsel. Although they may be able to retain such counsel initially, they may, however, be unable to maintain counsel if fee awards become uncollectible due to abusive procedural maneuvering designed to drive the financially disadvantaged spouse into capitulation.

Wechsler Conforms to the Key Principle of Statutory Construction, that the Legislative Intent Be Effectuated, First and Foremost, Consonant with Governing Law, as Set Forth by the Court of Appeals, which Has Broadened the Scope and Intent of DRL § 237

Decisional authority and the doctrine of statutory construction emphatically and repeatedly exhort courts to apply legislative intent as the primary purpose in statutory construction. Implementation of the legislative intent is the *sine qua non* recurring theme throughout the scheme of statutory construction (Comment, N.Y. Statutes § 91):

> The object . . . is not to lay down inflexible principles which are obligatory on the courts . . . but to render assistance in determining the legislative intent, which is the primary consideration in the construction of all statutes.

The underlying and inescapable commonality between the many different statutes on the issue of statutory construction is the exaltation of legislative intent as *"the primary consideration of the courts in the construction of statutes."*[12] The elucidation in the Comment of section 92 could not possibly be any more vigorous with respect to "the duty of courts" in the application of this rule as a fundamental principle of statutory construction:

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

Decisional authority similarly mandates that there is no substitute for effectuating legislative intent as the court's preeminent responsibility.[13] In the landmark decision, *Price v. Price*,[14] the Court of Appeals noted

that, "it is fundamental that in the interpretation of statutes, the spirit and purpose of the act and the objects to be accomplished must be considered. The legislative intent is the great and controlling principle." The Court of Appeals' declaration in *O'Shea* that "DRL § 237(a) marks our present place in a long legislative and decisional law journey that carries us to our result resonates consonantly with the key principle that 'in all cases the legislative intent is to be effectuated; not frustrated' (Comment, N.Y. Statutes § 96)." The clarity of the legislative intent is also cogently reinforced in the accompanying Memorandum to the bill.

Social Climate During the Time of a Law's Enactment and Its Legislative History

O'Shea's pronouncement that "DRL § 237(a) marks our present place in a long legislative and decisional law journey that carries us to our result" is also particularly relevant against the backdrop of N.Y. Statutes §§ 124 and 72, which point to the significance of exploring the social climate during the time of a law's enactment as well as its legislative history.[15] The statutory scheme emphasizes the importance of effectuating the contemplated reform by considering, "[T]he peculiar circumstances which surround particular persons or things and moved the lawmaking body to legislate regarding them may be considered in ascertaining whether ample grounds existed for discrimination between them by statute" (N.Y. Statutes § 96). The purpose behind counsel fee awards is so well chronicled that there is absolutely no room for doubt regarding the legislature's objective or intent across its historical development.

O'Shea tracked the history and progressive thinking behind fee awards across one and a half centuries as reflected in the various legislative amendments[16] and judicial pronouncements, each slated to bridge another schism between the needy spouse's inaccessibility to funds and the ability to mount a successful prosecution of her case.[17] Notably, the Court of Appeals observed that each successive statute further expanded judicial discretion as part of a vigorous campaign to shore up the rights of the less affluent spouse.

The Court of Appeals' blueprint of section 237(a)'s evolutionary process was clearly not undertaken without purpose but rather to emphasize the material implications of the various amendments[18] which repose greater discretion in the courts to be used in harmony with the statutory scheme of the CPLR. *Wechsler* avoided a regressive blow to the legislative and judicial development which would have implausibly and unjustifiably made the prosecution of the non-titled spouse's case more arduous, a direction diametrically opposed to *O'Shea*'s explication of current law as the product of the "unswerving direction" of the law across the past 150 years.

Wechsler Properly Exercised Its Discretion to Vacate the Stay

Pursuant to the statutory scheme, the automatic stay under CPLR 5519(a)(2) is not impregnable, except for the most limited of cases involving governmental entities. The legislature, clearly, vested discretion upon courts with appropriate jurisdiction over the subject appeal to penetrate the seeming inviolability of the automatic stay:

> CPLR § 5519(c) Stay and limitation of stay by court order. The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

Wechsler properly outlined and analyzed its predicate authority under CPLR 5519(a)(2), as tempered by CPLR 5519(c), to vacate the stay under the circumstances of the case directing that the monies held by the county clerk be released to the wife:

> The fact that the stay is automatic does not remove it from the purview of the court's discretion to otherwise vacate, limit or modify the stay. Moreover, the statute expressly gives the court issuing the order appealed from such discretion. The sole exception, not applicable here, is when the appealing body is a state authority. In that event the automatic stay may still be vacated, limited or modified, but only by the court to which the appeal is taken.

There Is No Evidence of Any Legislative Intent to Limit the Application of CPLR 5519(c) to Non-Matrimonial Cases Only

It is further significant that at no time has the legislature ever amended the applicability of CPLR 5519(c) to non-matrimonial actions. The following examples clearly establish the legislature's lack of reluctance to craft laws uniquely limited to the matrimonial arena when deemed necessary:

1. The prohibition of reverse partial summary judgment in matrimonial actions only; CPLR 3212(e) was enacted in 1984 to curb what was perceived as a procedural technicality which granted an unfair advantage to husbands seeking expeditious exits from their marriages "without paying the piper."
2. CPLR 211(e)'s specific application to support, alimony, and maintenance.
3. Enforcement proceedings set forth in CPLR 5241 and 5242 stemming from matrimonial actions.
4. The interdiction against serving interrogatories and a bill of particulars in a matrimonial action.

Statutes Are Presumed to Work Neither Hardship Nor Injustice, Nor Are They Shaped in a Vacuum to Leave Parties Without a Remedy; Decisional and Statutory Authority Unanimously Prevented Unjust Results to Counsel and Clients

There is a statutory presumption that "[A] statute should be construed in a manner which will not work hardship or injustice" (N.Y. Statutes § 146). The Comment expounds:

> Prominent among the objectionable consequences sought to be avoided in the construction of statutes are hardship and injustice, and courts will take into consideration the fact that one construction will lead to hardships which another would avoid. It will be presumed that the Legislature did not intend that a statute would have an unjust effect, and, unless the language forbids, it must be given an interpretation and application consistent with such presumption. The Legislature is not lightly to be charged with enacting a statute which will operate harshly or unjustly; and, if a statute apparently has such effect, some other construction is to be sought if possible.
>
> Where there is any doubt about the proper interpretation of a statute, it should receive that construction which would not work hardship or injustice. The courts should strive to avoid a construction which would make a statute unjust, or create a hardship. Thus if a fair construction can be found which gives force to the whole act and to the legislative intent, and does not work an injustice, it must necessarily be adopted. An interpretation of an act should be avoided which would injuriously affect the rights of others [such as counsel], and that sense should be attached to its provisions which will harmonize its objects with the preservation and enjoyment of all existing rights. . . .

The Legislature Is Presumed Not to Intend to Enact Laws which Leave a Party Without a Remedy

Similarly, the legislature is presumed not to enact laws that leave a party without a remedy.[19] The husband's untenable reading to wishfully eliminate section 5519(c) from the CPLR was without basis in either law or the principles of statutory construction, as they would have stripped a court of legislatively contemplated authority, thus, impermissibly emasculating the purpose of the statute (N.Y. Statutes §§ 144 and 146).

It is no secret that the matrimonial bar, like no other,[20] faithfully carries the financially weak spouse for periods up to several years without a fixed payment date in sight relying principally on little more than the client's own desperate assurance of integrity and governing authority. The harsh reality recognized by *Frankel* is that law office economics, especially of smaller firms, involves substantial overhead which is not as compassionate to a client's plight. *Wechsler*, like *Frankel*, recognized the onerousness that a contrary conclusion would bring to bear on solo practitioners and small firms whose existence require and depend on regular financial infusions to keep afloat.

Furthermore, conventional wisdom teaches that word travels fast through litigant channels. *Wechsler*: (1) disarms the duplicitous spouse from using an otherwise unavailable strangulation hold on the financially disadvantaged spouse; and (2) prevents inordinate gaps of time where the wife's counsel remains uncompensated while the financially well heeled spouse continues to oil his engine with regular payments. This is especially so in appellate practice where decisions are not rendered within 30 or 60 days.

Conclusion

Wechsler represents an appropriate exercise of judicial discretion harmoniously compatible with the continuum of decisional and legislative history, both in the letter and the spirit of the law. Justice is served by permitting the non-monied spouse to actively participate in the prosecution of her case, while allowing the trial court to sort out the equities and make the necessary economic adjustments and/or reassignments upon the conclusion of the case.

Endnotes

1. 8 Misc.3d 328, 797 N.Y.S.2d 844 (Sup. Ct., N.Y. Co. 2005).
2. This monograph was originally drafted as the *amicus curiae* brief on behalf of the American Academy of Matrimonial Lawyers until the underlying action was resolved between the parties.
3. *O'Shea v. O'Shea*, 689 N.Y.S.2d 8, 93 N.Y.2d 187, 711 N.E.2d 193 (1999); *Charpie v. Charpie*, 271 A.D.2d 169, 710 N.Y.S.2d 363 (1st Dep't, 2000); *DeCabrera v. Cabrera-Rosete*, 524 N.Y.S.2d 176, 70 N.Y.2d 879, 518 N.E.2d 1168 (1987).
4. DRL § 237(a).
5. 2 N.Y.3d 601, 814 N.E.2d 37, 781 N.Y.S.2d 59 (2004).
6. 689 N.Y.S.2d 8, 93 N.Y.2d 187, 711 N.E.2d 193 (1999).
7. 122 Misc.2d 552, 472 N.Y.S.2d 248 (Sup. Ct., Nassau Co. 1983).
8. 689 N.Y.S.2d 8, 93 N.Y.2d 187, 711 N.E.2d 193 (1999).
9. 70 N.Y.2d 879, 524 N.Y.S.2d 176, 518 N.E.2d 1168 (1987).
10. 271 A.D.2d 169, 710 N.Y.S.2d 363 (1st Dep't 2000).
11. 282 A.D.2d 392, 724 N.Y.S.2d 48 (1st Dep't 2001).
12. N.Y. Statutes § 92.
13. *Fumarelli v. Marsam Development*, 92 N.Y.2d 298, 703 N.E.2d 251, 680 N.Y.S.2d 440 (1998); *See New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 343 N.E.2d 735, 381 N.Y.S.2d 17 (1975); *Albano v. Kirby*, 36 N.Y.2d 526, 330 N.E.2d 615, 369 N.Y.S.2d 655 (1975); *Hogan v. Culkin*, 18 N.Y.2d 330, 221 N.E.2d 546, 274 N.Y.S.2d 881 (1966); *Peterson v. Daystrom Corp.*, 17 N.Y.2d 32, 215 N.E.2d 329, 268 N.Y.S.2d 1 (1966); *Scotto v. Dinkins*, 85 N.Y.2d 209, 647 N.E.2d 1317, 623 N.Y.S.2d 809 (1995); *Rankin on Behalf of Bd. of Ed. of City of New York v. Shanker*, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968); *Sutka v. Conners*, 73 N.Y.2d 395, 538 N.E.2d 1012, 541 N.Y.S.2d 191 (1989): ". . . legislative intent is "the great and controlling principle.". . . Generally, inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history."
14. 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).
15. N.Y. Statutes § 72:

    > Indeed, the purpose and applicability of a statute cannot be considered without first discussing its legislative history, and it has been held that legislative history is not to be ignored, even if words be clear . . . the courts will look at the contemporary history of a statute and the historical background thereof as an aid to interpretation; and these aids will show the circumstances under which the statute was passed, its object and the mischief at which it was aimed. The conditions under which act was adopted and evil intended thereby to be cured materially explain the purpose of the Legislature.

16. Comment, N.Y. Statutes § 191: Amendatory acts alter the text of a proposed bill or an existing enactment. Their purpose is usually to make an old statute express and conform to a more recent legislative intention, or to rectify an error:

    > Ascertainment and effectuation of the intention of the Legislature is the primary object in the construction of statutory amendments. . . . It is presumed that an amendment was made to effect some purpose, and to make some change in the existing law.
    >
    > In considering the meaning and effect of the amendatory act, it is desirable to have in mind the previous condition of the law on the subject, and the history and purposes of the statutes which are amended . . . In arriving at the legislative intent, the language of an amendment may be construed in the light of previous decisions construing the original act, it being presumed that the Legislature had such judicial construction in mind when adopting the amendment.

17. *See* N.Y. Statutes § 95. Consideration of the mischief to be remedied:

    > The courts in construing a statute should consider the mischief sought to be remedied by the new legislation, and they should construe the act in question so as to suppress the evil and advance the remedy.

    COMMENT

    > In construing statutes the cause and necessity of a law are always of value; and in passing upon matters of legislative intent and competence, the courts do not merely read the bare and product of the legislative labors, but rather they read the statute in light of the state of facts which were found by the Legislature and which prompted the enactment.

    Also see Comment, N.Y. Statutes § 234.

18. The significance of this effort in *O'Shea* is bolstered by § 193(a) and (b) and § 222 of N.Y. Statutes: "The Legislature, by enacting an amendment of a statute changing the language thereof, is deemed to have intended a material change in the law."

    See Comment in N.Y. Statutes § 222:

    > It is a general rule of statutory construction that earlier statutes are properly considered as illuminating the intent of the Legislature in passing later acts, especially where there is doubts as to how the later act should be construed, since when enacting a statute the Legislature is presumed to act with deliberation and with knowledge of the existing statutes on the same subject.

19. "[T]he Legislature does not contemplate the leaving of a party without a remedy, and a construction of a statute which would have such an effect is to be avoided. That statutes should be interpreted "workably" (Comment to N.Y. Statutes § 144, Avoidance of Objectionable Consequences). "[A] construction of a statute which tends to sacrifice or prejudice the public interests" is not permitted because it is "presumed" that the "use of every effort on the part of the Legislature to enact laws will promote the public interests and the intention will not be imputed to the Legislature of enacting a law which will be injurious to the welfare of the state, or hamper the officials of the state in the proper discharge of their duties."
20. Unlike, for instance, the personal injury bar where payment is a virtual certainty upon receipt of funds from the carrier.

Keys to Comparing Two or More Residential Appraisals on the Same Property—An Attorney's Tool

By Howard Jackson

It has been said that real estate is the basis of all wealth. Clients of attorneys practicing in a variety of fields such as matrimonial, trusts and estates, real estate, land use, zoning, corporate, etc., have small- to large-scale real estate assets somewhere in the situation. Sometimes it is prominent and the situation is critical.

Many times an attorney will be confronted with a situation where there are two, possibly more, appraisals on the same property, typically a marital residence in a matrimonial case or a home or commercial property in a tax certiorari proceeding or multiple properties in an estate proceeding. To make matters worse, the spread between the appraisals are wide. Sound familiar?

Many have said that there can be an "honest" difference between two appraisal experts. When the gap between the appraisals is wide, logically how can it be an honest difference? There are also appraisers out there who will "accommodate" the client.

Attorneys advocate a position. But any good attorney knows that where there is a large gap between appraisals, it is likely that one appraisal is wrong. But which appraisal is it? Does the opposing attorney know?

Regardless of any of the abovementioned issues, knowing how to determine which appraisal is on solid ground and which isn't forms a critical step in the processing of any case.

This article is not intended to make the attorney an expert appraiser. Rather it is intended to give the attorney a keen eye in reviewing two or more appraisals on the same property so that the attorney will be able to effectively do the following:

- Determine which appraisal is on solid ground. (This is defined as a competent appraiser with good market data with technically appropriate analysis producing a consistent, logical and defendable estimate of value.)
- Determine if the differences between the appraisals is due to an "honest" difference of opinion or is one of the appraisers attempting to "accommodate" the interests of the client? Could the difference also be due to a lack of market data with two appraisers with very different amounts of experience interpreting the data differently due to their differentials in experience?
- Develop direct examination questions to establish the character and credibility of the expert appraisal witness while on the other hand being able to develop cross-examination questions to expose the character and credibility issues of the opposition appraiser as well as establishing that the opposition appraisal is not on solid ground.

This article is designed to leave the attorney with simple but very effective ways to consistently deal with the above issues. It will engender confidence and competence in this area. There is a book also available, written by this author, which takes this a step further since there is more space available. The name of the book is *The Real Estate Appraiser and the Law* and can be viewed and accessed by going to this web site, www.upublish.com/books/jackson-h.htm.

"Attorneys advocate a position. But any good attorney knows that where there is a large gap between appraisals, it is likely that one appraisal is wrong. But which appraisal is it?"

In the typical residential appraisal, the most common report produced is a FNMA (Fanny Mae) form report, a/k/a a "summary appraisal report." It contains concise aspects of the appraisal, such as identification of the property, site and building description, and provides cost approach and sales comparison approach to value. The income approach to value (the other of the three approaches) is rarely used since the residential home is purchased as an owner user not as an investment property.

The remainder of this article will demonstrate the simple key areas of comparison which are summarized as follows:

- Type of report: summary, self-contained or limited appraisal
- Type of appraisal
- Appropriate data selection
- Analysis of data
- Reconciliation and conclusions

- Ethics, character and integrity of the expert witness

Over 98% of the residential appraisals are completed using the FNMA single-family residential form report.

Outlined below is a set of steps to follow in order to effectively compare two residential appraisals. It is organized to emulate the FNMA form report. This form report has section headers scripted on the left margin beginning with subject then neighborhood, PUD, site, description of improvements, comments, cost approach, sales comparison analysis and finally reconciliation. Most all of the steps below will fall into one of these sections. Its simple but thorough organization is one of the main positive attributes of this form report. By following the steps indicated below, a difficult task of comparing two or more appraisals on the same property is made easy for even the novice attorney. The way to gain the most advantage from this article is to have the two or more appraisals on the same property immediately available.

As more appraisals are reviewed using the methodology listed below, the review and compare process becomes almost second nature.

The following are the steps:

1. **Credentials of the appraisers:** First and foremost, is the appraiser qualified to perform the appraisal in the first place? The appraiser should have at least 5 years experience for the simple residential appraisals (subdivisions for example) and more for the upper end or complicated residential appraisals. Additionally, the appraiser must demonstrate competence geographically, meaning the appraiser has prepared many appraisals in the same geographic area as the subject property. Oftentimes, a relatively new appraiser is pitted against a very seasoned and experienced appraiser in a situation with limited data. The appraiser with the limited experience is not as competent in interpreting the appraisal situation with limited data and, as a result, produces a value estimate which is not as reliable or accurate as the experienced appraiser.
2. **Any hypothetical or extraordinary assumptions used by any of the appraisers such as value upon completion for example**: This is perfectly legitimate as long as any assumption or condition is labeled prominently. Double check to see if both appraisals are using it. If one is and the other isn't, that alone could cause substantial differences in the appraisals.
3. **Date of value**: The date of value for both appraisals should be identical. Otherwise it could be comparing apples to oranges.
4. **Subject property**: Are the appraisers appraising the same property? Not only double check the street address but also the tax or parcel ID number.
5. **Property description**: This covers the site (land area and dimensions, waterfront or not or if located on a heavily trafficked road, for example). It also includes the type of house, square foot area, date of construction, quality of construction, effective age, number of rooms, bedrooms, baths and any other relative amenity.
6. **Cost approach**: This is one of the three approaches to value. Rarely is this used as the main focus of value so it will not be elaborated on further here. But in theory, the appraiser estimates the replacement cost new (material which is comparable but may not be exact). Then depreciation is deducted (physical, functional, economic). To the net result, the land value and on-site improvements are added. Generally, the cost approach sets the upper limit to value.
7. **Income approach**: Since most single-family homes are bought for owner/user purposes and not investment purposes this approach is not utilized.
8. **Sales comparison approach**: For single-family residential appraisals this is the primary approach. The appraiser will base the conclusion to value on this approach. There is no formal reconciliation process as in a commercial appraisal since this is the main approach to value utilized. This is the "guts" of the appraisal. In theory, sales of similar homes in the same area as the subject property are utilized to determine the "most probable selling price" of the subject. Normally three (3) comparables are presented on the form. But who said three is the appropriate amount to be utilized? It is the role of the appraiser to present a logical and defendable estimate of value. Showing three good sales is sufficient, but there are additional pages on the form where more comparables can be utilized. There are five (5) areas to look at carefully when comparing two reports: (a) Location of the comparables relative to the subject: Look at the map. Are they in the same geographic area? Is there a major thoroughfare and the subject is on one side while all the comparables on the other? This could be a completely different market area. (b) Data verification: Is it verified by at least two sources? (c) Date of appraisal: The comparables should be as close to the date of valuation or appraisal as possible. Due to lack of sales, this is not always possible. But if you see that one appraisal has current sales and the other doesn't, this could be a red flag that something is not

right. (d) Types of houses: In most cases the appraisers should use the same type of house as the subject property. If not, the comparables should be equivalent in terms of market desirability. (e) Adjustments to the comparables: Most all comparables are not exactly the same as the subject. For example, the subject might have a two car garage while the comparable has one. The appraiser would make an adjustment for this. The condition might be different. The square foot area of the houses could be different. For any differences the appraiser must make a market-supported adjustment, and in the report there is a separate column for this. Watch out for inconsistent or unreasonable adjustments. The appraisal report itself will actually contain them if you know what to look for. For example, in an upper-end Long Island, New York, home, the appraiser lists in the cost approach the cost new per square foot to build the house at $275.00 per square foot. The sales price per square foot (based upon the building area) of the comparables range from $350.00 per square foot to $533.72 per square foot (this includes the land). The appraiser makes an adjustment for excess GLA (Gross Livable Area) of only $50.00 per square foot. This means, for example, the subject property has 3,084 square feet, Comparable #3 has 5,500 square feet and sold for $1,950,000, the appraiser is only making a $108,500 adjustment for the almost 2,500 square foot living area difference which is almost the entire size of the subject. Does this seem logical or reasonable? The quick answer is "no." Also keep in mind that in this case, there were comparables available at or near the size of subject property. Would it surprise the reader to know that this appraiser's client would benefit greatly from a higher appraisal since the buyout price to this client would be higher? Another issue in the same appraisal, all of the comparables used were almost twice the size (size of house) than the subject property. Continuing on, after all the adjustments to the comparables are made, at the bottom of this section is a line called the "adjusted sales prices." Below that is an area for comments where the appraiser will discuss the comparables and which one or ones are the best indications of value for the subject property. Watch out for statements such as "the appraiser reconciles to a value" from wide conclusions of analyzed sales. This is often an indication that the appraiser isn't really sure. Another red flag is the use of an average. An appraiser will come to a conclusion and the reader is left wondering "how did the appraiser come to such an exact conclusion?" This is often used by appraisers but it is not correct.

The good appraisers will sift through and analyze data. Combined with thoughtful explanations, the appraisal will lead the reader from Step A through Step Z along with the appraiser's conclusion to value. Many times a reader will not agree with the appraised value, but they will readily accept an appraisal that is logical, defendable, well presented and one that leads the reader from Step A through Step Z. When an appraiser—along with the appraisal—is used as an expert witness and exhibit, respectively, the one that is logical, defendable, well presented and the one that leads the reader from Step A through Step Z along with the conclusion to value, many times can make the difference between winning or losing a case.

The last part of the FNMA form is a place where the appraiser is valuing the property "as is" or "subject to completion," plus a "final reconciliation section" where the findings are tied together (usually a restatement of the sales comparison approach), a declaration of the effective date of the appraisal, the appraiser's signature, license, date of signature and the statement of the appraised value.

Did the appraiser do anything "out of the ordinary" or something that deviated from common and acceptable appraisal practices? This is where something is found to have been done either "out of the ordinary" or "deviated from common and accepted appraisal practice." This would set off a red flag. If we go back to the examples in #8, which was an actual case, the appraiser did something out of the ordinary. The appraiser used comparables that were twice the size of subject property when there were sales at or near the size of subject that could have been utilized. This automatically puts a strong upward bias on the appraisal. The appraiser then compounded this upward bias by making unreasonably low downward adjustments for the size differential (GLA differences). Then when you look at who the appraiser's client is and how the client benefits from a high appraisal, it doesn't take a rocket scientist to figure out what is going on. With this step-by-step analysis, these factors were detected within the appraisal and now the attorney, on cross-examination, can elicit this from the appraiser and discredit not only the appraisal, but also the conclusion to value.

Conclusion

This article attempts to present a simplified, step-by-step guide to comparing two or more residential appraisals on the same property. The goal was to illustrate how two appraisals could be systematically reviewed and compared to see which one was technically competent and produced a logical and defendable estimate of value. This has been referred to as an appraisal "being on solid ground."

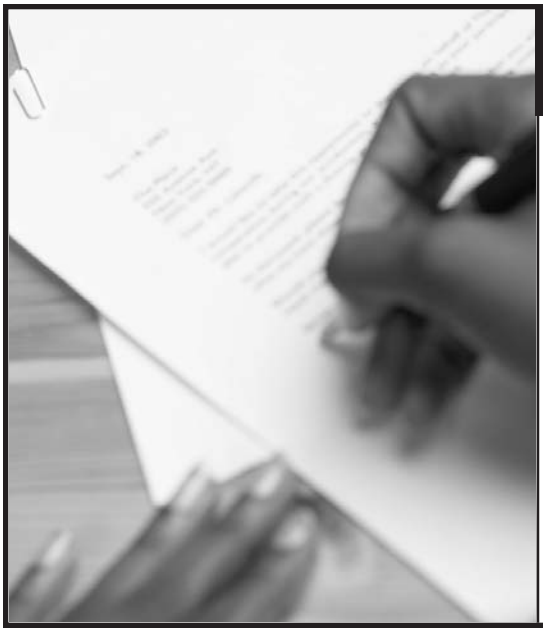
Assuming there are honest differences between the appraisals, this article endeavors to demonstrate how to hone in on these differences for the purpose of illustrating an aspect or aspects of a case. Two appraisals that are on solid ground are generally very close in their value estimates. If not, many times it is the result of assumptions that one or both of the appraisers is making.

In the instance where the differences between the appraisals were not a result of an honest difference of opinions, this article also showed how that situation should be detected, exposed and resolved.

In the final analysis, it is the mandate of the appraiser to produce a logical and defendable estimate of market value. When both or all of the appraisers involved strive for this goal, the differences between the appraisals (assuming two appraisers of equal caliber) should not be significant. Those steps necessary to properly compare appraisals were presented, examined and explained in a logical and simplified format for the ease of the reader.

Howard Jackson is an MAI member of the Appraisal Institute, ASA member of the American Society of Appraisers and Chairman of Integrated Real Estate Services, Inc. He has appraised all types of real estate around the United States for purposes such as mortgage financing, tax certiorari, condemnation, malpractice and equitable distribution. He has spoken throughout the United States for many organizations, institutions, colleges and universities. The topics range from real estate valuation, malpractice, expert witness testimony, computer science and applications in real estate, legal and economic issues. He has published numerous writings and books regarding appraisal, legal issues, computer applications and related subjects, including *The Real Estate Appraiser and The Law*, *Key Writings in Real Estate*, *Real Estate Values and You*, *Real Estate Financial Calculator Keystrokes* and *What is the "Market" in Market Value*, *Artificial Intelligence Application Concepts for the Real Estate, Financial and Land Information Services Industries*, *How Assessments, Tax Rates and Equalization Rates Affect Real Estate Values*, *The Realities of Rent Control—An Economic Disaster*, *The A-B-C's of Mortgage Financing*, *How a Property Can Have Two Different Values Simultaneously*. He is the only one in the profession to have published a law book that is used for continuing legal education dealing in the area of the essentials of expert witness testimony.

Mr. Jackson has been an adjunct associate professor of real estate at New York University, New York Institute of Technology, Hofstra University, Nassau Community College, New School for Social Research. His courses have been granted credit for appraisal certification, continuing education and continuing legal education (CLE) for attorneys in New York and New Jersey. He has qualified as an expert witness in Supreme Court since 1972, with his most recent case being September 2005. His offices are at 119 Second Street, Suite I-2, Garden City, New York (Tel: 516-294-1177; Fax: 516-294-1191; Web: www.integratedreal.com).



Request for Articles

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Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Selected Cases

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

(Vol.) Fam. Law Rev. (page), (date, e.g., Fall/Winter 2005) 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.

Marian B. Cocose o/b/o Michael M., Jr. v. Diane B., Anthony B. and Ulster County Department of Social Services, Family Court, Ulster County (Nussbaum, Steven, July 22, 2005)

For Petitioner: **Marian B. Cocose**
Petitioner/Law Guardian for Michael M., Jr.

For Respondents: **Keri E. Savona, Esq.**
Ulster County Department of Social Services

Colette A. VanDerbeck, Esq.
Law Guardian for Sandra B.

NUSSBAUM, S., J: This is a proceeding for visitation between two siblings who were found to have been abused and neglected by the parents. The children, along with three other siblings, were removed from the home of their biological parents in August, 1999. The parental rights of the father were terminated, and the mother surrendered her rights to their five children who were freed for adoption in November, 2001. Two of the children have been adopted, two of the children remain in the custody of the Ulster County Department of Social Services, and the oldest child, upon turning eighteen, signed himself out of care and returned to his natural mother.

Marian B. Cocose, Law Guardian for one of these children, Michael (d/o/b 5/30/91), has filed an Order to Show Cause in the above-captioned matter, seeking sibling visitation between Michael and his sister, Sandra (d/o/b 9/10/93), now adopted by Respondents B. [hereinafter "adoptive parents"]. This proceeding is commenced pursuant to §71 of the Domestic Relations Law and §651(b) of the Family Court Act. At the time of Sandra's adoption proceeding, there was no provision concerning sibling visitation. Michael, who has not yet been adopted, is in the custody of the Department of Social Services.

The Petition asserts that since the adoption of Sandra in November, 2003, Respondent adoptive parents have refused to permit sibling visitation or even communication between the two children. According to Ms. Cocose, such refusal is contrary to the best interests of both Michael and Sandra. On May 12, 2005, Colette A. VanDerbeck, Esq., Law Guardian for Sandra, moved for an order dismissing this action and, in the alternative, for summary judgment. The motion was returnable on July 12, 2005.

Submissions made and considered in this matter were Affidavits of the adoptive parents, sworn to on April 20, 2005, and the exhibits attached to them; Affidavit of Colette A. VanDerbeck, sworn to on May 12, 2005; Affirmation in Opposition of Marian B. Cocose, signed on June 15, 2005; Memorandum of Law submitted by Marian B. Cocose, signed on June 15, 2005; and Affirmation in Opposition of Keri E. Savona, Esq., Staff Attorney for the Ulster County Department of Social Services, signed on July 5, 2005. No papers were submitted by the adoptive parents except through Ms. VanDerbeck. No rebuttal papers were filed.

The affidavits of the adoptive parents, submitted in support of the motion to dismiss and for summary judgment, are virtually identical. They aver that they adopted Sandra in November, 2003, after knowing her since about August, 2002 and she having lived with them since February, 2003. They both assert that at least one unnamed person at the Department of Social Services had advised them that after they adopted Sandra, sibling visits would end and they were under no obligation to continue them. According to them, they were concerned that visits with Michael had a negative impact on Sandra. After visits Sandra would ask them why Michael acted the way he did, "hitting her, putting snot on her, crying, vomiting, hugging her and hanging on her." The adoptive parents assert Sandra is doing very well now and no longer requires therapy. She is in special education classes and is doing well in school, even winning a Super Student Bumper Sticker award. They believe that Sandra will not benefit and, in fact, would suffer setbacks if sibling visitation were to occur.

It is the position of both adoptive parents and Sandra's Law Guardian that Sandra's parents have the right to refuse visitation between the child and her brother, Michael. Relying on the United States Supreme Court decision in *Troxel v. Granville*, 530 U.S. 57, 147 L.Ed. 2d 49, 120 S. Ct. 2054 (2000), it is argued that the constitutional rights of the parents must prevail and the

motion be dismissed. According to the movant, since Michael has not lived with Sandra since their removal from their birth parents' home in 1997, their contact is minimal and insufficient to establish standing under DRL §71 in this visitation matter. It also is argued that if visitation were ordered it would have a chilling effect on future adoptions.

Sandra's Law Guardian, in her affidavit in support of the motion, added that at the time of the adoption of Sandra by Respondents B. in November, 2003, neither the Department of Social Services nor Michael made any demand for visitation. She noted the decision of Judge Mary M. Work of October, 9, 2001, that set forth the harsh effects of the abuse and neglect these children suffered, including sexual, physical, and emotional abuse but no copy of the decision was annexed to her moving papers. Reference was made to reports in the court files indicating that visits had to be terminated early because of Michael's behavior, but no specifics or copies were provided. Sandra's Law Guardian contends that the petition should be dismissed for failure to state a cause of action and that the Court lacks subject matter jurisdiction. She further seeks summary judgment as she contends no factual issues exist as neither of the adoptive parents nor Sandra desire visitation to occur between the brother and sister.

Ms. Cocose, in opposition to the motion, asserts that since the children were placed in the custody of the Department of Social Services until November, 2003, when Sandra was adopted, Michael, Sandra, and their other siblings visited with each other on a monthly basis. They visited until Michael was 12 and Sandra was 10. Given the consistency of their contact up until the time of the adoption, standing, according to Ms. Cocose, exists. Michael's Law Guardian further claims that any difficulties which arose during visitation were not due to the actions of Michael and that the records of the Court do not support the claims of Respondent adoptive parents. She acknowledges that both of these children have special needs requiring significant attention and emotional support. In her affirmation, Ms. Cocose refers to reports from a caseworker and a psychologist for Michael strongly favoring sibling visitation.

The Department of Social Services, in opposition to the motion, noted that the children and their other three siblings enjoyed consistent visitation with each other, even though not placed in the same foster homes. The Department agrees with Ms. Cocose that there is standing to maintain the petition and that the motions should be denied.

Motion to Dismiss

Sandra's Law Guardian has moved to dismiss the proceeding on the grounds that the petition fails to state a cause of action and the Court lacks jurisdiction over the subject matter in accordance with CPLR §3211)(a)(2) & (7). She argues that pursuant to *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000), the adoptive parents have a Fourteenth Amendment right to determine who Sandra should see. As neither they nor Sandra wish the child to visit with her brother Michael, their decision should not be challenged. It is asserted in the moving papers that the children have not resided together for over five years, had limited contact until November, 2003, and have not seen each other since Sandra's adoption. Given the limited contact, it is argued, the parents' decision to deny sibling visitation is proper.

Ms. VanDerbeck further argues that the plain language of DRL §117 results in the severance of sibling visitation after adoption. The statute provides in relevant part that "after the making of an order of adoption . . . adopted children . . . are strangers to any birth relatives." She argues that since siblings are birth relatives, once Sandra was adopted, her four other siblings became strangers to her. Because the order of adoption did not provide for sibling visitation, the opportunity to provide for it has passed. She finally asserts that were the Court to order sibling visitation at this time, after the adoption had been completed, it would have a chilling effect on future adoptions from the Department of Social Services.

Ms. Cocose, in opposition, argues that the Family Court has subject matter jurisdiction of this proceeding pursuant to FCA §651 and a cause of action is stated pursuant to DRL §71. The Department of Social Services also opposes the dismissal of this proceeding, noting that for purposes of this motion to dismiss, the petitioner is entitled to every favorable inference that might be drawn. Although DRL §71 does not explicitly provide for sibling visitation after adoption, precedent set by case law has found that post-adoptive visitation is permissible pursuant to said statute.

The Court's inquiry on a motion to dismiss is limited to ascertaining whether the pleadings state a cause of action as opposed to whether there is evidentiary support for the petition. The Court is to give the petition a liberal construction, take the allegations of the pleadings as true and provide petitioner the benefit of every possible inference. *EBC I, Inc. v. Goldman Sachs & Co.*, ___ N.Y. 3rd ____, ___ N.Y.S.2d ___, 205 N.Y. LEXIS 1178 (June 7th, 2005); *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326, 744 N.E.2d 1190, 746 N.Y.S.2d 858 (2002). The petition must be construed in the light most favorable to petitioner. *Scott v. Scott*, 215 A.D.2d 893, 626 N.Y.S.2d 600 (3rd Dept 1995); *In re Theresa "BB,"* 130 A.D.2d 834, 835, N.Y.S.2d 155, 156 (3rd Dept 1987); *Holly v. Pennysaver Corp.*, 98 A.D.2d 570, 471 N.Y.S.2d 611 (2d Dept 1984).

In *Troxel v. Granville*, 520 U.S. 570 (2000), the fundamental right of parents to make child rearing decisions concerning their children free of judicial intervention, except in certain circumstances, was upheld when Washington State's grandparent visitation statute was challenged. That state's statute, which enabled any nonparent to petition for visitation with a child, was found unconstitutional as it was overly broad and infringed on the fundamental right of a parent to make a decision about the care, custody and control of the parent's child. This constituted a violation of the parents' Fourteenth Amendment substantive due process rights.

Pursuant to *Troxel*, a visitation statute must meet two standards: (1) The statute must not be overly broad; and (2) the court's interpretation of the statute must require a presumption that a fit parent acts in the best interests of his or her child. "Special weight" is to be accorded the determination of the parents. *Troxel v. Granville*, 530 U.S. at 70, 120 S. Ct. at 2061-62, 147 L. Ed.2d at 58-59; *Hertz v. Hertz*, 291 A.D.2d 91, 84, 783 N.Y.S.2d 62, 65 (2d Dept 2001); *Rachel S. v. Annette R.*, 1 Misc. 3rd 760, 766 N.Y.S.2d 307 (Kings County Fam. Ct. 2003). The right to make parental decisions, however, is not unfettered or absolute. *See Davis v. Davis*, 188 Misc. 2d 81, 725 N.Y.S.2d 812 (Ostego County Fam. Ct. 2001).

Under New York law, there are only two classes of individuals, other than their parents, who may seek visitation with children. They are, pursuant to statute, siblings of the whole and half-blood, and grandparents. *Perry-Rogers v. Fasano*, 276 A.D.2d 67, 715 N.Y.S.2d 19 (1st Dept 2000), *leave to app. denied* 96 N.Y.2d 712, 728 N.Y.S.2d 439 (2001). Section 71 of the Domestic Relations Law, which authorizes sibling visitation, provides:

> Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child.

DRL §71, as is the grandparent visitation statute, DRL §72, is strictly construed. *See, e.g., Perry-Rogers v. Fasano*, 276 A.D.2d 67, 715 N.Y.S.2d 19 (1st Dept 2000) (child who shared womb of another child implanted in mother by mistake had no standing under DRL §71to seek visitation with "gestational sibling"); *David M. v. Lisa M.*, 207 A.D.2d 623, 615 N.Y.S.2d 783 (3rd Dept 1994) (great-grandparent visitation not covered by DRL §72). The statutory provision, therefore, comports with the *Troxel* requirement that the statute not be overly broad.

The language of Section 71 tracks that of the grandparent visitation statute, each providing "where circumstances show that conditions exist which equity would see fit to intervene." New York courts examine both the nature and basis of the parents' objection to visitation as well as the nature and extent of the sibling relationship. *See Morgan v. Grzesik*, 287 A.D.2d 150, 732 N.Y.S.2d 733 (4th Dept 2001). Special weight is given to the parents' decision.

The New York Court of Appeals found grandparents could seek postadoptive visitation prior to *Troxel*. *People ex rel. Sibley*, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981). That Court has not yet issued an opinion determining the constitutionality of sibling or grandparent visitation statutes in light of the Supreme Court's decision.

In *Hatch on Behalf of Angela J. v. Cortland County Dept. of Social Servs.*, 199 A.D.2d 765, 605 N.Y.S.2d 428 (3rd Dept 1993), the Appellate Court found that DRL §71 provides "the courts with authority to grant postadoption visitation rights." The court explicitly noted that, "the severance by adoption of the existing emotional ties between children and their . . . siblings and grandparents may be harmful to the children and that it may be beneficial to provide for visitation after adoption." *Id. at* 762, 605 N.Y.S.2d at 428, *citing to* Nathan, Visitation After Adoption: In the Best Interests of the Child, 59 NYU L. Rev. 633 (1984). But such visitation is not automatic. The Court will look to see if there was meaningful contact between the siblings prior to the commencement of the proceeding. Visitation was denied in *Hatch* between the child, Angela, who was born over one year after her two siblings had been placed in the custody of the Department of Social Services. Her birth parents had extremely limited visitation with her siblings and that visitation was terminated when Angela was 19 months old and the siblings four or less years old. The two older children, who had been removed from their parents' care when they were very young, were adopted and Angela's Law Guardian sought sibling visitation. Noting that the children never had the opportunity to develop any affectionate relations with each other, it was found that post-adoption visitation would not be in the best interests of any of these children. *See also Matter of Justin*, 215A.D.2d 180,

626 N.Y.S.2d 479 (1st Dept 1995), *appeal denied*, 86 N.Y.2d 709 (1995) (absence of prior relationship between siblings militates against ordering visitation); *Keenan R. v. Julie L.*, 3 Misc. 3rd 819, 775 N.Y.S.2d 468 (N.Y. County Fam. Ct. 2004) (14-year-old denied post-adoption sibling visitation with 8-year-old sisters where only contact since placement had been one visitation in 1999).

Hatch differs from the facts of this case where the children resided together for six years and had visitation up until the adoption of Sandra. As the parties do not agree on the quality and quantity of visitation, the issue whether there was meaningful contact is a matter to be determined at fact-finding. Moreover, Sandra and Michael, unlike the children in *Hatch*, are old enough to remember living with and other contact with their biological family and consideration must be given as to whether a deprivation of sibling visitation may have lasting effects on the children's development. As noted in *Matter of Lovell Raeshawn McC.*, 308 A.D.2d 589, 591, 764 N.Y.S.2d 714, 716 (2d Dept 2001), ultimately "the court should determine whether such visitation is in the child's best interest."

Post-adoption sibling visitation was ordered in *Adoption of Anthony*, 113 Misc. 2d 26, 448 N.Y.S.2d 377 (Bronx County Fam. Ct.1982), despite the fact that the child had never resided with the siblings who had been adopted by another family before he came into placement. Despite this separation of siblings, they were able to maintain an ongoing relationship with each other through visitation and telephone contact. All parties were in agreement that continued sibling visitation was in Anthony's best interest after his adoption, but the Department of Social Services wanted an informal visitation arrangement rather than one memorialized by an order. The Family Court disagreed and issued an order directing continuing contact between the subject child and his siblings for the purpose of insuring that the child's interests would be protected in the event his adoptive parents changed their minds at a future time. Although decided prior to *Troxel v. Granville*, *supra*, the importance of the continuity of a relationship between siblings is highlighted by this case.

There is clearly a dispute in this case as to the nature and extent of visitation between the siblings following their removal from their biological parents' home in 1999, although there is no dispute that they resided together before that date. There also is a dispute as to what is in the best interest of Sandra with regards to such visitation. In *Matter of Gregston v. Amatulli*, 273 A.D.2d 384, 709 N.Y.S.2d 599 (2d Dept 2000), the Appellate Court held that when a factual dispute exists as to the best interests of the children, a hearing is mandated.

Sandra's Law Guardian argues that if post-adoption sibling visitation was ordered by this Court, it may have a chilling effect on future adoptions through the Department of Social Services, especially of children with special needs such as the siblings in this case. The case law discussed above and recent amendments to the Family Court Act and Social Services Law, passed by the state Senate and Assembly and awaiting signature by the governor, however, renders this argument unpersuasive. An adoptive parent, pursuant to DRL §117(1)(c) has all the rights and duties of a parent. Just as a biological parent could be required to comply with an order directing sibling or grandparent visitation issued pursuant to DRL §§71 & 72, so may an adoptive parent.

An order of adoption does not erase the emotional bonds children may have with their birth family, especially when siblings from an abusive home are split apart by the adoption. They have a shared history and may have been each other's support system during the difficult years with their biological parents, a source of companionship, intimacy and nurturing for each other. As noted by one court in a different jurisdiction:

> Surely, nothing can equal or replace either the emotional and biological bonds which exist between siblings, or the memories of trials and tribulations endured together, brotherly or sisterly quarrels and reconciliations, and the sharing of secrets, fears and dreams. To be able to establish and nurture such a relationship is, without question, a natural, inalienable right which is bestowed upon one merely by virtue of birth into the same family.

L. v. G., 491 A.2d 215, 218 (N.J. Super. Ct. Ch. Div. 1985). While in the ideal world these two siblings might have been placed together and eventually adopted into the same family, this was not the case here. There were five siblings, each with special needs and emotional issues, removed from their home, almost assuredly making their placement in the same home a virtual impossibility.

This philosophy is reflected in the 2005 Permanency Legislation currently awaiting signature by the Governor which includes modifications to to Social Service Law §§383-c and 384. Conditional surrenders may now provide terms and conditions for communication with or contact between the adopted child and said child's "biological or half-siblings." A sibling or half-sibling fourteen years of age or older would be required to consent in writing before such a provision would be enforceable. 2005 NY Senate-Assembly S5805, A7225-A

According to undisputed statements from Sandra's Law Guardian, it does not appear as if the issue of sibling visitation was raised at the time of the child's

adoption. Michael, however, would not have been a party to the adoption proceeding, and his Law Guardian would not have received notice of it. The recent amendments will, hopefully, help resolve this issue in connection with future adoptions. But to penalize these children from possibly maintaining their connection and emotional ties because of a failure to raise the issue at the time of the adoption, under the circumstances of this case, would be inappropriate.

Based upon the motion papers and especially in light of the impact this Court's decision will have on the emotional development of these children, a hearing is a necessity. The application of Ms. Cocose for sibling visitation sets forth a cause of action, and this Court has subject matter jurisdiction. Accordingly, the motion to dismiss is denied.

Summary Judgment

To prevail on a summary judgment motion, the proponent is required to make a *prima facie* showing of entitlement to "judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985). The motion must be denied if there is a failure to make the *prima facie* showing, regardless of the opposing paper's sufficiency. *Id.* at 853. If the showing is made, the burden then shifts to the party opposing the motion for summary judgment, requiring the production of evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial or fact-finding in the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 729, 427 N.Y.S.2d 590, 597-98 (1980).

Summary judgment, as a drastic remedy, should only be granted in cases where there are "no material facts disputed sufficiently to warrant a trial." *La Bier v. La Bier*, 291 A.D.2d 730, 732, 738 N.Y.S.2d 132, 134 (3rd Dept 2002) *quoting Matter of Patricia YY. v. Albany County Dept of Social Servs.*, 238 A.D.2d 672, 673, 656 N.Y.S.2d 414, 415 (3rd Dept 1997). In considering a motion for summary judgment, the court's role is issue finding as opposed to issue determination, and the existence of conflicting issues of fact mandates the dismissal of the motion. *Werfel v. Zivnostenska Banka*, 287 N.Y. 91 (1941); *La Bier v. La Bier*, *supra*. The facts are to be construed in a light most favorable to the non-moving party. *Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3rd Dept 1964). Where different inferences may be reasonably drawn from the facts themselves undisputed, a motion for summary judgment must be denied. *Supan v. Michelfeld*, 97 A.D.2d 755, 756, 468 N.Y.S.2d 384 (2d Dept 1983). If there is any significant doubt whether material issues of fact exist or there is even arguably such an issue, summary judgment is to be denied. *Bulger v. Tri-Town Agency, Inc.*, 148 A.D.2d 44, 543 N.Y.S.2d 217 (3rd Dept 1989), app. dismissed, 75 N.Y.2d 808, 552 N.Y.S.2d 110 (1990). And the motion should be denied if a key fact in issue is within the exclusive knowledge of the movant. *Krupp v. Aetna Life & Cas. Co.*, 103 A.D.2d 252, 479 N.Y.S.2d 992 (2d Dept 1984).

This Court is bound to decide a summary judgment motion in accordance with CPLR §3212(b). The motion may be utilized in custody and visitation cases pursuant to Family Court Act §165(a) which permits its utilization "to the extent . . . appropriate to the proceedings involved." *La Bier v. La Bier*, 291 A.D.2d at 732, 738 N.Y.S.2d at 134.

The moving party must first come forward with admissible evidence to support its claim of entitlement to summary judgment. Affidavits by persons having first hand knowledge of the facts and reciting material facts meet this requirement. Were the movant to satisfy their obligation, "the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so, and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *Zuckerman v. City of New York*, 49 N.Y.2d at 560, 404 N.E.2d at 718, 427 N.Y.S.2d at 596. An affirmation by an attorney who does not have personal knowledge of the facts "is without evidentiary value and thus unavailing." *Id.* at 563, 404 N.E.2d at 721, 427 N.Y.S.2d at 598.

These are the undisputed facts in this matter. On August 12, 1999, Michael, Sandra and their three other siblings were removed from the case and custody of their biological parents and placed in the custody of Ulster County Department of Social Services. In November, 2000, a petition was filed against the biological father, alleging that he had permanently neglected his children. In March, 2001, the biological mother signed a judicial surrender, and on December 19, 2001, the Court issued an order of disposition finding all of the children to be permanently neglected and terminating the parental rights of the biological father. In November, 2003, Sandra was adopted and visitation between Sandra and her other siblings ceased.

Both Ms. Cocose and the Department of Social Services contend that visitation between the children occurred on a consistent basis from the time of their removal until Sandra was adopted. Ms. VanDerbeck and the adoptive parents assert that the visitation was less consistent and had been cancelled at times due to Michael's behavior. There is insufficient proof before this Court to reach a determination as to the meaningfulness of the visitation between the children. And while it would be tempting to use the documentation present in the court's five-volume file consisting of

thousands of pages, legal precedent has established such an action by the court is inappropriate. *La Bier v. La Bier*, 291 A.D.2d at 732, 738 N.Y.S.2d at 134 (Family Court cannot search the entire case record and go beyond statutory standard of review in determining summary judgment motion.).

After reviewing the parties' submissions, the Court cannot say that the difficulties at the visitations were due to Michael's behavior. References to any problems in one document provided by movant indicate the difficulties at visitation were caused primarily by the actions of Joshua, the oldest sibling of the children.

Additionally, much of the relevant information in the affidavits and affirmations supplied were based upon hearsay and therefore have no evidentiary value with respect to a motion for summary judgment. Sandra's reports of difficulties with Michael to her adoptive parents were not supported by any other evidence. While a letter from Sandra's former therapist purports to provide a basis to deny visitation, the mere fact Sandra does not speak of her biological family members does not support such a result. Her failure to speak about her biological family leads to other reasonable inferences that would support a determination that she has a need for sibling visitation. The unsworn letter also is insufficient to support a motion for summary judgment and contains only conclusory statements without setting forth facts sufficient to support her opinion that visitation between the siblings is not in the best interest of Sandra. *Matter of Patricia YY. v. Albany County Dept of Social Servs.*, 238 A.D.2d at 674, 656 N.Y.S.2d at 416. The motion for summary judgment is denied.

Conclusion

Both Michael and Sandra have been the victims of abuse and neglect and have been separated as a result of the actions of their biological parents and by the state. As stated by Justice Stevens in his *Troxel* dissent, sibling and grandparent cases are not just a struggle between parents and the state "over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child." *Troxel v. Granville*, 530 U.S. at 86. The submissions in this matter establish that a fact-finding is necessary before the Court can make any decision in this complicated matter.

Accordingly, the motion to dismiss and for summary judgment is denied. A conference is scheduled for August 24, 2005, at 9:00 a.m., and fact-finding is set for October 11, 2005, at 10:00 a.m.

This constitutes the decision and order of this court.

* * *

***Mindy S. v. Edwin Jay S.*, Supreme Court, Westchester County (Spolzino, Robert A., August 3, 2004)**

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This is an action for divorce and ancillary relief. The parties were married on August 14, 1977. This action was commenced on June 14, 2001, and was tried on January 30 and 31, 2003. The grounds for the divorce were established to be the constructive abandonment of the defendant by the plaintiff *(see* Domestic Relations Law §170[2]; *Diemer v Diemer*, 8 NY2d 206 [1960]). The issues of custody of and parenting time with the parties' one unemancipated child were resolved prior to trial. The issues to be determined here are the content of the marital estate, the manner of its distribution, the amount of the defendant's child support obligation, whether, and, if so, to what extent, the defendant is required to pay spousal support and the parties' respective responsibilities for attorneys' fees and litigation expenses.

I. Stipulated Facts

The parties have stipulated to the following facts:

1. The date on which the parties were married was August 14, 1977.
2. The date on which this action was commenced was June 14, 2001.
3. The defendant was born on January 11, 1954.
4. The plaintiff was born on October 15, 1952.
5. There are two children of the marriage, a daughter, born September 6, 1981, and a son, born October 19, 1986.
6. The defendant resides at xxxxx, White Plains, New York 10606.
7. The plaintiff resides at xxxxx, New Rochelle, New York 10804, which was the marital residence.
8. The defendant's occupation is Senior Vice President, Business Development, Office/Sales Manager.
9. The defendant's employer is Sxxxxx Bank.
10. The plaintiff's occupation is Professor/Audiologist.

11. The plaintiff's employer is xxxxx College. The plaintiff is also the owner of A. C., Inc. of which she is the sole principal.

12. The defendant obtained an M.B.A. in Business Finance from St. John's University in 1981. The plaintiff obtained a Ph.D. in Hearing Science from the Graduate Center of the City University of New York in 1979.

13. The value of the marital residence is $535,000.

14. In or around June, 2001, the defendant paid a security deposit of $2,335 from marital funds for his current apartment, which deposit is marital property.

15. The defendant is the owner of three life insurance policies issued by John Hancock Life Insurance Company which have the following cash surrender values: (a) policy no. xxxxl3 - $899 as of July 9, 2001, $604 as of the date of trial; (b) policy no. xxxxx57 - $7,777 as of July 9, 2001, $5,566 as of the date of trial; (c) policy no. xxxxxxx42 - $3,325 as of July 6, 2001, $2,917 as of the date of trial.

16. The defendant was awarded 5,500 incentive stock options for the purchase of common shares of Sxxxxx Bancorp on February 11, 2000, and 1,000 such stock options on February 14, 2001, which options are marital property. A ten percent stock dividend was declared on December 10, 2001, and the stock options were adjusted as follows: (a) 5,500 shares were adjusted to 6,050 shares with an exercise price of $13.08; and (b) 1,000 shares were adjusted to 1,100 shares with an exercise price of $20.01.

17. The parties' Lincoln Financial Advisors account is marital property. The value of the bonds and cash in the account as of June 30, 2001, was $262,865. The value of the bonds and cash in the account as of January 3, 2003,was $296,087. The Citicorp stock held at Lincoln Financial Advisors had a value of $909,596 as of June 30, 2001. The value of the Citicorp stock as of January 3, 2003, was $675,951. No funds were deposited or withdrawn from the aforesaid accounts since the commencement of this action.

18. The Charles Schwab stock portfolio, account no. xxxx-xx87, accrued during the marriage and was equally divided between the parties in May 2002, with each party receiving $114,193 from said account.

19. The 535 shares of John Hancock stock accrued during the marriage and were sold in May 2002, at which time each party received one-half of the proceeds.

20. The defendant is the custodian of Citicorp account nos. xxxxxl241 and xxxx1153 established under the Uniform Gifts to Minors Act for the benefit of the parties' son, with a value as of January 3, 2003, of $79,359.

21. The defendant has an IRA account at Citibank, account no. xxxxx01, previously held jointly with his mother, who is now deceased. The account is separate property, having been inherited by the defendant upon the death of his mother.

II. Content of the Marital Estate

The Domestic Relations Law commands that "marital property" be divided equitably between the parties and that "separate property" remain separate *(see* Domestic Relations Law §236[B][5][b]). The term "marital property" means "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held" (Domestic Relations Law §236[B][1][c]). Separate property is "(1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part" (Domestic Relations Law §236 [B][1][d]). The assets in issue here are the marital residence, the defendant's master's degree, certain commissions earned by the defendant, the plaintiff's doctoral degree, the plaintiff's interest in A. C., Inc., a brokerage account with Lincoln Financial Advisors, an individual retirement account with SEI Investments, options to purchase Sxxxxx Bancorp stock, a brokerage account with Charles Schwab, the cash value of certain life insurance policies issued by John Hancock Life Insurance Company, certain shares of John Hancock stock, the defendant's individual retirement account at Citibank, the defendant's Citibank investment account and the security deposit posted by the defendant with his current landlord.

A. The Marital Residence

The marital residence is located in New Rochelle, New York. There is no dispute that the marital residence is marital property. The parties have stipulated that its value is $535,000.

B. The Defendant's Master's Degree

The defendant earned a master's degree in business administration from St. John's University in 1981, during the marriage. The plaintiff's expert testified that the value of the degree is $1,159,142. The defendant argues that the value of the degree is less than the plaintiff's expert found. More basically, however, the defendant argues that the degree did not actually enhance his earning capacity at all and is not, therefore, a marital asset to be distributed in equitable distribution.

At the time of the marriage, the defendant had a bachelor's degree in education and was working as a sales representative for Philip Morris, selling cigarette products to grocery stores. While in that position, the defendant attended classes toward his master's degree at night at the employer's expense. His studies included courses in marketing and management. In the course of his studies, before he had earned a degree, he left the employ of Philip Morris and accepted a position as a sales officer with Citibank, earning $17,000 per year. After a brief respite to qualify for Citibank's tuition reimbursement program, he continued the program, at Citibank's expense. The defendant ultimately completed the program, and received his master's degree with a major in business finance, in 1981.

The defendant was employed by Citibank as a sales officer and sales executive from 1979 to 1999. By 1984, he had been promoted from Assistant Manager to Manager to Assistant Vice-President and then to Vice-President. The defendant asserts that none of those promotions were directly attributed to the attainment of the degree. The defendant's primary responsibilities throughout his Citibank employment were in the areas of business and professional sales and sales management. While his work involved analyzing the financial statements of prospective customers to determine whether they were good prospects for business, and required that he have some understanding of the potential client's business and financial needs, he did not make any credit decisions or other banking decisions with respect to the client. Although the defendant received regular pay increases, there is no evidence that any pay increase was attributed to his master's degree. The fact that he had earned the degree was not mentioned on his business card.

The defendant left Citibank in 1999 to accept a position as Senior Vice-President at Sxxxxx National Bank. His job responsibilities at Sxxxxx are essentially the same as they were at Citibank, the development and retention of business customers.Sxxxxx's Human Resources Director testified that neither the defendant's title nor his salary are dependent upon his master's degree. She further testified that there are other individuals employed by the bank as business development officers who do not have master's degrees. She acknowledged, however, that she did not know whether the defendant's master's degree had played a role in the bank's decision to hire him.

The plaintiff argues that whether the master's is required for the defendant's particular position is irrelevant to the issue of enhanced earning capacity. Rather, the issue, she claims, is whether the degree has enhanced the defendant's earning capacity. The plaintiff argues, moreover, that in reaching a determination with respect to this issue the court should draw a negative inference against the defendant by reason of his failure to produce as a witness the bank's executive vice-president, who made the decision to hire him.

When a witness who should be expected to testify on behalf of a party is not called, an inference generally arises that his testimony would be unfavorable to that party, unless the party against whom the inference is sought can demonstrate that the testimony would be merely cumulative, that the witness was unavailable or not under his control, or that the witness would address matters not in dispute *(see Brueckner v Simpson,* 206 AD2d 448 [2d Dept 1994]; *Arroyo v City of New York,* 171 AD2d 541, 544 [1st Dept 1991]; *Levande v Dines,* 153 AD2d 671, 672 [2d Dept 1989]). Where such a showing is not made, the finder of fact may draw the requested inference *(see Placakis v City of New York,* 289 AD2d 551, 552-53 [2d Dept 2001]; *Iovine v City of New York,* 286 AD2d 372, 373 [2d Dept 2001]; *Staltare v D & B Distribs,* 281 AD2d 469, 470 [2d Dept 2001]; *Jordan v Donat,* 255 AD2d 242, 243 [1st Dept 1998]; *Ghize v Kinney Drugs,* 177 AD2d 784, 785 [3d Dept 1981]).

The question here is whether the witness is within the defendant's control. Although it is clear that an employee is within the control of his or her employer *(see Leven v Tallis Dept Stores, Inc.,* 178 AD2d 466 [2d Dept 1991]), the witness in issue here is not the defendant's employee. He is, rather, a co-employee of the defendant who is, apparently, his superior. Since this would not normally be a relationship in which the defendant can be expected to control the activities of the witness, the defendant has met his burden of establishing his lack of control over the witness. The plaintiff has introduced no evidence to counter this understanding. Moreover, the plaintiff could have subpoenaed the potential witness to testify, but chose not to do so. There is no basis, therefore, for the negative inference the plaintiff seeks.

As the party asserting the claim that the defendant's master's degree constitutes an enhanced earning capacity, the plaintiff bears the burden of proof *(see Vainchenker v Vainchenker,* 242 AD2d 620 [2d Dept 1997]; *Iwahara v Iwahara,* 226 AD2d 346 [2d Dept 1996]). The fact that the defendant became employed by Citibank and then by Sxxxxx Bancorp after earning the master's degree is not, by itself, sufficient to carry this burden.

The issue is not, simply, the chronological relationship between the defendant's degree and his earnings, but the causal relationship, if any. Six factors relevant to this analysis were perceptively identified in *A.Z. v C.Z.* (NYLJ, July 9, 2004 [Sup Ct, Nassau County]): (1) the salary structure; (2) the job description; (3) personnel records from employment; (4) nexus of job duties compared to degree obtained; (5) prior employment—working up corporate ladder within company; and (6) timing of salary increases and amounts.

Consideration of several of these factors here would support the conclusion that there has been no enhanced earning capacity resulting from the defendant's degree. Both the defendant and his employer's human resources executive testified, without contradiction, that a master's degree was not required for any of the positions that the defendant has held. In addition, although, as the plaintiff argues, the defendant's promotions and salary increases followed rapidly after he earned his master's degree, there is no evidence that they were the result of that degree.

However, the obvious nexus between the defendant's degree in business finance and his successful employment in the banking industry cannot be ignored. The defendant, while not denying the sequential relationship or even the apparent nexus between his degree and his employment, argues that his particular position, although in the banking industry, is nevertheless such that any knowledge of banking practices or finance that he gained in his education is irrelevant to his success. He is, the defendant argues, simply a salesman, albeit a very good one, who happens to be selling banking products and who could just as easily be selling, with similar success, encyclopedias or shoes. It was, he argues, his success as a salesman, not any knowledge of or ability with respect to banking resulting from his master's degree, that has resulted in his enhanced earnings.

While it is no doubt relevant that the degree earned by the defendant was not a prerequisite either to his employment in the banking industry or to his career advancement, it cannot be denied that the education he received through that degree program was of benefit in the successful performance of his responsibilities. In light of his limited education in business and finance prior to engaging in that course of study, moreover, the education he received through that degree program was, no doubt, of benefit in the successful performance of his responsibilities and, as a result, the substantial remuneration that he has consistently received.

Although the defendant's position is well argued, it simply cannot be ignored that the defendant undertook his course of study while in a non-financial field, that he became employed in the financial industry during that course of study and that the conclusion of his graduate education was paid for by Citibank while he was an employee there. As noted by the Appellate Division, First Department, in *Murtha v Murtha* (264 AD2d 552 [1st Dept 1999], the defendant "would certainly not have expended the considerable time, * * * and effort involved in obtaining [his master's degree] if it were not a highly desirable and valuable professional credential" *(Murtha v Murtha,* 264 AD2d 552 [1st Dept 1999]). The defendant did not obtain a master's degree merely for the sake of engaging in an intellectual exercise; he obviously anticipated that it would have a direct correlation to his career advancement in the financial industry. Citibank, moreover, would not likely have paid for the defendant's graduate education if it did not perceive some benefit to his job performance as a result. Thus, whether a master's degree is, in all cases of banking employment, an earning-enhancing qualification, it has more likely than not, been an earning enhancing qualification for the defendant. That is all that is required in order for the degree to be considered marital property.

Having found that the defendant's master's degree constitutes marital property, the issue becomes its value. The evidence in this regard consists of the report of the plaintiff's valuation expert, which was introduced into evidence without objection, and the testimony of the expert at trial. The expert determined the value of the enhanced earning capacity resulting from the defendant's master's degree to be $1,159,142.

The defendant disputes the validity of the valuation reached by the plaintiff's expert on two grounds. First, the defendant argues that the expert improperly established the defendant's baseline earnings on the basis of governmental tables, rather than on the basis of the defendant's actual income prior to earning the advanced degree. Second, the defendant argues that the expert improperly included in the defendant's topline earnings $17,590 in income from Nxxxxx, a company owned by the defendant that sold messenger services.

Before addressing the specific objections to the expert valuation raised by the defendant, the plaintiff argues that the court must accept the valuation submitted by the plaintiff because the defendant failed to produce an expert to rebut the valuation evidence offered by the plaintiff, despite having identified just such an expert prior to trial. The defendant's failure to call an identified expert who has been consulted with respect to a material issue in controversy entitles the plaintiff to an inference that the expert's testimony would not have been favorable to the defendant *(see Sanders v Otis Elevator Co,* 232 AD2d 327, 328 [1st Dept 1996], *lv denied* 89 NY2d 813 [1997]; *Rivera v MKB Industries,* 149 AD2d 676, 677 [2d Dept 1989]; *Laffin v Ryan,* 4 AD2d 21, 24-25 [3d Dept 1957]). The determination of the value of the

enhanced earning capacity in issue is nevertheless ultimately a determination of fact to be made by the court *(see Burns v Burns,* 84 NY2d 369 [1994]). Although the testimony of the plaintiff's expert is entitled, as the only expert testimony with respect to valuation in the case, to great weight *(see Morales v Moralez,* 230 AD2d 895, 896 [2d Dept 1996]), the plaintiff nevertheless bears the burden, as the nontitled spouse, of establishing a valid and sufficient basis upon which the court can predicate its determination of value and, ultimately, the equitable distribution of the marital asset *(see Iwahara v Iwahara,* 226 AD2d 346 [2d Dept 1996]). The failure of the defendant to present expert evidence does not, therefore, foreclose the court from considering the validity of the opinion offered by the plaintiff's expert.

The defendant's argument with respect to the appropriate baseline figure must be considered, therefore, but is without merit. While it is true that the "pragmatic and individualized analysis" that is necessary to the determination of enhanced earning capacity generally requires consideration of actual, rather than hypothetical earnings *(see Fanelli v Fanelli,* 191 Misc2d 123 [Sup Ct, Westchester County 2002]), where the relevant earning experience is limited to the use of hypothetical figures is appropriate *(see McSparron v McSparron,* 87 NY2d 275, 284-86 [1995]). Although this issue has generally been addressed in the context of hypothetical topline figures, the logic applies equally to baseline figures. Where, as here, the earnings history is limited, and there are many career avenues available to the party prior to attaining the advanced degree, his or her earnings history at the time is not necessarily representative of what those earnings would have been, without the enhanced earning capacity, for the balance of that career. Because the use of hypothetical values for baseline earnings compensates for this lack of real data, it is entirely appropriate, if not necessary *(see Morales v Morales, supra).*

The plaintiff's expert was incorrect, however, in including the defendant's Nxxxxx income in the topline figure. Although the validity of the enhanced earnings with respect to the defendant's banking career presented a close question, which was ultimately resolved, for the reasons stated above, in favor of the plaintiff's argument, there was no evidence whatsoever that the defendant's master's degree enhanced his Nxxxxx earnings. In the absence of such evidence, the plaintiff's expert improperly included the income from that source in his topline figure. Reducing that figure by the amount of those earnings, the appropriate gross topline figure $212,670 and the "net after tax enhancement" is calculated as follows:[1]

Calculation of Net After Tax Enhancement

	Current Income	*Base Income*
Gross Earnings	212,670	70,000
FICA	4,985	4,340
Medicare	3,084	1,015
Federal Tax	61,249	14,179
State Tax	14,036	3,886
Net After Tax	129,316	46,580
Net After Tax Enhancement		82,736

Completing the analysis, the determination of the present value of the enhanced earning capacity resulting from the defendant's master's degree is as follows:[2]

Calculation of Present Value of Net After Tax Enhancement

Year	*Year*	*Actual/Assumed Earnings After Tax*	*Base Earnings After Tax*	*Net Enhanced Earnings*	*Assumed Growth*	*Present Value Percent*	*Net Present Value*
1	2001	129,316	46,580	82,736	85,218	93.45794%	79,643
2	2002	129,316	46,580	82,736	87,775	87.34387%	76,666
3	2003	129,316	46,580	82,736	90,408	81.62979%	73,800
4	2004	129,316	46,580	82,736	93,120	76.28952%	71,041
5	2005	129,316	46,580	82,736	95,914	71.29862%	68,385
6	2006	129,316	46,580	82,736	98,791	66.63422%	65,829
7	2007	129,316	46,580	82,736	101,755	62.27497%	63,368
8	2008	129,316	46,580	82,736	104,807	58.20091%	60,999
9	2009	129,316	46,580	82,736	107,952	54.39337%	58,719
10	2010	129,316	46,580	82,736	111,190	50.83493%	56,523
11	2011	129,316	46,580	82,736	114,526	47.50928%	54,410
12	2012	129,316	46,580	82,736	117,962	44.40120%	52,376
13	2013	129,316	46,580	82,736	121,501	41.49644%	50,418
14	2014	129,316	46,580	82,736	125,146	38.78172%	48,534
15	2015	129,316	46,580	82,736	128,900	36.24460%	46,719
16	2016	129,316	46,580	82,736	132,767	36.24460%	48,121
16.6	2017	77,590	27,948	49,642	82,050	34.80271%	28,556
		2,146,646	773,228				1,004,107

The value of the defendant's master's degree is, therefore, $1,004,107.

C. The Defendant's Commissions

The defendant is compensated for his services at Sxxxxx National Bank through a base salary of $124,000 and commissions. The commissions are calculated quarterly on the basis of the average daily balances in the accounts and the average daily loan obligations of customers who were brought to the bank by the defendant and his sales team. The defendant's entitlement to commissions continues for a period of 24 months after the customer is brought to the bank, provided that the customer uses the bank's services during the quarter for which the commission is being calculated.

The commissions present two issues. First, the plaintiff argues that the commissions earned for two years after the date of commencement, through the second quarter of 2003, are marital property subject to distribution in equitable distribution. The defendant, for obvious reasons, disagrees. Second, the plaintiff claims that the defendant improperly disposed of the commissions he received in July 2001, for the second quarter of that year, virtually all of which preceded the June 14, 2001, commencement date.

(1) Post-Commencement Commissions

Income such as a bonus or commissions earned, as here, during the course of the marriage but prior to commencement of the matrimonial action is marital property, even if it is not paid or received until after the action has been commenced *(see Hartog v Hartog,* 85 NY2d 36, 49 [1990]). In accordance with this principle, the defendant recognizes that to the extent that these commissions were earned during periods prior to the commencement of the action, they are marital property. He argues, however, that because his continued receipt of these commissions depends on the continued use of the bank's services by the customer, and that is, at least in part, a result of his continuing efforts, these commissions cannot be deemed to have been earned prior to the period in which he is credited with them and they are paid.

The question here is when this income was earned. The documents introduced at trial, and submitted to the court thereafter without objection, establish that during the two years following the commencement of this action the defendant earned $321,826 in commissions, broken down by quarter as follows:

Commissions Received Post-Commencement		
Year	*Quarter*	*Amount*
2001	3	94,923
	4	46,872
2002	1	37,237
	2	26,462
	3	24,537
	4	27,435
2003	1	30,099
	2	34,261
Total		321,826

There is no dispute that, pursuant to the defendant's compensation agreement, it is a condition precedent to the defendant's receipt of these commissions that the customer continue to utilize the bank's services. No commission is earned with respect to a customer who has left the bank. By virtue of this fact alone, it is clear that there is always a component of current effort at retaining the customer inherent in the earning of these commissions, regardless of the fact that most, or even nearly all, of the effort may have occurred prior to commencement.

The plaintiff argues that there is a presumption of marital property that plays a part in this analysis. The presumption, however, is that income received during the marriage and prior to commencement is marital *(see* Domestic Relations Law §236[B][1][c]). There is no such presumption with respect to income received after the date of commencement. Domestic Relations Law § 236(B)(1)(c) excludes from marital property those assets acquired after the commencement of a divorce action. Thus, if anything, the presumption with respect to post-commencement income is otherwise.

While it is thus clear that there is both a marital and a separate component to these earnings, the line between the two is not at all clear. There is no evidence whatsoever from which the amount of commissions earned by pre-commencement efforts can be distinguished from those earned by post-commencement efforts. Nor can there be, since the customer's level of banking activity, while no doubt referable to some degree to the defendant's efforts, is a function of many other, perhaps more important, variables related to the bank's services and the customer's banking needs. The lack of a precise line of demarcation should not, however, prevent an appropriate distribution of what is clearly a marital asset in part *(cf.* Domestic Relations Law § 236[B][1][c], [d]), particularly where, as here, a rough demarcation can be accomplished, based upon the defendant's testimony that he spends approximately one-third of his time servicing existing clients. In the absence of any relevant evidence to the contrary, that testimony provides an appropriate basis for determining that the commissions received during the two years subsequent to the commencement of this action were earned two-thirds as a result of marital effort and one-third as a result of the defendant's separate effort. The commissions are accordingly, marital property to the extent of two-thirds of their value and separate property to the extent of one-third of their value.

The plaintiff argues that the value of the marital portion of the commission should be determined on the basis of the gross amounts earned by the defendant, rather than the net amounts he received after taxes were withheld, because there is no evidence in the record of the defendant's tax rate. Since the defendant

has already paid any taxes due with respect to this income received post-commencement, however, it would be highly unfair to him to distribute on the basis of the gross amount an asset with respect to which he only received the net, thereby imposing on him what is, in reality, the plaintiff's tax obligation.

Contrary to the plaintiff's argument, moreover, there is, in fact, evidence in the record of the applicable tax rate. The report of the plaintiff's expert, which the plaintiff urges the court to rely on without question, and to which the defendant did not object, sets forth tax calculations with respect to the defendant's income to which neither party objected. Specifically, as discussed above in connection with the valuation of the defendant's master's degree, the plaintiff's expert, based upon the parties' most recent tax return, applied a rate of 28.8 percent to the defendant's income for federal tax purposes and 6.6 percent to the defendant's income for state tax purposes. There is no reason not to consider this undisputed evidence of the applicable income tax rates in calculating the distribution of the commissions received by the defendant subsequent to commencement. Applying those tax rates, the net amount received by the defendant is $207,899, the marital portion of which, for the reasons set forth above, is $138,600.

(2) Pre-Commencement Commissions

There is no dispute that the defendant received commissions in the amount of $79,744 for the second quarter of 2001 and that those commissions are entirely marital property. The issue is what the defendant did with those commissions. According to his testimony, he deposited the entire amount received after taxes were withheld, either $46,742 or $49,819, into a separate account maintained by him. From that account, $10,000 was distributed to each party pursuant to the *pendente lite* order. The balance was used by the defendant for his ordinary living expenses during the four months immediately following the commencement of this action. The plaintiff contends that since the commissions received by the defendant in July 2001, are admittedly marital property, she is entitled to a distribution of one-half of the net amount received, or $24,500, less the $10,000 that she has already received, despite the absence of any evidence that the defendant has used those funds for any inappropriate purpose. The plaintiff is wrong *(see Harbour v Harbour,* 227 AD2d 882 [3d Dept 1996]). Regardless of the amount actually received by the defendant, therefore, the plaintiff is entitled to none of it.

D. The Plaintiff's Doctoral Degree

The plaintiff earned a doctoral degree in Hearing Science from the Graduate Center of the City University of New York during the marriage. The only evidence introduced with respect to the value of the plaintiff's degree is the report of the plaintiff's expert, setting forth his opinion that the value of the degree is $271,585. The defendant has not questioned this opinion.

E. A. C., Inc.

At the time of the marriage, the plaintiff was an audiologist, employed by the Lexington School for the Deaf. She began teaching at xxxx College in 1978, an appointment that continued after she earned her Ph.D. from the Graduate Center of the City University of New York in 1979. She later became a tenured Associate Professor. While in this position, she was employed on a part-time basis by a physician to conduct audiological evaluations. In 1998, she began A. C., Inc. ("ACI"), a firm that conducts audiology testing for children. ACI's gross income was $2,772 in 1998, $14,387 in 1999, $38,916 in 2000, $43,416 in 2001 and $18,394 in 2002. There is no dispute that ACI is a marital asset.

No evidence was presented at trial as to the value of ACI. The defendant argues, however, that despite the lack of testimony as to the value of ACI, the corporation can be valued on the basis of its assets as of the date of trial. While the defendant's argument is not unreasonable, it fails to take into consideration the fact that, as the plaintiff points out, the plaintiff's earnings from ACI were considered in determining the value of the plaintiff's degree. Since the value of that income stream will be distributed as part of the value of the degree, it would be impermissible double-counting to distribute the value of ACI separately *(see generally Grunfeld v Grunfeld,* 94 NY2d 696, 705 [2000]; *McSparron v McSparron,* 87 NY2d 275, 287 [1995]). Thus, ACI, while still a marital asset, is nonetheless without value, therefore, for equitable distribution purposes.

F. The Lincoln Financial Advisors Brokerage Account

The parties have an account with Lincoln Financial Advisors. They have stipulated that the value of the bonds and cash in the account was $262,865 as of the date of commencement and $296,087 as of the date of trial, and that the value of the Citibank stock in the account was $909,596 as of the date of commencement and $675,951 as of the date of trial. The parties have further stipulated that no funds were deposited to or withdrawn from this account since the commencement of the action.

There is no dispute that the Lincoln Financial Advisors account is marital property. The only issue is the valuation date and, consequently, who should bear the burden of the loss in value in the Citibank stock from the date of commencement to the date of trial. There is no significant dispute with regard to the facts related to the establishment and management of the account. In

this regard, the parties' financial advisor testified that he met with the parties in March or April 2000, at which time he recommended that they diversify their portfolio by selling $250,000 of Citibank stock. There is no dispute that they did so and that the Lincoln account was set up as a result. There is also no dispute that no trading has been done on the account since. Nor is there any claim that the defendant did anything affirmative to cause the decline in the value of this account.

The plaintiff's argument for the earlier valuation date is predicated on the fact that subsequent to the commencement of this action, the plaintiff requested that the defendant agree to a *pendente lite* division of the jointly held marital assets, including this account. The defendant does not dispute that he refused this request. The plaintiff then moved for an order directing such a distribution or, in the alternative, for the appointment of a neutral financial planner to manage the account, noting the potential risk of failing to diversify this marital asset. The defendant opposed the motion and the motion was denied. The value of the account declined substantially thereafter, primarily as a result of the decline in the value of Citibank stock, the major asset of the account. The plaintiff argues that because the defendant refused to agree to the division of the account that would, arguably, have avoided the losses he should bear the burden of the loss by valuing the asset as of the date of commencement.

As a general rule, a stock account or other asset that is actively managed should be valued as of the date of commencement *(see Grunfeld v Grunfeld,* 94 NY2d 696 [2000]; *Wegman v Wegman,* 123 AD2d 220 [2d Dept 1986]) and an asset that is passive should be valued as of the date of trial *(see Miller v Miller,* 304 AD2d 727*; Lamba v Lamba,* 266 AD2d 515 [2d Dept 2003], *leave dismissed* 100 NY2d 615 [2003]; *Gonzalez v Gonzalez,* 240 AD2d 630 [2d Dept 1997]; *Thomas v Thomas,* 221 AD2d 621 [2d Dept 1995]). The plaintiff's argument here is irrelevant to this analysis. If anything, the plaintiff's argument goes not to valuation date, but to whether the defendant's refusal to divide the account at the time of commencement, and thereby allow the plaintiff to make different, and, presumably, wiser, investment decisions constitutes the waste of a marital asset. That analysis, which would apply to an investment decision made prior to commencement, is not relevant to a post-commencement litigation decision, where other considerations necessarily apply. Even if such an analysis was relevant, however, it fails to justify the relief the plaintiff seeks, since there was no evidence that the refusal to diversify this asset was an investment decision so imprudent as to constitute waste. The Lincoln account is, therefore, properly valued as of the date of trial, in the amount of $972,038.

G. SEI Investment IRA

The parties own an individual retirement account with SEI Investments, which was created in June 2000. There is no dispute that this account is marital property. The issue is whether it should be valued as of the date of commencement, when its value was $653,502.43, as the plaintiff claims, or as of the date of trial, when its value was $482,630.86, as the defendant claims.

As stated above, it is well-established that, in the absence of unique circumstances not presented here, a stock account or other asset that is actively managed should be valued as of the date of commencement *(see Grunfeld v Grunfeld, supra; Wegman v Wegman, supra)* and an asset that is passive should be valued as of the date of trial *(see Miller v Miller, supra; Lamba v Lamba, supra; Gonzalez v Gonzalez, supra; Thomas v Thomas, supra).* Here, the decision to establish the SEI account was made by the defendant in consultation with the parties' financial advisor. SEI selects the investment managers who, in turn, select the stocks in which the account is invested. Neither the defendant nor the parties' financial advisor makes any investment decisions with respect to the account. For this reason, this is a classic passive account *(see Grunfeld v Grunfeld, supra; Wegman v Wegman, supra),* as to which *Greenwald v Greenwald* (164 AD2d 706 [1st Dept 1991]), upon which the plaintiff relies, is irrelevant. Accordingly, the account should be valued as of the date of trial, in the amount of $482,631.

H. Sxxxxx Bancorp Stock Options

The defendant was awarded various options to purchase Sxxxxx Bancorp stock prior to the commencement of this action. As a result of a post-commencement stock dividend, the options were adjusted so that the defendant presently holds options to purchase 6,050 shares at $13.08 and 1,100 shares at $20.01. There is no dispute that these stock options, as adjusted, are marital property and the parties have already agreed to the manner in which they will be distributed.

I. Charles Schwab Account

At the time of the commencement of this action, the parties jointly held an account with the Charles Schwab brokerage firm. The account was equally divided between the parties in May 2002, with each party receiving $114,193 from the account.

J. John Hancock Life Insurance Policies

The defendant is the owner of three life insurance policies, each of which has a cash value: (a) policy no. xxxx13 - $899 as of July 9, 2001, $604 as of the date of trial; (b) policy no. xxxxx57 - $7,777 as of July 9, 2001, $5,566 as of the date of trial; and (c) policy no.

xxxxxxx42 - $3,325 as of July 6, 2001, $2,917 as of the date of trial. Although the cash value of a life insurance policy is a passive asset, and thus properly valued as of the date of trial *(see Grunfeld v Grunfeld, supra; Wegman v Wegman, supra),* the decrease in value here, in the amount of $2,894, was not the result of market forces, but of the continuation, until prohibited by the *pendente lite* order, of the defendant's pre-commencement practice of borrowing against the cash surrender value to pay premiums. While there is no dispute that the plaintiff was aware of, and did not object to, this practice prior to commencement, there is also no question that, after commencement, the continuation of this practice resulted in the conversion by the defendant of a marital asset into a separate asset. Since the defendant will retain these policies in the equitable distribution, the appropriate way to account for this is, as the plaintiff suggests, to value the policies as of the date of commencement. Here, that value is $12,001.

K. John Hancock Stock

The parties owned 535 shares of stock in John Hancock Life Insurance Company that had accrued during the marriage. The shares were sold in May 2002, during the pendency of this action, and each party received one-half of the proceeds at that time. The shares having thus been distributed by agreement of the parties, there is no need to address their value here.

L. The Defendant's Citibank IRA

The parties have stipulated that the defendant has an IRA account at Citibank (account no. xxxxx01) that was previously held jointly with his mother, who is now deceased. The parties have further stipulated that the account is the separate property of the defendant, having been inherited upon the death of his mother *(see* Domestic Relations Law § 236[B][1][d][1]).

M. The Citibank Tax-Free Investment Account

The parties jointly own a Citibank tax-free reserve investment account (no. xxx-xxx94-12), the balance in which was $15,912.91 at the time of trial. Because the account is jointly owned, it is presumed to be a marital asset *(see* Banking Law § 675[a], [b]; *Sherman v Sherman,* 304 AD2d 744 [2d Dept 2003]). The defendant testified, however, that the funds in the account had originated in the retirement funds of his aunt and that, prior to being passed on to him as part of his mother's estate, were held by his mother for the benefit of his aunt's mentally ill son. The plaintiff has not controverted the defendant's testimony in that regard, which is supported by the fact that these funds were not identified in the financial statement given to the parties' financial advisor in 2000, prior to the commencement of this action. In addition, subsequent to the commencement of this action, the plaintiff acknowledged in an e-mail that these funds were being held for the benefit of the defendant's cousin. Based upon these facts, the defendant has overcome the presumption of marital property and the funds in this account must be determined to be the separate property of the defendant, subject to any claim that his cousin may have thereto.

N. The Defendant's Security Deposit

In June 2001, the defendant paid a security deposit with respect to his present residence in the amount of $2,335. The payment was made from marital funds and is, therefore, marital property *(see Iaquinto v Iaquinto,* 248 AD2d 676, 679 [2d Dept 1998]).

III. Custodial Account

Prior to the commencement of this action, the parties had established a bank account, held as joint tenants by the defendant and the parties' daughter. The plaintiff claims that in June, July and December of 2001, the defendant withdrew $41,795.91 from that account. The plaintiff complains that, contrary to the defendant's representation that there would be $50,000 in that account for the daughter's benefit when she graduates from college, there will actually be only $12,000 to $14,000. The plaintiff also claims that the defendant improperly utilized these accounts to pay the daughter's expenses after he had been ordered by this court not to do so, which she argues to have been improper in light of the defendant's ability to pay the daughter's expenses from his post-commencement income. The defendant does not dispute that the alleged withdrawals were made. He argues, however, that the plaintiff has no standing to compel the return of these funds and that, even if the plaintiff were permitted to raise the issue, the withdrawal was a permissible use of a marital asset, entirely consistent with the parties' pre-commencement practice.

The account in question, a Citicorp investment account (no. xxxxx629), held as joint tenants by the defendant and the parties' daughter, had a balance of $84,584.24 on June 1, 2001. The account statement, which was introduced into evidence without objection, reflects that on June 18, 2001, four days after the commencement of this action, $29,404.56 in securities held in the account were sold and $11,524.00 was transferred to the checking portion of the account. The defendant's bank register, also admitted into evidence without objection, reflects a deposit on the same day in the amount of $11,762.00, denominated by the defendant "Excess from Jo." The defendant admitted that these funds were from the joint account with the parties' daughter. The account statement for July reflects that on July 23, 2001, the defendant withdrew additional funds. The account was further depleted in December 2001, when the defendant made "transfers to cash" in the amounts of $491.95, $7,815.50 and $453.80.

Before addressing the merits, the defendant argues that the plaintiff is without standing to raise any claim with respect to the account in question because she has no interest in it. There is no question that a litigant may not assert a claim with respect to which he or she has no cognizable interest *(see New York Pub Interest Research Group v Carey,* 42 NY2d 527 [1977]). For this reason, a matrimonial litigant cannot assert a claim on behalf of an alleged creditor not party to the action *(see Kirk v Kirk,* 177 AD2d 619 [2d Dept 1991]). The principle is no less valid here, where it is the parties' now-adult daughter, rather than the plaintiff, who owns the account in question.

Since the plaintiff thus cannot raise any claim on behalf of the parties' daughter for reimbursement of the sums removed from the account by the defendant, her claim is limited to, at most, asserting a marital interest in one-half of the value of the account at the time this action was commenced, based upon the presumption that one-half of the funds in the account were the property of the defendant *(see* Banking Law §675). The defendant argues that even this claim must fail, however, on the ground that the presumption upon which it is based has been overcome by evidence that the defendant's interest in the account was merely for the purpose of convenience *(see Fragetti v Fragetti,* 262 AD2d 527 [2d Dept 1999]; *Viggiano v Viggiano,* 136 AD2d 630 [2d Dept 1988]).

The evidence, while failing to establish the initial source of the funds in the account, establishes, if anything, that funds other than those of the parties' daughter routinely flowed in and out of the account. Contrary to establishing that the defendant's status as an account owner was for purposes of convenience, the evidence establishes, if anything, that it was the parties' daughter who was made an owner of the account for convenience purposes. The evidence thus fails to rebut the presumption upon which the plaintiff relies, which is thus sufficient to establish her standing to seek her equitable share of the half of the value of the account to which the defendant is presumably entitled. In light of the parties' stipulation to an equal division of the marital estate, the plaintiff's claim in this regard is thus limited to one-quarter of the $84,574.24 balance in the account at the time of commencement. In her reply brief, however, the plaintiff expressly declines to seek such relief.

In light of the limited nature of the arguments the plaintiff is entitled to make here, her assertion that the defendant is somehow bound by his prediction made in opposition to the *pendente lite* application that there would be $50,000 in the account is clearly beyond the ability of the plaintiff to enforce. Even if the argument were the plaintiff's to make, however, it is flawed almost to the point of being frivolous. The statement upon which this claim is predicated was made in the defendant's affidavit in opposition to the plaintiff's application for *pendente lite* relief, sworn to on March 8, 2002. In the affidavit, the defendant stated, "There will be approximately Fifty Thousand ($50,000) Dollars in [our daughter's] accounts when she graduates which she can use for higher education or for household set up costs to enable her to begin a career." The balance in the account as of February 28, 2002, was $45,700.86. In order to be fraudulent, however, a representation must be as to a presently existing fact (*see Small v Lorillard Tobacco Co*, 94 NY2d 43, 57 [1999]). The representation at issue here fails to satisfy this requirement.

The defendant can be held responsible for the depletion of this marital asset during the pendency of the action only if the funds were improperly used for non-marital purposes (*see Seeley v Seeley*, 135 AD2d 703 [2d Dept 1987]). The plaintiff alleges in this regard, however, only that the defendant used the account to reimburse himself for expenditures he made for the education and maintenance of the parties' daughter, which the plaintiff argues the defendant had the resources to pay himself. The plaintiff has presented no evidence that the defendant did anything to the contrary. The plaintiff argues in this regard that prior to the commencement of the action, the defendant had used marital resources other than the account in question to support their daughter. The defendant persuasively controverts this claim. Even if it were true, however, the fact that the defendant may have used marital funds separate from the daughter's account to support her prior to commencement does not make the expenditure of those funds after commencement an improper non-marital purpose.

Contrary to the plaintiff's argument, the fact that the defendant earned a substantial income during the period in question does not alter this analysis. Although a party's resources must be considered in determining whether to impose on the party the obligation to pay for a child's education (*see Wen v Wen*, 304 AD2d 897 [3d Dept 2003]; *Cassano v Cassano*, 203 AD2d 563 [2d Dept 1994], *aff'd*, 85 NY2d 649 [1995]), the extent of those resources is not a basis upon which to limit a party's use of marital assets for such purposes. In the absence of a court order to the contrary, a party is free, subject to a claim of waste, to use marital resources as he or she sees fit. Since the plaintiff's only legitimate claim here is waste, and that argument has been rejected, this argument has no basis as well.

The plaintiff's conclusory claim that the defendant's use of the funds from the account in question violated a court order is also without merit. Although the plaintiff claims in her post-trial brief that the defendant acted "contrary to the court's direction" in paying the daughter's non-tuition living expenses from the joint account,

she fails to identify the specific order that was allegedly violated or even the month in which it was made. She also fails to itemize the expenditures she claims to be in violation of the purported order. In the absence of such particulars, there is no basis upon which the claim can be credited. Thus, since the funds were still used for a legitimate marital purpose, the education and support of the parties' daughter, and the plaintiff has failed to establish that the expenditure was in violation of a court order, there is no basis upon which to impose the burden of the depletion of the funds on the defendant and the plaintiff's argument in this regard must be rejected.

IV. *Pendente Lite* Payments

The plaintiff claims a credit for the reduction in mortgage principal accomplished as a result of his payments during the pendency of the action. The defendant left the marital residence on June 15, 2001, the day after this action was commenced. Until the issuance of the *pendente lite* order, in March, 2002, the defendant deposited his base salary income into a joint account, from which the marital expenses were paid. He also used that account to pay for his personal expenses, including the costs of establishing a new residence, until July, 2001, when he received his quarterly commission check. He deposited that check into a separate account and used those funds, as well as his subsequent commission checks, to pay his personal expenses until the *pendente lite* order was issued. At that time he ceased depositing his earnings into the joint account, and paid support in accordance with the *pendente lite* order.

Based on these facts, the defendant claims a credit for his share of the $2,606 reduction in the mortgage balance with respect to the marital residence from the date of commencement to the date of the *pendente lite* order and the $3,094 reduction in the mortgage balance since the *pendente lite* order. With respect to the pre-*pendente lite* order reduction, the defendant argues that since he deposited 81 percent of the funds into the joint marital account that was used to pay the mortgage and each party is receiving 50 percent of the benefit of that reduction, he should receive a credit of 31 percent, or $808. Similarly, with respect to the post-*pendente lite* order reduction, the defendant argues that since he was required to pay 85 percent of that amount, and each party is receiving 50 percent of the benefit of that reduction, he should receive a credit of 35 percent, or $1,083.

The plaintiff is not entitled to a credit for the amounts he contributed to reduce the mortgage on the marital residence prior to the *pendente lite* order. He is, however, entitled to a credit equal to 50 percent of the reduction in the principal balance of the mortgage thereafter *(see Litman v Litman,* 280 AD2d 520, 522 [2d Dept 2001]; *Graham v Graham,* 277 AD2d 423, 424 [2d Dept 2000]; *MacDonald v MacDonald,* 226 AD2d 596, 597 [2d Dept 1996]). That amount is $1,547.

V. Distribution of the Marital Estate

The statute commands that marital property "be distributed equitably between the parties, considering the circumstances of the case and of the respective parties *(see* Domestic Relations Law § 236[B][5][c]). The parties agreed at the preliminary conference that, with one exception, the equal distribution of the marital estate is equitable here. They have since, pursuant to agreement and court order, divided $332,439.96 in cash and stock accounts. At trial, they stipulated to the distribution of their Florida condominium, the defendant's automobile, the insurance proceeds received with respect to the plaintiff's automobile, the marital portion of their retirement plans and the defendant's stock options. Thus, and for the reasons set forth above, the marital estate to be distributed here consists of the marital residence, valued by stipulation at $535,000, which the parties have, subsequent to trial, agreed be sold and the proceeds be divided between them; the defendant's master's degree, the value of which is $1,004,107; certain commissions received by the defendant subsequent to the commencement of this action, in the amount of $138,600; the plaintiff's doctoral degree, valued at $271,585, which includes the value of the plaintiff's interest in A. C., Inc.; a brokerage account with Lincoln Financial Advisors, the value of which is $972,038; the $12,001 cash surrender value of certain life insurance policies issued by John Hancock Life Insurance Company; and the $2,335 security deposit posted by the defendant with his current landlord.

The exception to the equal distribution agreement is the plaintiff's claim that the defendant should be charged with the $233,645 loss in the value of the Lincoln Financial Advisors from the date of commencement to the date of trial because he refused to agree to a division of the account at commencement and thereby prevented her from making her own, presumably, wiser, investment decisions with respect to this fund. There was absolutely no evidence presented, however, demonstrating that any decrease in value of the account was attributable to any action by the defendant. In the absence of such evidence, the plaintiff's argument is without merit.

In effectuating the equal distribution of the marital estate to which the parties have stipulated, the parties will each necessarily retain their degrees and their retirement accounts will be divided into equal shares by qualified domestic relations orders. The net proceeds of the sale of the marital residence, after paying the normal closing costs, will be divided equally between the parties except that the defendant must receive the addi-

tional credit, in the amount of $1,547, to which he is entitled as a result of the reduction in mortgage principal. The defendant will retain the commissions that he received after commencement, his life insurance and his security deposit. The division of the marital estate will be equalized by dividing the value of the Lincoln account as of the date of trial unequally, as set forth in the table that follows. Any increase in the value of that account since the date of trial will be divided equally between the parties and, similarly, any decrease since that time will be borne by them equally.

Distribution of Marital Estate			
Asset	*Value*	*To Plaintiff*	*To Defendant*
Defendant's M.B.A.	1,004,107	0	1,004,107
Defendant's Commissions	138,600	0	138,600
Plaintiff's Ph.D.	271,585	271,585	0
A. C., Inc.	0	0	0
Lincoln Financial Account	972,038	928,748	43,290
John Hancock Policies	12,001	0	12,001
Defendant's Security Deposit	2,335	0	2,335
Total	2,400,666	1,200,333	1,200,333

VI. Maintenance

In addition to the distribution of property and child support, the court is authorized to award spousal maintenance "in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties (Domestic Relations Law § 236[B][6][a]). The plaintiff seeks $4,000 per month. She has been receiving $2,000 per month pursuant to the *pendente lite* order.

A. Statutory Factors

In making a determination with respect to maintenance, the court is required by the statute to consider ten specific factors plus "any other factor which the court shall expressly find to be just and proper" *(see* Domestic Relations Law § 236[B][6][a]).

> ***(1) The income and property of the respective parties including marital property distributed pursuant to subdivision five of this part.***

The plaintiff is an Associate Professor and Chair of the Department of Speech Communications Study at xxxxx College. She is also the sole shareholder and employee of A. C., Inc. The plaintiff's income in 2002 from both sources was $71,000. The defendant is employed by xxxxx Bank as a Senior Vice-President. He earned $261,000 from that employment in 2002. Although from 1997 to 2000, the defendant supplemented his income by selling messenger and mail room services, he is no longer involved in that work and the income derived therefrom is, therefore, irrelevant to his obligation to pay spousal support. The plaintiff's argument that the defendant's income is greater than reported is speculative at best and, therefore, is not considered in this analysis *(see Hartog v Hartog,* 85 NY2d 36, 52 [1995]).

The defendant argues that to the extent the value of this stream of income has been distributed as marital property, it is not available for equitable distribution purposes. The defendant is correct *(see Grunfeld v Grunfeld, supra; McSparron v McSparron, supra).* At the plaintiff's urging, the defendant's income from his current employment has been found to be derived, in large part from the enhanced earning capacity resulting from the master's degree earned by the defendant during the marriage. "Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout" *(Grunfeld v Grunfeld,* 94 NY2d at 705, *supra; see McSparron v McSparron, supra).* The application of this principle here requires that the defendant's earnings from the $70,000 baseline figure used in the enhanced earnings analysis to the $212,670 topline figure be excluded from the maintenance calculation. Accordingly, the defendant's income for maintenance purposes is the difference, $118,000.

The logic of the defendant's argument applies equally to the plaintiff's enhanced earning capacity. Thus, the plaintiff's income must similarly be reduced, to avoid double-dipping, by excluding from the maintenance calculation the income stream that has been distributed as the enhanced earning capacity resulting from her doctoral degree. In the plaintiff's case, that income stream is the difference between the baseline figure used in the enhanced earning capacity analysis, $37,956, and the topline figure, $60,262. The income below the baseline figure and above the topline figure, up to the plaintiff's $71,000 income, a total of approximately $33,000, is thus the plaintiff's income for the purpose of determining maintenance.

The reality, of course, is that the parties have far more income and assets than this analysis suggests. Specifically, as a result of the equitable distribution of the marital estate, the parties have equally divided approximately $3,600,000 in marital property. In addi-

tion, the parties have the separate property identified above.

(2) The duration of the marriage and the age and health of both parties.

The plaintiff is 51 years old; the defendant is 50 years old. The parties were married for 23 years and 10 months at the time the action was commenced. Both parties are in good health.

(3) The present and future earning capacity of both parties.

The earning capacity of both parties is consistent with their present earnings.

(4) The ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor.

Although the plaintiff does not have, and will not likely have, an income sufficient to sustain the marital lifestyle, she is nonetheless self-supporting.

(5) Reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage.

There is no evidence that the plaintiff's lifetime earning capacity was reduced or lost as a result of having foregone or delayed education, training, employment or career opportunities during the marriage.

(6) The presence of children of the marriage in the respective homes of the parties.

The parties have two children, a daughter, born in 1981, and a son, born in 1986. The parties' daughter resides on her own; the parties' son resides with the plaintiff in the marital residence. The parties have agreed, however, that the marital residence will be sold and the proceeds divided equally between them.

(7) The tax consequences to each party.

No evidence of tax consequences to either party has been introduced.

(8) Contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker to the career or career potential of the other party.

There is no evidence of direct contributions by either party to the career of the other.

(9) The wasteful dissipation of marital property by either spouse.

There is no credible claim of wasteful dissipation of marital assets by either party.

(10) Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.

There is no credible claim of any transfer or encumbrance made in contemplation of the matrimonial action without fair compensation by either party.

(11) Any other factor which the court shall expressly find to be just and proper.

The plaintiff has incurred substantial debt in order to pay the cost of this litigation.

B. Discussion

The plaintiff seeks lifetime maintenance in the amount of $4,000 per month. The plaintiff's income for maintenance purposes, $33,000 per year, is obviously insufficient to meet the reasonable portion of this need. While the defendant's income for maintenance purposes, $118,000, is substantially greater, it is not sufficient to bridge the gap in the plaintiff's financial plan. Of course, even without regard to maintenance, the plaintiff will have received in excess of $1,800,000 in equitable distribution.

In these circumstances, the defendant should be required to make some contribution to the plaintiff's living costs, albeit not in as great an amount, or for as long, as the plaintiff would like. Balancing the needs of the plaintiff against the resources of the defendant *(see Hartog v Hartog, supra; Hirschman v Hirschman,* 156 AD2d 644, 645 [2d Dept 1989]), the defendant should be required to pay maintenance in the amount of $2,000 per month for three years. This will enable the plaintiff to re-organize her finances after the divorce without unduly burdening the defendant.

C. Retroactivity

The plaintiff claims that the maintenance award should be retroactive to the date on which she first requested spousal support, June 14, 2001. Although normally she would be entitled to such relief *(see* Domestic Relations Law § 236[B][6][a]), subject to a credit in favor of the defendant for the amounts he has paid pursuant to the *pendente lite* order *(see Ferraro v Ferraro,* 257 AD2d 598 [2d Dept 1999]; *Verdrager v Verdrager,* 230 AD2d 786 [2d Dept 1996]), that is not the case here. The defendant deposited all of his earnings into the joint account to pay household bills until the *pendente lite* order was issued, and there is no evidence that he failed to com-

ply faithfully with his obligations under the order. In such circumstances, there is no basis for the retroactive application of the defendant's maintenance obligation.

D. The Plaintiff's Additional Claims

The plaintiff makes numerous additional claims regarding minor expenditures for which she seeks reimbursement and/or credits. These claims have been reviewed and found to be without merit.

VII. Child Support

Child support is determined in accordance with the Child Support Standards Act (Domestic Relations Law §240 [1-b]) ("CSSA"). CSSA requires the court to establish the parties' basic child support obligation as a percentage of the combined parental income up to $80,000 and then allocate that amount between the parents according to their respective shares of the combined parental income (Domestic Relations Law § 240 [1-b] [c]).

The plaintiff is an Associate Professor and Chair of the Department of Speech Communications Study at xxxx College. Her salary is $61,056. Reducing that sum by FICA, which is calculated as 6.2 percent of the first $87,000 of earned income (26 USC §§ 3101[a], 3121[a]), or $3,785, and Medicare tax, which is calculated as 1.45 percent of earned income (26 USC §3101[b][6]), or $885, the plaintiff's employment earnings, for child support purposes, are $56,386.

In addition, the plaintiff is also the sole shareholder and employee of A. C., Inc., from which she earned $9,838 in 2002. Reducing this figure by the required self-employment tax contribution of 12.4 percent on that income up to the FICA cap, or $1,220, and Medicare tax on that sum, or $143, her income from self-employment for child support purposes is $8,475. As discussed above, the plaintiff will also receive maintenance in the amount of $24,000 per year, which is considered to be income to her for the purpose of determining her child support obligation *(see Rohrs v Rohrs*, 297 AD2d 317, 318 [2d Dept 2002]; Domestic Relations Law §240[1-b] [b] [5] [vii]). The plaintiff's income for child support purposes is thus $88,861, an amount that will be reduced to $64,861 upon the termination of maintenance.

As noted above, the defendant is employed by xxxxx Bank as a Senior Vice-President. He earned $260,577 in 2002. Although from 1997 to 2000, the defendant supplemented his income by selling messenger and mail room services, he is no longer involved in that work and the income he derived from it is, therefore, irrelevant in determining his child support obligation. Reducing the defendant's earnings by FICA, which is calculated as 6.2 percent of the first $87,000 of earned income (26 USC §§ 3101[a], 3121[a]), or $5,394, and Medicare tax, which is calculated as 1.45 percent of earned income (26 USC §3101[b][6]), or $3,778, the plaintiff's employment earnings, for child support purposes, are $251,405. That sum must be further reduced by the maintenance he is required to pay, in the amount of $24,000 per year *(see Rohrs v Rohrs*, 297 AD2d 317, 318 [2d Dept 2002]; Domestic Relations Law §240[1-b][b][5][vii]), to arrive at his income for child support purposes of $227,405.[3] The parties' combined income for child support purposes is, therefore, $316,266, of which 28 percent is attributable to the plaintiff and 72 percent is attributable to the defendant.

Even though the parties' combined income is $316,266, pursuant to CSSA, multiplying only the first $80,000 of their combined income to which the basic child support obligation applies by the 17 percent factor applicable to the support of one child[4], would yield a combined basic child support obligation of $13,600. The plaintiff's 28 percent share of this obligation is $3,808, or $317 per month; the defendant's 72 percent share is $10,200, or $850 per month.

Where the combined parental income exceeds $80,000, the statute requires the court to determine whether additional child support is appropriate by reason of the parental income in excess of the basic child support limit and, if so, to determine the amount of that additional child support "through consideration of the factors set forth in paragraph (f) * * * and/or the child support percentage" (Domestic Relations Law § 240[1-b][c][3]). Those factors are: (1) the financial resources of each parent and the child; (2) the physical and emotional health of the child; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the tax consequences to the parties; (5) the non-monetary contributions made by each parent toward the child's well-being; (6) the educational needs of each parent; (7) whether the gross income of one parent is less than that of the other parent; (8) the needs of any other child not subject to the order, for whom the non-custodial parent is responsible; (9) expenses incurred by the non-custodial parent in exercising visitation; (10) any other factor the court shall order the non-custodial parent to pay *(see* Domestic Relations Law § 240[1-b][f]). After carefully considering the circumstances of the parties, the court may apply the paragraph (f) factors, or apply the statutory percentages, or apply both in determining that additional child support is appropriate because the basic child support obligation is unjust or inappropriate *(see Matter of Cassano v Cassano*, 85 NY2d 649, 654-55 [1995]).

When a court awards additional child support, in excess of the basic child support calculation, however, it is required to set forth its reasons for doing so *(see Matter of Cassano v Cassano, supra; Wagner v Dunetz,* 295

AD2d 501 [2d Dept 2002]). There are several reasons why application of the statutory percentage beyond the basic child support limit is appropriate here.

First, the statutory limit on basic child support does not reflect current economic reality. The current basic child support cap was adopted by the Legislature in 1989. Since that time, the consumer price index, which represents the average monthly change in the prices paid by urban consumers for a representative basket of goods and services, has increased significantly. In 1989, the consumer price index for the New York metropolitan area, including Westchester County, was $130.60; it is now $196.90,[5] an increase of 51 percent. At the same time, family income has increased by 31 percent. The median household income in Westchester County, $48,405 in 1990,[6] was $63,582 in 2000.[7] More compelling evidence of this increase is presented by the United States Housing and Urban Development Area Median Income (AMI) for Westchester County, which is calculated by considering specific factors with adjustments for family size and is used to determine the eligibility of applicants for both federally funded and locally funded programs. The HUD AMI figure for a four-person household in Westchester County was $90,100 as of March 2003,[8] but was only $36,900 for the same sized household in 1990[9]—a 144 percent increase over the ten-year period since the enactment of CSSA. In addition, the cost of housing, a factor of particular importance in the support calculation, has increased dramatically since 1989. The median price of a single-family residence in Westchester County in 1989, when the CSSA was enacted, was $296,500[10]. The median price has since risen to $570,000,[11] an increase of more than 92 percent.

Second, the statutory limit on basic child support has not ever, and does not now, reflect the economic reality of living in Westchester County. To begin with, primarily as a result of the high cost of housing in Westchester, it simply takes more money to raise a family in Westchester County than it might in some other areas of this state. As noted above, the median price of a single-family residence in Westchester County is $570,000,[12] three times the $196,000 statewide median price.[13] This increased housing cost is supported by (and perhaps caused by) the fact that Westchester incomes are well in excess of statewide averages. Specifically, the median household income in Westchester County in 2000, $63,582, was 46 percent higher than the statewide median household income for the same year of $43,393.[14]

All of these factors reflect the high cost of living in Westchester County and, consequently, affect the amount of support necessary to sustain the standard of living that should be enjoyed by the child of parents whose financial circumstances so permit. Application of the statutory percentage to the combined parental income above $80,000 is an appropriate way to account for this economic reality *(see* Domestic Relations Law § 240 [1-b][c][3],[f][10]; *see also R.R. v P.R.*, NYLJ, May 25, 2000, at 28, col 5 [Sup Ct, NY Co]). Although there is no mathematically precise way in which to adjust the CSSA calculation in response to these factors, an appropriate adjustment can be approximated. Looking solely at the temporal differential, *i.e.,* the 51 percent increase in prices since 1989, the increase in household income of anywhere from 31 percent to 144 percent and the 92 percent increase in housing costs, it would be appropriate to apply the child support standards to an income 80 percent greater than the $80,000 cap on basic child support established in 1989, or $144,000. The geographical differential, *i.e.,* the fact that Westchester housing costs are three times the statewide average and that Westchester incomes are 46 percent higher than the statewide average, requires an additional increase of 50 percent, to $216,000.

Applying the CSSA calculation up to that amount here is, moreover, consistent with the standard of living enjoyed by the parties here. The parties' net worth statements reflect ordinary spending that can be sustained only on an income well in excess of $80,000. For example, the parties combined housing expense is approximately $60,000 per year. Based on that figure alone, it is clear that their lifestyle requires an income greater than the $80,000 used to calculate basic child support. Were the award here limited to the basic child support, the parties' combined obligation would constitute less than five percent of their income. The defendant's proportionate share of this amount, $10,200 per year, or $850 per month, is less than nine percent of his monthly budget. He spends more each month dining out. The plaintiff's $317 per month share of basic child support is approximately what she spends on clothing for herself each month. Considering the financial resources of each parent *(see* Domestic Relations Law §240[1-b][f][1]) and the standard of living the child would have enjoyed had the marriage not been dissolved *(see* Domestic Relations Law § 240[1-b][f][3]; *R.R. v P.R.*, NYLJ, May 25, 2000 at 28, col *5, supra),* limiting the parties' financial contributions to the costs of raising their child by the statutory basic child support amount is both unfair and inappropriate.

Courts, including the Appellate Division, Second Department, have, in fact, routinely applied the statutory formula to combined parental income as high as and greater than $300,000 *(see Scheinkman, New York Law of Domestic Relations,* §16.34, at 679 [1996]; see *Kosovsky v Zahl,* 272 AD2d 59 [1st Dept 2000] [statutory formula applied up to $300,000 of combined parental income where total family income was $550,000]); *Zaremba v Zaremba,* 237 AD2d 351 [2d Dept 1997] [statutory formula applied to joint parental income of $152,254,

based on the lifestyle established during the marriage, the assets acquired and the amounts expended on daily living that comported with a six figure income]; *Robert C v Pamela R,* NYLJ, Feb 25, 2002, at 19, col 6 [Sup Ct, NY County] [statutory formula applied to joint parental income of $300,000]; *Miyake v Miyake,* NYLJ, October 5, 1998 [Sup Ct, NY Co] [statutory formula applied to joint parental income of $200,000]). Here, the lifestyle established during the marriage, the assets acquired and the amounts expended on daily living are commensurate with a level of expenditure greater than that which would be possible if child support were limited to the basic child support required by the statute *(see R.R. v P.R.,* NYLJ, May 25, 2000, at 28, col 5, *supra).*

Thus, considering the circumstances of the parties *(see Matter of Cassano v Cassano,* 85 NY2d 649, *supra; Zema v Zema,* 294 AD2d 431 [2d Dept 2002]; *Anonymous v Anonymous,* 286 AD2d 585 [1st Dept 2001], *leave denied,* 97 NY2d 611 [2002]; *Kessinger v Kessinger,* 202 AD2d 752 [3d Dept 1994]), as well as the cost of living in Westchester County in 2003, application of the CSSA percentage up to $216,000 is appropriate here. Multiplying that amount by the 17 percent statutory factor for the support of one child yields a combined support obligation of $36,720 per year, or $3,060 per month, the plaintiff's 28 percent share of which is $857 per month, and the defendant's 72 percent share of which is $2,203 per month.

The defendant's child support obligation will thus be in the amount of $2,203 per month, commencing September 1, 2004. The defendant's child support obligation will be retroactive to the date on which the plaintiff made her initial demand for child support, June 14, 2001, less any amounts that the defendant has paid pursuant to the *pendente lite* order *(see Koeth v Koeth,* 309 AD2d 786 [2d Dept 2003]). Any arrears that are due will be paid at the rate of $1,500 per month, commencing September 1, 2004, until satisfied. The defendant will be required to pay the child's expenses from these funds, except that the plaintiff is, in addition to these child support payments, obligated to pay his proportionate share, 72 percent, of the statutory "add-ons" for the expenses of child care, education, extracurricular activities and non-reimbursed medical costs *(see* Domestic Relations Law §240 [1-b] [c] [4], [5] & [7]).

Upon the conclusion of the defendant's maintenance obligation, the plaintiff's income will be reduced by the cessation of those payments and the defendant's income will be increased accordingly. As a result, the plaintiff's share of the combined parental income will decrease to 21 percent and the defendant's share will increase to 79 percent and the defendant's child support obligation will, consequently, increase to $2,417 per month. The plaintiff's percentage of statutory "add-ons" will change in accordance with their respective shares of combined parental income.

The plaintiff's request that the defendant be required to reimburse her for the cost of an automobile she purchased for the parties' son is without merit. The defendant is under no legal obligation to fund, or even to participate in the funding of, such an expenditure.

The defendant should be obligated, however, to pay for the college education of the parties' son. In light of the educational backgrounds of the parties, with which much of this matter has been taken up, and the experience of the parties' daughter, there is little doubt that the parties' son will attend college. His age requires that this reality be dealt with presently. Since the parties' resources are sufficient for this purpose, the child's funds should not be used for this purpose until he reaches the age of 21, at which time the funds will be turned over to him, to be used for his expenses, including college. Until then, the parties should each pay the cost of that college education in proportion to their incomes. As discussed above, that proportion is 28 percent for the plaintiff and 72 percent for the defendant. In light of the parties' respective incomes, the child should be permitted to select, in consultation with both parents, any educational institution that meets his needs, without limitation on the expense. The defendant is entitled, however, to a credit against his child support obligation for any amounts he contributes toward the cost of his son's room and board while away at college *(see Comstock v Comstock,* 1 AD3d 307 [2d Dept 2003]; *Jablonski v Jablonski,* 275 AD2d 692 [2d Dept 2000]).

Since the defendant is bearing the larger share of the expenses of the parties' son, the judgment should provide that he is entitled to claim the child as a dependent on his income tax return *(see Iwahara v Iwahara,* 226 AD2d 346 [2d Dept 1996]; *Mahon v Mahon,* 129 AD2d 684 [2d Dept 1987]).

VIII. Life Insurance

The plaintiff requests that the life insurance policies issued to the defendant by John Hancock Life Insurance Company be maintained to secure the defendant's payment of his support obligation in the event of his death, an appropriate request despite the division of the cash surrender value of those policies in equitable distribution *(see Iaquinto v laquinto,* 248 AD2d 676, 678 [2d Dept 1998]). Since the maintenance of life insurance policies is a usual and ordinary means of preserving support for the dependent spouse and children in the event of the death of the monied spouse *(see* Domestic Relations Law § 236 [B][8][a]), the plaintiff's request in this regard is granted. The judgment will, accordingly, provide that the defendant will maintain, at his cost and expense, a policy or policies of life insurance providing death ben-

efits in an amount not less than the balance remaining of his obligation to provide maintenance and basic child support.

IX. Attorneys' Fees

The plaintiff seeks an award of attorneys' fees in the amount of $211,610.37. Section 237(a) of the Domestic Relations Law provides, in pertinent part, that in any proceeding brought for a divorce, the court may direct either spouse maintaining the action to pay an amount directly to the other spouse's attorney to enable that spouse to carry on or defend the proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. The purpose of such an award is to enable a financially disabled spouse to obtain funds necessary to prosecute or defend the action (*see Cole v Cole*, 182 AD2d 738 [2d Dept 1992]; *Cook v Cook*, 95 AD2d 768 [2d Dept 1983]).

The unusual circumstance of having one litigant pay the other side's counsel fees even during the course of the litigation, while unique to matrimonial litigation, reflects the recognition of the often unequal economic positions of men and women in a traditional marriage arrangement. Counsel fees are awarded to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the evidence (*see* Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C237:1, at 6, quoted in Charpie v Charpie, 271 AD2d 169 [1st Dept 2000]). As the Court of Appeals has stated:

> This enactment, which has deep statutory roots, is designed to redress the economic disparity between the monied spouse and the non-monied spouse. Recognizing that the financial strength of matrimonial litigants is often unequal—working most typically against the wife—the Legislature invested Trial Judges with the discretion to make the more affluent spouse pay for legal expenses of the needier one. The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.

(*O'Shea v O'Shea*, 93 NY2d 187, 190 [1999]).

The application of these policies here requires that the defendant's request be denied. Although the defendant is clearly the "less-monied" spouse here, at least in terms of income, "less-monied" is a relevant term. When the equitable distribution is completed, each party will have received approximately $1,800,000 in assets. This is more than a sufficient fund from which the plaintiff may pay her attorney. Moreover, the plaintiff has already received her equitable share of the defendant's income for the balance of his working life through equitable distribution. Having thus been distributed her share of that marital asset, she cannot rely on it to justify shifting her attorneys' fees burden to the defendant. As discussed with respect to the plaintiff's request for maintenance, the magnitude of the difference in the parties' incomes, after eliminating that income stream, is not substantial. There is, therefore, no basis upon which her request for attorneys' fees can be granted.

The foregoing constitutes the decision and order of the court. Submit findings of fact and conclusions of law and judgment on notice.

Endnotes

1. This calculation is also made in accordance with the methodology employed by the plaintiff's expert, which methodology was not challenged except as discussed. FICA and Medicare tax have been calculated in accordance with the statutory requirements (6.2 percent of the first $87,000 of earned income in the case of FICA [*see* 26 USC §§ 3101(a), 3121(a)], and 1.45 percent of earned income for Medicare tax [*see* 26 USC § 3101(b)(6)]. Since no evidence was presented as to the income tax rate applicable to the defendant's income, the same rates applied by the plaintiff's expert to the defendant's gross income with the NYDEX earnings was applied to the defendant's gross income without those earnings.
2. This calculation is also made in accordance with the methodology employed by the plaintiff's expert, which methodology was not challenged except as discussed. The expert's calculation assumes a three percent annual growth in the defendant's income and a seven percent present value rate. These factors have not been challenged and are, therefore, applied to the "net after tax enhancement" in the same manner as they were applied by the expert.
3. The value of the enhanced earning capacity distributed as a marital asset is irrelevant to this analysis *(see Holterman v Holterman*, _ NY3d _ (NYLJ, June 10, 2004).
4. The parties' daughter is 22 years of age; their son is 17.
5. United States Department of Labor, Bureau of Labor Statistics.
6. United States Census Bureau, 1990.
7. United States Census Bureau, 2000.
8. United States Department of Housing and Urban Development (HUD), Income Limits, Westchester County Area Median Income, Feb. 20, 2003.
9. United States Department of Housing and Urban Development (HUD), Income Limits, Westchester County Area Median Income, 1990.
10. Westchester County Board of Realtors, Compilation of Quarterly Residential Real Estate Sales in Westchester County, New York, 1989.
11. Westchester County Board of Realtors, 2003 Second Quarter Residential Real Estate Sales Report, Westchester & Putnam Counties, New York, July 29, 2003.
12. Westchester County Board of Realtors, 2003 Second Quarter Residential Real Estate Sales Report, Westchester & Putnam Counties, New York, July 29, 2003.
13. New York State Association of Realtors, New York State Housing Statistics, July 18, 2003.
14. United States Census Bureau, 2000.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Same-Sex Marriage Licenses in New York

Update on *Hernandez v. Robles*, 7 Misc.2d 459, 794 N.Y.S.2d 579 (N.Y. Co., 2/4/2005, J. Ling-Cohan)

As mentioned in my previous column, on February 4, 2005, New York County Supreme Court Justice Doris Ling-Cohan ruled that same-sex couples must be allowed to marry. On September 15, 2005, oral argument was heard by the First Department on the appeal of that case. No matter what the outcome, the case is expected to go to the Court of Appeals.

But see, *Seymour v. Holcomb*, 7 Misc.3d 530, 790 N.Y.S.2d 858 (Tompkins Co., 2/23/2005), where, in reaction to the mayor of Tompkins County giving out marriage licenses to same-sex couples, the lower court held that New York's DRL does not authorize marriage licenses to same-sex couples.

Same-Sex Couples Are Not Covered Under the Workers' Compensation Law 16 (1-a)

***Valentine v. American Airlines*, 17 A.D.3d 38; 791 N.Y.S.2d 217 (3d Dep't 2005)**

Domestic partners do not fall under the definition of surviving spouse under Workers' Compensation Law 16 (1-a), because the term only includes a person who was a spouse in a legally valid marriage. Under the workers' compensation death benefits provision, "the term surviving spouse shall be deemed to mean the legal spouse" of the deceased employee. It was pointed out that the Legislature, however, carved out an exception in Workers' Compensation Law 4, by permitting the receipt of death benefits by domestic partners of employees who died as a result of the September 11, 2001 terrorist attacks.

Same-Sex Partner Not Entitled to Wrongful Death Claim

***Langan v. St. Vincent's Hospital of NY*, 2005 N.Y. Slip Op 07495 (2d Dep't 10/11/2005), N.Y. App. Div. LEXIS 10922**

Application of NY EPTL 5-4.1 and 4-1.1 to preclude same-sex partner, who had been joined with decedent in civil union in Vermont, from receiving wrongful death benefits did not violate Equal Protection Clauses of the United States and New York Constitutions, since the partner failed to show that the law did not have a legitimate governmental purpose. The court indicated that it is up to the Legislature to amend the statute.

Massachusetts' Reverse Evasion Statute

A 1913 Massachusetts state law declares that out-of-state couples cannot get married in Massachusetts if their home states do not recognize such unions. The "Reverse Evasion Statute" was originally intended to prevent interracial marriage. Republican Gov. Mitt Romney has invoked the law (and brought it out of obscurity) to prevent out-of-state gay couples from marrying in Massachusetts. On October 6, 2005, eight same-sex couples, one of whom is from New York, argued before Massachusetts highest court to strike down the law. If successful, same-sex couples from across the country can wed in Massachusetts and then demand marriage rights at home. A decision is expected to be rendered within a few months.

Custody and Visitation

Restraint on Paramours

***Barnett v. Barnett*, 801 Misc.2d 291, 2005 N.Y. Slip Op 06865 (1st Dep't 9/22/2005), 2005 N.Y. App. Div. LEXIS 9286**

The *pendente lite* order of the court restraining both parties from permitting their paramours to be present during their parenting time with the child was affirmed, based upon the court's finding that it is in the child's "best interests" to have the benefit of his parents' full attention during his time with them, at least until his apparent anxiety (as reported by the forensic evaluator) about the divorce has abated.

Grandparent Visitation

***Principato v. Lombardi*, 19 A.D.3d 602, 798 N.Y.S.2d 71 (2d Dep't 2005)**

Pursuant to DRL § 72, the maternal grandparents were granted visitation with their grandchildren. The grandparents established that they enjoyed a long-standing loving relationship with their grandchildren, and that they had been a part of the children's daily lives before the dispute with the children's father that gave rise to this litigation. The lower court properly granted visitation since animosity between the children's father and the maternal grandparents is not a proper basis to deny visitation privileges to the grandparents.

Child Support and Maintenance

Arbitration of Child Support

***Frieden v. Frieden*, 2005 N.Y. Slip Op 07659 (2d Dep't 10/17/2005), 2005 N.Y. App. Div. LEXIS 11095**

The parties' settlement agreement required disputes over child support to be subject to arbitration. When the ex-husband requested arbitration regarding a modification of child support, the ex-wife refused, and requested the Supreme Court to determine the issue. The lower court held that child support matters were beyond the reach of arbitration. The appellate court reversed, and determined that arbitration of child support issues does not violate the objectives of the CSSA because the award is subject to vacatur if it fails to comply with the CSSA and is not in the best interest of the child.

Termination of Maintenance and Recalculation of Child Support

***Kaplan v. Kaplan*, 801 N.Y.S.2d 391, 2005 N.Y. Slip Op 06777 (2d Dep't 9/19/2005), 2005 N.Y. App. Div. LEXIS 9192**

The recent axiomatic trend in the appellate division's decisions is to omit the facts of the case, and merely cite black letter law. Kudos to the judges on this case for reporting the income levels of the parties and the amount of support awarded, so that the case may be used as precedent.

The husband's income was in excess of $400,000 as a partner in a radiology practice, and the wife was a stay-at-home mother to their special needs child, with no income. The court below properly capped the husband's income at $300,000 for purposes of the CSSA. However, in making its child support determination, the court below failed to deduct from the father's income the amount of maintenance ($90,000 per year) that he was ordered to pay to the mother, and failed to deduct FICA. In the interest of judicial economy, the appellate division recalculated the support, rather than remitting the matter to the court below. After deducting from the annual income of $300,000 the sums of $90,000 for maintenance and $9,768 for FICA, and applying the 17% statutory rate, the court concluded that the father's child support obligation should be $2,836 per month. Upon termination of the father's maintenance obligation, his child support obligation will be upwardly modified to $4,112 per month

The mother's award of maintenance in the sum of $7,500 per month for 5 years was affirmed based upon the mother's absence from the work force as a certified social worker for most of the period following the birth of the parties' special needs child, the mother's continued role as the primary caretaker of a special needs child, the father's significantly higher earning capacity as a successful partner in a radiology practice, and the short duration of the parties' marriage.

The award of $100,000 in counsel fees was affirmed.

The court below properly awarded custody to the mother, who was the child's full-time caretaker since his birth, however, the appellate court modified the judgment to add a directive that "the parties, in good faith, shall jointly consult with each other regarding decisions pertaining to the child's education and health, with the mother having final decision-making authority."

***Schiffer v. Schiffer*,__A.D.2d __, 800 N.Y.S.2d 752 (2d Dep't 2005)**

The trial court awarded the wife maintenance in the sum of $2,500 per month for eight years, child support in the sum of $8,031.75 per month, and counsel fees in the sum of $145,000. However, the court below failed to properly calculate the retroactive support, including credits for the husband's payments. Additionally, while the trial court properly deducted the amount of the maintenance award from the amount of the defendant's parental income used in calculating the child support obligation, the court failed to account for the increase in the defendant's parental income and the concomitant increase in the child support obligation upon the termination of the maintenance. Therefore, the appellate court remanded to the trial court for a further determination.

Deduction for Child's College Room and Board from Child Support

***Navin v. Navin*, 2005 N.Y. Slip Op 07355 (2d Dep't 10/3/2005), 2005 N.Y. App. Div. LEXIS 10585**

The court below erred by directing the non-custodial parent to pay the child's college education expenses without including a provision deducting from his child support obligation the amount that he contributes to the room and board expenses while the child is away from home.

Pursuant to DRL § 240 (1-b)(5)(vii))(c), when calculating child support, the court below also should have reduced the non-custodial husband's income by the amount of maintenance paid to the wife before determining his child support obligation, and should have directed an increase in the child support obligation upon the termination of the maintenance obligation.

Pending the new determination of the defendant's child support obligations, the appellate court directed the defendant to pay a reduced amount of child support, with a direction that any overpayment be credited against future payments after entry of the amended judgment.

Family Court Has Jurisdiction to Enforce a Child Support Stipulation Which Provides for Child Support Past the Age of 21

***Cancilla v. Cancilla*, 2005 N.Y. Slip Op 07371 (2d Dep't 2005), 2005 N.Y. App. Div. LEXIS 10624**

The Nassau Family Court erred in failing to enforce the parties' divorce stipulation of settlement which was incorporated into their judgment of divorce, and which provided that the father shall pay the parties' child's college expenses until age 23. The Family Court claimed that it did not have jurisdiction to enforce child support for college expenses past the child's 21st birthday. The appellate court reversed, and stated that pursuant to FCA 443, the Family Court has jurisdiction to enforce child support past the child's 21st birthday if the parents have voluntarily incurred such obligation in their stipulation which is incorporated into an order or judgment.

Modification of Support

***Lieberman v. Lieberman*, 801 N.Y.S.2d 382, 2005 N.Y. Slip Op 06781 (2d Dep't 9/19/2005), 2005 N.Y. App. Div. LEXIS 9216**

The court below properly refused to decrease the ex-husband's maintenance obligation despite his work-related injury, since the court determined that he still had an earning capacity of $100,000 and his reduction in income was voluntary.

Evidence

Electronic Discovery

In my previous column, I discussed the matrimonial e-discovery case, *Etzion v. Etzion,* 7 Misc.2d 940, 796 N.Y.S.2d 844 (Nassau Co., 2/17/2005) which permitted discovery of the husband's computer hard drives for purposes of information relating to fraudulent transfers and equitable distribution. In *Bill S v. Marilyn S*, 2005 N.Y. Slip Op 51093U; 8 Misc. 3d 1013A (Nassau Co., 4/7/2005, J. Balkin) the court quashed the husband's Subpoenas Duces Tecum for *inter alia*: cell phone and instant message chat logs records between the wife and her paramour since the information was not relevant to the equitable distribution issues, nor was he entitled to pre-trial discovery with respect to the issue of grounds for the divorce or marital fault.

Equitable Distribution

Enhanced Earnings

***Guskin v. Guskin*, 18 A.D.3d 814, 796 N.Y.S.2d 642 (2d Dep't 2005)**

The Supreme Court improperly based its valuation of the husband's license to practice podiatric medicine on the estimated earnings of a hypothetical license holder, rather than on his actual prior earnings, and therefore the case was remanded for further determination on the value of the license.

The lower court also erred by limiting the defendant's testimony as to his non-economic contributions to the household during the parties' long-term marriage when considering the equitable distribution of the plaintiff's pension and tax-deferred annuity. The appellate court also directed the lower court to reconsider the issue of counsel fees based on its reassessment of the equitable distribution issues.

***Liu v. Chen*, 2005 N.Y. Slip Op 07515 (2d Dep't 10/11/2005), 2005 N.Y. App. Div. LEXIS 10818**

The trial court improperly relied on the valuation of the husband's expert in determining the value of the wife's acupuncture license. The expert erroneously assumed that the practice was operated only by the wife rather than by both parties, and therefore did not properly calculate the wife's income.

The trial court improperly determined the marital portion of the wife's acupuncture license by using a 100% coverture factor, where a portion of the three-year training necessary to become licensed was performed prior to the marriage.

There was insufficient evidence to determine the wife's earnings, and the case was remitted for further determination. The appellate court also directed that the trial court, after determining the wife's income, reconsider the equitable distribution award, including the requirement that the wife give the defendant a mortgage on the marital residence to secure her four years of equitable distribution payments, as well as whether the husband is entitled to an award of maintenance.

Author's note: The security for the payment of equitable distribution was an unusual direction by the lower court. There was no mention in the facts of the case whether there was a need for such an extreme measure.

Equitable Distribution of Disability Pension

***Cameron v. Cameron*, 2005 N.Y. Slip Op 07757 (3d Dep't 10/20/2005), 2005 N.Y. App. Div. LEXIS 1189**

While the portion of the disability pension which represents compensation for personal injuries is separate property, the portion that it represents—deferred compensation—is subject to equitable distribution. The party who claims the disability pension to be separate property has the burden of proving what portion of the pension reflects compensation for personal injuries as opposed to deferred compensation.

The court improperly treated the husband's entire pension as marital when there was evidence in the record that he started earning his pension benefits two years prior to the marriage. Also, the court failed to consider the husband's evidence regarding the tax consequences of the pension.

The trial court was directed to reconsider the maintenance provisions in light of the redistribution of the marital assets.

Legal Fees Collection

Account Stated

***Bartning v. Bartning*, 16 A.D.3d 249, 791 N.Y.S.2d 541(1st Dep't 2005), *rearg den*, 2005 N.Y. App. Div. LEXIS 5785 (1st Dep't 5/26/2005)**

The court below erred in dismissing appellant-attorney's claim to fix his fees and impose a lien, and in finding that the reasonable value of counsel's services was covered by the funds previously paid by his client. An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time. The client failed to establish that he objected in a timely fashion to the invoices. The appellate court reversed, and fixed a lien for the amount billed.

Contempt

All Other Remedies Ineffectual

***Cooper v. Cooper*, __A.D.2d __, 800 N.Y.S.2d 618 (2d Dep't 2005)**

The plaintiff-wife was directed to return $274,000 she unilaterally withdrew from the parties' joint account and to account for any sums spent. The plaintiff refused to do so. The Supreme Court held the plaintiff in contempt and directed that she be incarcerated for four days with no opportunity to purge herself of the contempt. The appellate court reversed, and held that the court below erred by failing to give the wife an opportunity to purge herself. DRL § 245 requires a showing that resort to other enforcement devices has been exhausted or would be ineffectual. The plaintiff's attorney's efforts to defend against the contempt motion by demonstrating the efficiency of other enforcement remedies were improperly and prematurely terminated by the hearing court.

The court below improperly awarded the defendant an attorney's fee since such relief was not requested in his motion, nor was there a hearing on attorney's fees.

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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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