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Notes and Comments

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New York Matrimonial Law Enters the Modern World

For more than a decade, New York legislators steadfastly clung to the ancient notion that in order to obtain a divorce in the Empire State, one must allege fault, that included the biblical proscription against adultery as well as cruel and inhuman treatment, that made it difficult, if not impossible, to prove in a contested divorce action. Also, there was the old chestnut of "sexual abandonment," the elixir of choice that were buzzwords to promote perjury in the courts. With a stroke of a pen, Governor Paterson changed all that and permitted perhaps the most sophisticated state in the union to enter the twenty first century of jurisprudence. The king is dead, long live the king!

The new standard that was signed into law makes irreconcilable differences, better known as "a marriage that is irretrievably broken for a period of at least six months," the standard bearer for divorce in New York. There is a caveat in the statute that requires one of the parties to the marriage to state so under oath and mandates the parties to resolve all ancillary financial issues that would include maintenance, child support, custody, visitation, counsel and expert fees, as well as equitable distribution, before a divorce can be granted. The law became effective October 12, 2010.

Interestingly in the Bill's *raison d'etre*, the legislative justification included the fact that in states when no fault was enacted, the suicide rate of wives declined 20%, while reports of domestic violence perpetrated by husbands against wives were reduced by more than 33.33%. One wonders with these statistics in mind, why it took more than ten years of active lobbying by responsible organizations, including local bar associations, for New York to join every other state in the union that had already passed no fault bills. Just think of the lives it could have spared.

Another dramatic provision contained in the justification discussion was the further observation that "It is the intent of the legislation to grant full recognition to valid marriages of same-sex couples to obtain relief under New York State laws and in New York's courts." It is clear, then, if a same-sex couple, legally divorced in a sister state, applies to the New York courts for financial relief, the designation in the statute to husband and wife, rather than plaintiff and defendant, will not preclude access. Clarity is indeed preferred over ambiguity, and at least to this extent will be appreciated by the gay community.

However, this no fault bill was not the end of the entry into the age of enlightenment. For all of you loyal readers…there was more…much more to finally level the playing field between monied and non-monied parties, and actually enable a bankrupt party to obtain counsel of their own choice since necessary counsel fees will be provided for such representation. This will be more understandable when one examines the companion statutes that provide sweeping changes for the award of temporary counsel and expert fees,[1] and provides a formula guide for the award of temporary maintenance.

Inside

First let's explore the maintenance bill. Gross income as defined by the child support standard act will be adopted and applied to all income of the paying spouse up to $500,000, as adjusted by any increase (but not decrease) in the Consumer Price Index beginning January 31, 2012 and every two years thereafter. Then the fun begins. If you are able to decipher the garbled language of the statute, you are a better man than I, Gunga Din. Without presuming to be accurate, and certainly not as a prognostication of what the lower and appellate courts will struggle with for at least another decade, the statute *appears* to provide the following:

1. Determine the gross income of the payor pursuant to the CSSA and multiply by 30%.
2. Determine the gross income of the payee pursuant to the CSSA and multiply by 20%.
3. Subtract the resulting numbers from one another and put this number aside.
4. Now, add the gross income of the payor spouse to the gross income of the payee spouse and multiply the resulting number by 40% and from this resultant number, subtract the payee's income, if any, and put this number aside.
5. The guideline amount of temporary maintenance will then be the lower of the amounts put aside, unless the resultant number is less than or equal to zero, in which event there will be no guideline income...and that's what I call "ballin' the jack."

Let's get real and see how this works out with actual numbers. Suppose the paying spouse has gross income from all sources of $250,000; 30% of $250,000 equals $75,000. Now assuming the receiving spouse has gross income of $50,000, 20% of $50,000 equals $10,000. Now subtract $10,000 from $75,000 to arrive at $65,000 as the first leg of your journey computed from "column A." Thereafter, add the payee's spouse income to the payor's spouse income to arrive at the next number of $300,000, and then multiply this number by 40% to arrive at $120,000. Now subtract the payee's income of $50,000 and the presumptive amount of temporary maintenance is the sum of $70,000 pursuant to "column B." So, to review the mathematics, the column A approach results in presumptive maintenance of $65,000 per annum (or $5,416.67 per month), and the column B method results in $70,000 per annum or $5,833.33 monthly. Now all you have to do is to compare column A to column B and select the lower number and *voilà*, you have arrived at the presumptive amount of maintenance in your case! Now don't you agree that was a piece of cake? Whoa, wait a moment before reaching this premature conclusion. You may still have to determine the further presumptive guideline amount of any income of the payor spouse that exceeds $500,000. Here's where the former simplicity comes to an end, and your mettle will be judicially tested. The new statute has 19…yes, 19 factors…count them (albeit in Roman numerals) that the court *must consider* in deciphering the formula to apply *to obtain the excess presumptive award above the $500,000 threshold. Come, let us explore them.* Actually you already know most of them, since they were adopted from DRL 236. The totally new enumerated factors include:

II The substantial differences in the income of the parties;

III The standard of living during the marriage;

IV The age and health of the parties;

V The present and future earning capacity of the parties;

VI The need of one party to incur education or training expenses;

VIII Any transfers or encumbrances made without fair consideration;

IX The existence and duration of a pre-marital joint household or a pre-divorce separate household;

X Acts that inhibit a party's earning capacity or ability to obtain meaningful employment which shall include but are not limited to acts of domestic violence;

XI The availability and cost of medical insurance;

XII The care of children and stepchildren or disabled adult children or stepchildren, elderly parents or in laws that has inhibited a party's earning capacity or ability to obtain meaningful employment (what a doozie this one is);

XIII The inability of a party to obtain meaningful employment because of age and absence from the workforce; and

XIV The need to pay for exceptional additional expenses for the children including but not limited to schooling, day care and medical treatment.

Now get this. The above paraphrased factors (and the others) considered and made determinative, must be specified in a court decision and this requirement cannot be waived by the court, the parties, or the attorneys. This requirement will undoubtedly cast a pale on the lower court considering such excess amounts because it may well require AN ADDITIONAL ten-page decision JUST to reach additional awards.

As far as the duration of the temporary maintenance award (that used to be the pendency of the action), a new standard has been proffered. It is contained in four words—do so by considering the "length of the marriage"—but then in an oxymoron provides that the award shall terminate upon the issuance of the final award or death of either party, whichever occurs first. This undoubtedly means that temporary maintenance

awards can be less than the duration of the pendency of the action, although the statute does not precisely state so. For example, if a couple are married for less than a year, say six months, then theoretically the court could award temporary maintenance for any period of time up to six months or longer, but less than the *pendente lite* period. If this confuses you, you will not be alone. It appears that it is entirely discretionary with the court to award temporary support as long as it sees fit, but certainly there is no longer a requirement to award such support for the entire duration of the preliminary litigation prior to trial.

Now, let's take a look at how the court can completely ignore the statute. Yes, the new statute does have a way out. The magic words are if the court finds the presumptive amount "unjust or inappropriate" it can change it by considering seventeen of the nineteen enumerated factors stated in capital letters and not in Roman numeral factors, as provided, for considering awards over the threshold $500,000. Rather than confusing you (or are you already confused?), the capital letters are identical to the Roman numeral factors. Interestingly, it would have been far more understandable for the statute to refer to the enumerated Roman numeral factors that apply by referring to Section D(2)(A). Instead they chose to renumber the factors with capital letters.

Having said that, it is important to note that in order for the court to make such deviation, it must set forth the factors relied on and its rationale. As is the case with the computation of an excess award, this requirement cannot be waived.

The new statute, however, does permit the parties to enter into voluntary stipulations and agreements, provided the presumptive amount specified results in the correct amount that would have been computed pursuant to the mandates of the statute, *or*, if it does not, the agreement must set forth the arithmetic computation that would apply, and then set forth the reasons for the deviation. Your guess is as good as mine as to what reasons will be acceptable to the court, since the statute is silent on this requirement. This provision also cannot be waived. There is one important caveat and that is the court shall nevertheless retain discretion with respect to temporary and post-divorce maintenance awards made pursuant to this statute. You tell me what in the devil does this mean? Now listen to this: even though an agreement of the parties is incorporated into a court decree, the court must nevertheless set forth its reasons for permitting the deviation made by the parties to be sanctioned by the court. How many Judges do you know that are going to be willing to spend their entire working day obeying such mandate?

You say you want more for your money...well, here it is. Where there is insufficient proof to determine gross income, the court will then make an award based upon the needs of the payee spouse, and may retroactively upwardly modify such award without a showing of a change of circumstances, provided there is a showing of newly obtained evidence. One can only speculate when a *downward* modification will be allowed. Since there is no provision to do so, it is this writer's opinion that the statute is unconstitutional since it fails to provide equal protection of the law.

There is a further provision that makes clear that the new statute will not constitute a change of circumstances to apply for a modification of prior maintenance or alimony awards. Phew! That at least clarifies something for the reader.

If you thought the new law forgot about permanent awards, you are wrong. The terminology has been amended to provide for post-divorce maintenance awards, and Section 236B(6) has been amended to include six new additional factors. They have been set forth above in the earlier section of this article. The most glaring change is that living together while not married may be as good as living together while married.

Finally the new law directs that a law revision commission shall convene and make recommendations how to further amend existing law, and preliminarily report to the governor and the legislators after its pregnancy (nine months), and render a final report by December 31, 2011. We are breathless to await this paragon of clarity from the Commission. What a way to celebrate my fiftieth year at the bar!

Endnote

1. More in a later column.

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The CSSA's Impact on the Doctrine of Necessaries

By Elliott Scheinberg

Necessaries is a claim for support for sums expended by a party before the issuance of the court's support order.[1] The word support means necessaries[2] which includes food, clothing, shelter, and medical care[3] but is not limited thereto as it may also include legal fees to defend a spouse.[4] It is a common law doctrine which: (1) allows support for the period preceding the commencement of an action, and (2) also bridges the commencement of an action with the pendente lite award where the statute only permits retroactivity until the date of the initial application for support. The doctrine recognized that marriage involves shared wealth, expenses, rights and duties[5] and has historically facilitated support of the family.[6]

That which is necessary is that which is suitable according to the station and condition in life and what is suitable is measured with reference to the husband's pecuniary ability, honestly exercised, or his pecuniary resources—what is a luxury to the family of a man of very modest means may well be a necessary to the family of a man of wealth and substance.[7]

The Evolution of Necessaries

The necessaries doctrine originally evolved as a safeguard to ensure that the essential needs of a dependent wife and children were provided for, and at the heart of this common law rule "is a concern for the support and the sustenance of the family and the individual members thereof."[8]

The underlying philosophy acknowledged a now defunct gender-based obligation flowing uniquely towards the wife and children, serving to protect them against economic abandonment by the husband; since the formation of this doctrine under the common law, great changes have been made in the status of the married woman, which resulted in the amendment of certain statutes in 1980 making New York's support statutes gender neutral (Domestic Relations § 32; Family Court Act §§ 412, 413; see also, Domestic Relations Law § 50; General Obligations Law § 3-301).[9] The doctrine also reflects the "common-law disability of a married woman to contract and comported from the traditional family structure of the husband as sole breadwinner and the wife as full-time homemaker"[10] which structure persisted as one of the most primary and absolute principles in New York law.[11]

Necessaries Is a Creditor's Remedy

A cause of action for necessaries is neither a matrimonial action nor a Family Court proceeding, rather, it is primarily a creditor's remedy,[12] which a spouse may enforce in his or her own name directly where the spouse has actually paid for the necessaries.[13] The necessaries doctrine originated as a common law remedy,[14] grounded in implied contract,[15] to safeguard and ensure that the essential needs of a dependent wife and children were provided for:

> At early common law, a husband and wife were regarded as one legal entity, and a married woman had no right to own property or to control her financial affairs.… Since the married woman was considered legally incapable of owning property and incurring debts independent of her husband, the common law recognized that the husband had a duty to support his wife and to provide for her necessary expenses.… A corollary of the husband's obligation of support was the common-law doctrine of necessaries, which imposed liability on the husband to third parties who provided essential goods and services, including medical care and treatment, to his wife and children.… Because the basis of liability for expenses incurred by the wife was the husband's presumed failure to provide adequate support.[16]

The doctrine holds the husband and wife jointly and severally liable for the necessary expenses of either spouse, which

> has been termed "equality with a vengeance" because it results in the exposure of the property of one spouse for a debt incurred by the other spouse, thereby affording a creditor the same benefits as if both spouses had agreed to liability.…
>
> This approach takes into account neither which spouse incurred the debt nor the financial resources of each spouse. The creditor can proceed directly against the nondebtor spouse, regardless of that spouse's financial situation. * * * Because the joint and several approach does not consider whether one spouse needs support from the other, the doctrine of necessaries has been reduced to nothing more than a creditor's remedy.[17]

Liability under the doctrine of necessaries has never been automatic—a creditor seeking to recover for necessaries retains the burden of demonstrating that necessaries were furnished on the nondebtor spouse's credit, which, under the common law, the responsibility to pay for a spouse's debts must remain limited by the nondebtor spouse's ability to do so.[18]

Standard of Living

It was the husband's primary duty to support his wife and family in accordance with his station and position in life,[19] not merely to keep them from the poorhouse, as measured with reference to his pecuniary ability, honestly exercised, or his pecuniary resources so that the family shares in the lean as well as in the plentiful years.[20] Nevertheless, the recipient spouse is not granted *carte blanche* to spend at will and at whim. The proof on the claim for necessaries puts into issue the standard of living maintained by the parties.[21] Accordingly, whether a particular item is "a necessary" is to a great extent a question of fact relative to the circumstances of the parties,[22] so that what is a luxury to the family of a man of very modest means may well be a necessary to the family of a man of wealth and substance.[23]

Support of One's Children, a Natural Obligation

Although early law viewed the husband's obligation to support his wife as based on implied contract, the duty to furnish necessaries for one's children, however, was deemed a natural obligation,[24] that rested primarily with the father.[25] If the father neglected that duty, any other person who supplied such necessaries was deemed to have conferred a benefit on the delinquent parent, for which the law raised an implied promise enforceable in equity to pay on the part of the parent.[26]

Axiomatic is the general rule that once a court has fixed the amount of spousal support or child support,[27] interim or permanent, the husband's liability was confined to the amount of the award, and discharged his obligation to provide any further necessaries.[28]

Duty to Provide Counsel

Authority to require a parent to pay a child's legal expenses also flows from the statutory duty to support a child under the age of 21 (Family Court Act §§ 413, 416), which encompasses a duty to provide necessaries. While necessaries have traditionally been defined to include a child's most basic needs, such as food, clothing, shelter, and medical care, in appropriate circumstances the duty to provide necessaries may obligate a parent to provide a child with counsel.[29] A parent's potential duty to pay for legal services provided to a child as necessaries was also recognized by the Court of Appeals.[30]

Burden of Proof

The amount spent by the wife does not automatically fix the husband's obligation.[31] Specifically, the party asserting the claim carries the burden of proof[32] to establish, inter alia, that each item for which recovery is sought was provided and paid for, and constituted a necessary.[33]

Eligibility for a grant of necessaries hinges on the ability to establish entitlement by competent proof of what the items were and whether they were in fact necessaries,[34] which proof is not met simply by a typewritten or handwritten list of expenditures because such is insufficient to establish that the expenditures either constituted necessaries or were even bona fide;[35] a party must either testify or submit documentary evidence.[36] Similarly, simply borrowing money, in and of itself, is too vague a standard to establish a right to an award of necessaries.[37] This imposes significant evidentiary hurdles on the applicant spouse, especially because credibility is a key factor.[38]

CSSA Eliminates Burden of Proof

Contemporary thinking, as expressed by legislative fiat and decisional authority, has made dramatic advancements in the domain of child support. Public policy *vis à vis* child support does not "permit [an] unemancipated child to be without an appropriate level of financial support…regardless of [the] propriety [of the order] issued.…"[39] The prior law's inconsistent, unpredictable and often seemingly arbitrary results led to the legislative promulgation of the Child Support Standards Act (CSSA) which simultaneously abolished the needs-based discretionary system[40] and the arduous burden of proof on the custodial parent to painstakingly establish with arithmetic precision the exact expenses incurred in providing for the children down to the last morsel consumed. In its stead it implanted a comprehensive formula that contemplates all expenditures related to children.[41] The new statute created uniformity, predictability and equity in fixing child support awards, while at the same time maintaining the degree of judicial discretion necessary to address unique circumstances.[42]

The Domestic Relations Law makes child (and spousal) support obligations retroactive to the date of the initial application therefor.[43] However, assume a significant schism in time between the date of the separation of the parties and the commencement of a proceeding during which time no application for child support has been made,[44] or if the custodial parent is the defendant in an action and an application for child support is not asserted until much later in the proceedings, necessaries cover these gaps.[45] To hold otherwise illogically exalts form over substance and runs afoul of governing public policy because some children would impermissibly be ineligible to benefit equally from the legislatively mandated level of support simply because their interests had fallen through a procedural crack and were not preserved in a formal proceeding. It is akin to ruling that out-of-wedlock children are not entitled to the same quantum of support as children born to married parents. Such a conclusion is untenable. The CSSA legislatively supplants the common law burden of proof upon the custodial parent to establish "competent" proof as to the appropriateness of the expenses incurred on behalf of the children.

Conclusion

In sum, the legislative guidelines in the CSSA are applicable in actions for necessaries involving child support and supersede any prior decisional authority requiring the custodial parent to prove the precise amounts expended towards their support.

Endnotes

1. Zaremba v. Zaremba, 237 A.D.2d 351 (2d Dept., 1997).
2. Grishaver v. Grishaver, 225 N.Y.S.2d 924 (N.Y.Sup., 1961).
3. Medical Business Associates v. Steiner, 183 A.D.2d 86 (2d Dept., 1992).
4. Dravecko v. Richard, 267 N.Y. 180 (1935); Elder v. Rosenwasser, 238 N.Y. 427 (1924) (Where a wife living with her husband, whom he is obliged to support, is arrested on a criminal charge or prosecuted in a civil action which may result in her incarceration, the necessity for a lawyer may be as urgent and as important as the necessity for a doctor when she is sick. Her health is a very important matter in the maintenance of the home, and the happiness or even existence of the marital state. Of like importance is her presence in the home, which may be interrupted and the home broken up by taking her therefrom on a criminal charge. The mental suffering and anguish which may result from an unwarranted suit for alleged libel may be as disastrous in its effects as any other mental sickness or disorder.… [The husband], therefore, could not, by merely providing a house and eatables, refuse to provide a lawyer for his wife, when the services of that official became necessary for her protection.); Merrick v. Merrick, 163 Misc.2d 929 (Sup.Ct. NY Co. 1995) (counsel fees are in the nature of necessaries); also see In re Hofmann, 34 A.D.3d 243 (1st Dept., 2006).
5. Medical Business Associates, supra note 3.
6. Id.
7. Grishaver, supra note 2.
8. Medical Business Associates, supra note 3.
9. Medical Business Associates, supra note 3:

   > At early common law, a husband and wife were regarded as one legal entity, and a married woman had no right to own property or to control her financial affairs… Since the married woman was considered legally incapable of owning property and incurring debts independent of her husband, the common law recognized that the husband had a duty to support his wife and to provide for her necessary expenses.… A corollary of the husband's obligation of support was the common-law doctrine of necessaries, which imposed liability on the husband to third parties who provided essential goods and services, including medical care and treatment, to his wife and children.… Because the basis of liability for expenses incurred by the wife was the husband's presumed failure to provide adequate support…the necessaries doctrine served, in the words of one commentator, as a "protective remedy for the hapless wife and children facing economic abandonment by the husband."
   >
   > Although this allocation of marital rights and responsibilities developed during a period in history when married women were under legal disabilities which prevented them from managing their own financial affairs, the enactment across the nation of "Married Women's Acts" which empowered women to make contracts and transact business, did not relieve husbands from liability for necessaries purchased by their wives.… The obligation of a husband to support his wife, which comported with the traditional family structure of the husband as sole breadwinner and the wife as full-time homemaker… remained "one of the most primary and absolute principles in New York law"…the husband's duty to support his wife and children in conformity with his means was deemed fundamental to the marital relationship and an integral part of the public policy of this State.

10. Our Lady of Lourdes Memorial Hosp. v. Frey, 152 A.D.2d 73 (3d Dept., 1989).
11. Medical Business Associates, supra note 3.
12. Id.
13. Goldman v. Goldman, 132 Misc.2d 870 (Sup.Ct. NY Co. 1986); Hafner v. Security Pacific Nat. Bank, 135 Misc.2d 942 (Sup.Ct. NY Co. 1987); Gristede Bros. v. Leeds, 97 Misc.2d 804 (N.Y.City Civ.Ct. 1979); York Towers, Income. v. Bachmann, 73 Misc.2d 214 (N.Y.City Civ.Ct. 1973); DeBrauwere v. DeBrauwere, 203 N.Y. 460 (1911); Grishaver, supra note 2.
14. Medical Business Associates, supra note 3.
15. Grishaver, supra note 2: "…where the wife has been obliged to expend her own funds for the purchase of necessaries, whether she is living with him or has been abandoned by him, she may seek reimbursement of such funds from her husband founded upon a promise to pay which the law implies from the husband's legal obligation to furnish his family with the necessaries of life suitable to their condition…. In order to recover on her action for reimbursement, the wife must establish that payments were made out of her separate estate, and that they were made for what the law deems necessaries."; Zaremba, supra note 1; Hafner, supra note 13.
16. Medical Business Associates, supra note 3.
17. Id.
18. Id.
19. DeBrauwere, supra note 13: "…those things might properly be deemed necessaries in the family of a man of generous income or ample fortune which would not be required in the family of a man whose earnings were small and who had saved nothing."; Tausik v. Tausik, 38 Misc.2d 11 (Sup.Ct. NY Co. 1962), household expenses, maid's wages, telephone, gas and electricity charges, clothing and wearing apparel purchases, restaurant bills, routine gratuities to the residential building staff, cost of laundry, stationery, newspapers and the like, medical expense, and even beauty parlor and hairdressing disbursements, were deemed necessaries.; Schneider v. Schneider, 156 A.D.2d 439 (2d Dept., 1989): premiums for insurance on former husband's life, as well as interest on loans ex-wife was required to incur during those periods when former husband was not expending any money for support of family, were properly deemed necessaries.; Grishaver, supra note 2.
20. DeBrauwere, supra note 13; Garlock v. Garlock, 279 N.Y. 337 (1939); Merlino v. Merlino, 33 Misc.2d 462 (Sup.Ct. NY Co. 1962).
21. Grishaver, supra note 2.
22. Tausik, supra note 19.; DeBrauwere, supra note 13.
23. Grishaver, supra note 2.; Patino v. Patino, 195 Misc. 887 affd., 278 App.Div. 756, affd., 303 N.Y. 999 (1952).
24. DeBrauwere, supra note 13; Matthews v. Matthews, 30 Misc.2d 681 (Sup.Ct. Nassau Co. 1961), modified on other grounds, 18 A.D.2d 830 (2d Dept., 1963), affd., 14 N.Y.2d 778 (1964).
25. Prior to Orr v. Orr, 440 U.S. 268 (1979), the child support obligation was gender specific resting the primary obligation to furnish necessaries for his infant children upon the husband.
26. DeBrauwere, supra note 13.

27. Friou v. Gentes, 11 A.D.2d 124 (2d Dept., 1960).
28. Turner v. Woolworth, 221 N.Y. 425 (1917), written by Justice Cardozo; Dravecko, supra note 4; Merrick, supra note 4; Golin v. Cassese, 197 A.D.2d 608 (2d Dept., 1993); Berkowitz v. Berkowitz, 49 A.D.2d 872 (2d Dept., 1975).
29. Plovnick v. Klinger, 10 A.D.3d 84 (2d Dept., 2004); In re Adoption of Baby U, 263 A.D.2d 385 (1st Dept., 1999), leave to appeal dismissed, 94 N.Y.2d 875 (2000), appeal dismissed, 95 N.Y.2d 886 (2000), leave to appeal denied, 95 N.Y.2d 770 (2000).
30. Felder v. Mohr, 39 N.Y.2d 1002 (1976); Plovnick v. Klinger, 10 A.D.3d 84 (2d Dept., 2004).
31. This concept is consistent with the current notion of the imputation of income.
32. Rodgers v. Rodgers, 98 A.D.2d 386 (2d Dept., 1983), appeal dismissed, 62 N.Y.2d 646 (1984) (It was plaintiff's burden to establish her right to recover for each of the items sought. [Malman v. Malman, 46 A.D.2d 803; Mumford v. Mumford, 44 A.D.2d 817; Rosinsky v. Rosinsky, 42 A.D.2d 999, mot. for lv. to app. den., 33 N.Y.2d 519]).
33. Scheinkman, West's McKinney's Forms Matrimonial and Family Law § 3:96, Liability for Necessaries; Mumford v. Mumford, 44 A.D.2d 817 (1st Dept., 1974).
34. Shoenfeld v. Shoenfeld, 563 N.Y.S.2d 500; Himelfarb v. Himelfarb, 35 A.D.2d 664 (1st Dept., 1970); Koeth v. Koeth, 309 A.D.2d 786 (2d Dept., 2003); Grishaver, supra note 2.; Zaremba, supra note 1; Schneider, supra note 19.
35. Zaremba, supra note 1; Koeth, supra note 34.
36. Soles v. Soles, 41 A.D.3d 904 (3d Dept., 2007).
37. Himelfarb, supra note 34.
38. Rodgers, supra note 32.
39. Stanley v. Bouzaglou, 194 Misc.2d 45 (NYFamCt. 2002); see Gravlin v. Ruppert, 98 N.Y.2d 1 (2002).
40. Cassano v. Cassano, 85 N.Y.2d 649 (1995).
41. Real life economics readily reveal that such is not, in fact, the case because of the phantom expenses that are unique to children at different developmental levels, e.g., as when older children invite friends for meals, movies, etc.
42. Cassano, supra note 40.
43. DRL § 240(1)(j).
44. See, E. Scheinberg, When Does the Clock Start Ticking For Back Child Support?, NYLJ, Sept. 5, 2003.
45. See, Zaremba, supra note 1.

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Healthy New York: Extending Health Insurance Coverage to Young Adults in Divorce Settlement Agreements

By Marguerite E. Royer

It is no secret that millions of Americans do not have health insurance. However, it is less well known that young adults comprise the largest segment of the population that is uninsured.[1] In fact, among the 46.3 million Americans without health coverage, 13.7 million individuals are young adults.[2] Approximately 30% of Americans between the ages of 19 and 29 are uninsured.[3]

Under current law, parents generally can maintain their children as dependents on their medical insurance plan until their children turn 19 years old or graduate from college.[4] The majority of young adults covered under public health insurance programs, such as Medicaid, lose their eligibility when they turn 19 years old.[5]

The new health care legislation passed under the Obama administration will afford millions of currently uninsured young adults health insurance coverage. The federal health care reform legislation extends the amount of time children can remain covered under their parents' medical insurance.[6] In addition, 37 states, including New York, have expanded the conditions under which children can be considered dependents for insurance purposes.[7]

The new legislation stands to impact and alter health insurance provisions in divorce settlement agreements. It is already common practice for parties to stipulate to extend child support beyond the age of majority, such as through college graduation. In light of the new health-care laws, an increasing number of parents may choose to enter into agreements wherein a party is required to maintain medical insurance on behalf of their children well into their twenties.

Large Number of Uninsured Young Adults

In recent years, there has been a significant increase in the number of uninsured young adults.[8] A primary cause of this phenomenon is the high cost of health insurance premiums.[9] Many young adults, largely in good health, are reluctant and/or cannot afford to spend their valuable dollars on insurance.[10] Instead, they pay out-of-pocket for medical care on an "as needed" basis because it is cheaper than maintaining insurance.[11] Many uninsured young adults fail to obtain medical treatment because of the cost, suffer a worsening of their condition because they did not seek medical care soon enough, and incur a large expense in the event of a serious illness and/or injury.[12]

Additional factors contributing to the large number of uninsured young adults include high unemployment rates[13] and fewer jobs offering full health benefits.[14] As a result of the high costs of medical insurance, many employers are reluctant to hire full-time employees.[15] Consequently, young adults fresh out of high school or college often have part-time, consulting, freelance, or contract jobs, which do not offer health insurance benefits.[16] Young adults fortunate enough to have health insurance provided through their employment may not maintain the insurance because of high employee contributions required toward premiums.[17] The new health care legislation seeks to reverse this trend and provide young adults with greater access to medical insurance.

Federal Law

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act ("Affordable Care Act"). The Affordable Care Act, together with the Health Care and Education Reconciliation Act of 2010 signed into law on March 30, 2010, represent comprehensive health care reform.

Significantly, the Affordable Care Act allows children to remain on their parents' medical insurance plan until age 26.[18] The Affordable Care Act extends to young adults, regardless of their living situation, financial circumstances, marital status, or educational status.[19] Whether a child is classified as a dependent on his/her parents' income tax return or resides with his/her parents is irrelevant to the extension of health benefits to a child under 26 years old.[20] However, the Affordable Care Act is only applicable to health insurance plans that offer dependent coverage (most, but not all, do so).[21]

The Affordable Care Act actually appears to be affordable. The legislation requires medical insurance for young adults to be available at the same price as for other dependents, and thus treats similarly situated individuals in the same manner.[22] It is estimated that young adult coverage will increase the cost of family health insurance premiums by a mere .7%.[23]

There are favorable tax benefits attendant with the Affordable Care Act. For example, employee and employer contributions toward premiums are excluded from income.[24] Moreover, an employer's contribution toward health coverage for an employee's child is excluded from the employee's income through the end of the taxable year when the child attains age 26.[25]

For policies beginning on or after September 23, 2010, insurance providers are required to give young adults at least 30 days to enroll as dependents on their parent's health insurance plan.[26] Young adults are required to receive written notice of the enrollment period.[27]

The federal law provides the floor, not the ceiling, with respect to health insurance coverage. Many states, including New York, provide more extensive health care reform than under federal law.

New York Law

On June 29, 2009, Governor Paterson signed into law Chapter 240 of the Laws of 2009.[28] The legislation allows children to remain or obtain coverage under their parents' health insurance through age 29,[29] and thus is commonly referred to as the "Age 29" law.

In order to be entitled to benefits under the "Age 29" law, the young adult must: (1) be 29 years old or under; (2) be unmarried; (3) not be insured by or eligible for health insurance through his/her own employer; and (4) live, work or reside in New York or in the health insurance company's service area.[30] As under federal law, whether a young adult is claimed as a dependent on his/her parents' income tax return or lives with his/her parents does not impact eligibility for coverage.[31]

The "Age 29" law extends medical insurance coverage to young adults either through a "young adult option" or a "make available" option."[32]

Under the "young adult option," insurers will notify employees of this benefit and employees or their dependents may elect the benefit and pay the premium.[33] Either the young adult or his/her parents will be responsible to pay the premium.[34]

In contrast, under the "make available option," insurers that issue a health insurance policy that covers dependents must make medical insurance available for eligible young adults through age 29 if requested by the policy holder.[35] The "make available option," unlike the "young adult option," is extended to individual health insurance policies in addition to group health insurance policies.[36]

It is important for matrimonial practitioners to keep in mind that there are enrollment periods and deadlines under the "Age 29" law. For example, there are four instances when an eligible individual can obtain coverage under the "young adult option."[37] First, if a child is covered under his/her parent's health insurance plan, the child may enroll within 60 days of the date when the coverage would otherwise end due to reaching the maximum age of health insurance coverage.[38] Second, a young adult may enroll within 60 days of newly satisfying the eligibility requirements.[39] Third, eligible young adults can enroll during the annual 30 day open enrollment period.[40] Fourth, there is a 12 month open enrollment period following the first renewal of the health insurance policy on or after September 1, 2009.[41]

In addition to extending coverage to more New Yorkers, reforms have been instituted with respect to the cost of health care. In June 2010, the Governor's Program Bill Number 278 was signed into law. The new legislation provides tighter state regulation of health insurance premiums by reinstating the New York State Insurance Department's power to review and approve health insurance premium increases before they come into effect.[42] The recent reforms enacted in New York give hope for more widespread health coverage at affordable rates.

Addressing the Health Insurance Needs of Young Adults in Divorce Settlement Agreements

Pursuant to Family Court Act §413 and Domestic Relations Law §240, in New York, parents are chargeable with the support of their children until they attain the age of 21 years old or are sooner emancipated. In the absence of an express agreement between the parties, courts lack the authority to direct a parent to pay support for a child beyond age 21.[43] However, express agreements to extend child support beyond age 21 are enforceable by the courts.[44]

In addition to the payment of basic child support, on behalf of their children, parents have a statutory obligation to maintain health insurance benefits, which are broadly defined as "any medical, dental, optical and prescription drugs and health care services or other health care benefits that may be provided for a dependent through an employer or organizations which are self insured, or through other available health or health care coverage plans."[45]

In cases where children have health insurance, generally the court directs that the health insurance must be maintained.[46] If the children do not have medical insurance and one parent has available health insurance benefits, the court shall direct that parent to provide such benefits on behalf of the children.[47] When the children do not have health insurance and both parents have available health insurance benefits, the court shall direct either or both parents to maintain health insurance benefits on behalf of the children.[48] In making this determination, courts examine factors such as the cost and the comprehensiveness of the coverage.[49] In the event that neither parent has health insurance benefits available to him/her, the court shall direct the custodial parent to apply for health insurance through New York State.[50]

Pursuant to Domestic Relations Law §240(1)(d) and Family Court Act §416(f), the cost of providing health insurance benefits is supposed to be prorated between the parties unless the court determines such allocation would be unjust or inappropriate. If the custodial parent is ordered to maintain health insurance benefits on behalf

of the children, the non-custodial parent's pro rata share of the cost of the health benefits is added to the basic child support obligation.[51] If the non-custodial parent is directed to maintain health insurance benefits on behalf of the children, the custodial parent's pro rata share of the cost of health insurance benefits is deducted from the non-custodial parent's basic child support obligation.[52]

It is already common practice for parents to extend their support obligations in written agreements through the latter of their child's college graduation or the child's attainment of the age of 22 or 23 years old. Matrimonial practitioners drafting stipulations of settlement, separation agreements, and/or postnuptial agreements should be cognizant of the new health care legislation and its impact on young adults. In light of the recent health care reforms and the staggering statistics regarding uninsured young adults, parents may increasingly decide to enter into agreements that extend the duration they are required to maintain health insurance benefits on behalf of their children until age 26 or 29.

Making provisions in divorce settlement agreements for the maintenance of medical insurance for children beyond age 21 would help reduce the number of uninsured young adults. It is better to stipulate to extend health benefits to young adults than leaving it to the parents' discretion after divorce. Without an express agreement, most likely the burden of paying medical insurance premiums would fall on the custodial parent or the young adult. Entering into a divorce settlement agreement with respect to health benefits beyond the age of 21 is advantageous to the custodial parent rather than leaving it to chance after the divorce, as there is a stronger bargaining chip to resolve the issue of health benefits together with the other issues ancillary to the divorce. It is also advantageous to the non-custodial parents who want to provide health benefits on behalf of their young adult children because the cost of the premiums can be contractually shared with the other parent. At minimum, since the young adult may have the right to apply for his/her own coverage, divorce settlement agreements should provide that parents must cooperate in procuring medical insurance for their young adult children even after they turn 21 years old.

Even though courts cannot order an unwilling parent to provide medical insurance for a child over 21 years old, there are tax benefits under the Affordable Care Act that may be an incentive to enter into an agreement in which health benefits are extended beyond the age of majority. As aforesaid, the value of an employer's contribution toward health coverage for an employee's child is excluded from the employee's income through the end of the taxable year in which the child turns 26.

A cautionary note for attorneys contemplating making provisions in divorce settlement agreements that extend the duration of medical coverage to young adults is that, as the health care reforms are so recent and complex, it can be difficult to determine what health insurance coverage is available and to whom it is available. There are specific enrollment periods that must be adhered to in order to obtain coverage. For information about specific health insurance and dependent coverage that is available, attorneys should contact their client's and the opposing party's Office Manager, Human Resources Department, or Insurance Company.

Health care reform will make medical insurance available to a broader spectrum of New Yorkers at more affordable rates. Matrimonial practitioners can have a hand in making medical insurance more readily available to young adults through health care provisions set forth in divorce settlement agreements.

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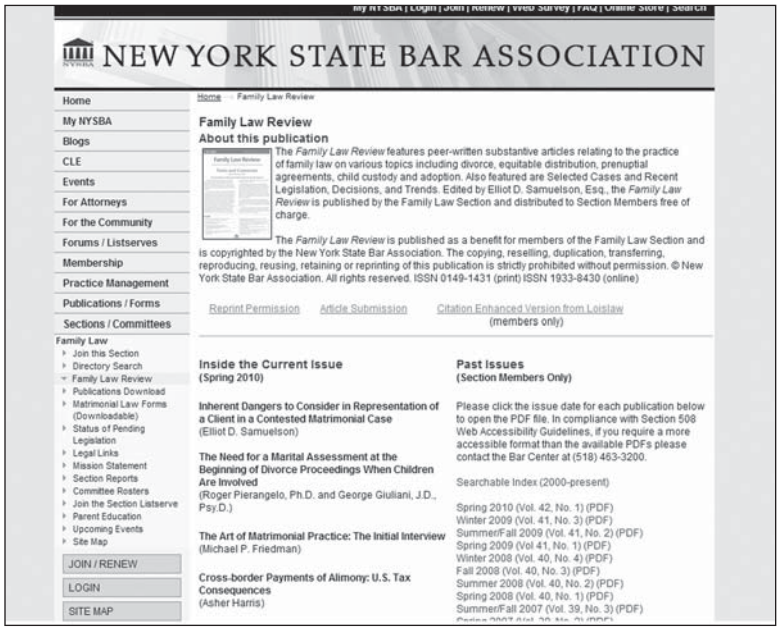

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Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

Five states (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire) plus the District of Columbia permit same-sex marriage. Three more states (Maryland, Rhode Island and New York) officially pledge to honor out-of-state same-sex marriages. Seven foreign countries also grant full marriage rights: The Netherlands, Belgium, Canada, Spain, South Africa, Norway, and Sweden.

Although New York does not permit same-sex marriage (and the New York Senate recently turned down a bill permitting same-sex marriage), it does recognize same-sex marriages performed outside of its jurisdiction, based on the principles of full faith and credit and comity. Governor Paterson issued a broad executive order in 2008, directing state agencies to review their policies to recognize gay marriages performed in other states.

Massachusetts overturns DOMA as unconstitutional

On July 8, 2010, Judge Joseph Tauro of the U.S. District Court in Boston ruled in two separate lawsuits that a critical part of the federal Defense of Marriage Act (DOMA), a law barring the federal government from recognizing same-sex marriage, is unconstitutional. In one lawsuit, *Commonwealth of Massachusetts v. Health and Human Services*, the court ruled that DOMA violated the Tenth Amendment to the U.S. Constitution by taking from the states powers that the Constitution gave to them, including the power to regulate marriage. In the other lawsuit, *Gill v. Office of Personnel Management*, he ruled that DOMA violates the equal protection clause of the Fifth Amendment. Both of the lawsuits targeted Section 3 of DOMA which states that, for federal government purposes, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Neither lawsuit challenged the section of DOMA that enables any state to ignore valid marriage licenses issued to a same-sex couple in other states.

On October 11, 2010, the U.S. Department of Justice filed notices of appeal to the U.S. Court of Appeals in these two cases. If the cases make their way to the U.S. Supreme Court and are upheld, gay and lesbian couples in states that recognize same-sex marriage will be eligible for federal benefits that are now granted only to heterosexual married couples, including but not limited to Social Security survivors' payments, the right to file taxes jointly, and guaranteed leave from work to care for a sick spouse.

California's Proposition 8 held unconstitutional

In May 2008, the California Supreme Court in its decision *In re Marriage Cases* granted same-sex couples the right to marry. However, in November 2008, Proposition 8, a constitutional amendment designed to supersede the court's decision, narrowly passed, and gay couples could no longer marry in California. The two powerhouse attorneys who were opposite each other in *Bush v. Gore*, Ted Olson and David Boies, joined forces to overturn Proposition 8 in *Perry v. Schwarzenegger*. On August 4, 2010, District Court Chief Judge Vaughn Walker, in a landmark decision, ruled that the amendment to the California Constitution barring marriage for same-sex couples violates the U.S. Constitution's guarantees of equal protection and due process. Judge Walker lifted a temporary stay on his ruling, but the Ninth Circuit Court of Appeals granted a stay. Oral arguments are set for the week of December 6, 2010. This case is expected to reach the U.S. Supreme Court.

New York recognizes parentage created by a civil union in Vermont

***Debra H v. Janice R*, 14 NY3d 576, 904 NYS2d 263 (5/4/2010), *lv to reargue denied*, 15 NY3d 767, ___ NYS2d___ (7/1/10)**

A non-biological mother is entitled to seek custody and visitation based on a Vermont civil union that she and her same-sex partner entered into prior to the birth of the parties' son but after the partner was already pregnant by an anonymous donor. The high court did not go further and overrule its decision in *Alison D v. Virginia M*, 77 NY2d 651, 569 NYS2d 586 (1991), which allowed only a biological or adoptive parent to seek custody and visitation, and not a same-sex partner who neither adopted nor was the biological parent of the child. *Debra H* only adds one new category of protection for same-sex families. Children whose parents conceive them using an anonymous donor but haven't traveled out of state to enter into a civil union or marriage still lack protection and standing to request custody and visitation. It is up to the Legislature to expand the definition of "parent" under DRL 70. See Cases of Interest below for further details.

Recent Legislation

New York's No Fault Statute

On August 14, 2010, Governor Paterson signed three bills into law affecting matrimonial practice, effective October 12, 2010 and applicable to cases and proceedings commenced thereafter. They generally relate to 1) the

enactment of "no fault" divorce; 2) a rebuttable presumption of counsel and expert fee awards to the non-monied spouse; and 3) a formula for pendente lite spousal support. All three of these statutes are discussed more fully below.

No-fault divorce: DRL 170, amended by adding a new subdivision 7, effective October 12, 2010

A new ground for divorce is that the relationship between the couple "has broken down irretrievably for a period of at least six months." The judgment will not be granted until all issues are resolved including equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses, and the award of custody and visitation.

Author's note: New York is the last state in the nation to enact a no-fault divorce law. In the past, litigants were required to prove grounds (such as adultery, abandonment or cruel and inhuman treatment) and/or risk perjury charges for agreeing to "amicable" grounds that didn't exist (i.e. constructive abandonment). Oftentimes, if a party did not have grounds, the other spouse would use that as a financial "blackmail" strategy. Also, litigants would waste time and money in court testifying to grounds, only to later learn that the judge denied the divorce because the allegations only supported "irreconcilable differences" which did not rise to the level of endangering the physical and mental health of the other spouse. The couple would have to remain legally married (even though they were no longer living together) or one spouse would have to move to another state like New Jersey for a year in order to get a divorce. What's worse, the now separated couple would still be entitled to inherit from each other, since they were not legally divorced, an unfair result. The new no-fault law allows for unilateral divorces—a cost-effective and peacefully simple process.

Counsel fees: DRL 237(a) and (b) and 238 amended, effective October 12, 2010

There is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. The amendment also instructs that "the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, *pendente lite*...." When making an application for counsel fees, *both* parties must submit an affidavit detailing the financial agreement between the party and counsel, including the amount of the retainer, the amount paid and still owing, the hourly amount charged by the attorney, the amounts paid or to be paid, "any experts,"[1] and "any additional costs and disbursements.... Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section."

Author's note: The amendment is tailored to address the past problem faced by the lesser monied spouse, where many courts reserved decision on counsel fees until trial and final decision in the case, forcing counsel to either work unpaid for many months (or sometimes years) or request to be relieved from the case. In addition, in the past, the more monied party was not required to disclose to what extent he has paid his counsel.

As discussed in my previous columns, the Second Department in *Prichep v. Prichep*, 52 AD3d 61, 858 NYS2d 667 (2d Dept 2008), tried to address the problem in case law, by holding that pursuant to DRL 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied nor deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." *Id.* at 62, 858 NYS2d at 668. The new statute codifies the holding of *Prichep* and the recent cases following it.

Interestingly, under the "Justification" memorandum of the statute, the Legislature specified that "It is the intent of the Legislature to grant full recognition and respect to valid marriages of same-sex couples to obtain relief under New York state laws.…" and that the use of the terms "husband" and "wife" in the statute does not preclude these couples from such relief.

Temporary maintenance awards: DRL 236B amended, adding a new subdivision 5-a, effective October 12, 2010

This new temporary maintenance statute is similar to the Child Support Standards Act in many ways. The payor is the person with the higher income. There is a formula that the court must apply, unless it determines the amount to be "unjust or inappropriate" and adjusts it based on various prescribed factors. If the parties enter into an agreement that opts out of the statutory guideline, the agreement must calculate what the support would have been under the guideline and the reasons for the deviation. "Income" is defined as income defined by the CSSA, DRL 240(1-b), as well as "income from income producing property" to be distributed pursuant to the Equitable Distribution Law.

The income cap is defined as income up to and including $500,000 of the payor's annual income, with a cost of living adjustment commencing January 31, 2012 and every two years thereafter.

The temporary maintenance is calculated as follows:

1. Where the payor's income is up to and including the cap ($500,000):

a. The court shall subtract 20% of the income of the payee from 30% of the income up to the income cap of the payor.

Example:

Payor's income = $100,000
Payee's income = $50,000

Payor's income $100,000 x 30%	**$30,000**
Less Payee's income $50,000 x 20%	**$10,000**
	$20,000

b. The court shall then multiply the sum of the payor's income up to and including the income cap and all of the payee's income by 40%.

Payor's income	**$100,000**
Plus Payee's income	**$50,000**
Subtotal	**$150,000 x 40% = $60,000**

c. The court shall subtract the income of the payee from the subtotal derived in b.

Subtotal	**$60,000**
Less Payee's income	**-$50,000**
	$10,000

d. The guideline amount is the lesser of subparagraphs a and c.

a= $20,000
c= $10,000
In this case, the guideline amount is $10,000/yr.

2. Where the income of the payor exceeds the income cap ($500,000):

a. The court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap according to subparagraph 1. For the income in excess of the cap, the court shall determine any additional guideline amount of temporary maintenance through consideration of 19 factors.

Example:

Payor's income:	**$700,000**
Payee's income:	**$50,000**

Guideline amount up to income cap

a.

Payor's income up to cap:	
$500,000 x 30%	**$150,000**
Less Payee's income	
(50,000 X 20%)	**-$10,000**
	$140,000

b.

Payor's income up to cap	**$500,000**
Plus Payee's income	**$50,000**
Subtotal	**$550,000 x 40% = $220,000**

c.

Subtotal	**$220,000**
Payee's income	**-$50,000**
	$170,000

d. Lesser of a and c = $140,000 (up to income cap)

Author's note: It is not clear how to apply the formula if the payee's income is above the cap. Under the statute, you are to apply all of the payee's income to the formula. It seems that the payee's income should be capped as well, but the statute fails to address this hypothetical.

Guideline amount above cap

e. When determining whether to use the payor's income in excess of the cap (in this example, $200,000) the court must consider 19 factors, which closely mirror the 12 factors of the original maintenance statute DRL 236B6(1-12) before the recent amendment, and adds the following additional factors (and/or change of language):

(ii) the *substantial differences* in the income of the parties; (***Author's note:*** the prior DRL 236B6(1) states only to consider the income of the respective parties);

(vi) the need of one party to incur education or training expenses;

(ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(x) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(xii) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;

(xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;

(xvi) marital property subject to distribution pursuant to subdivision five of this part. (***Author's note:*** This statute does not consider the income derived from separate property nor separate property assets when determining support, whereas the former statute did DRL 236B6(1)).

The court is also directed to consider the effect of a barrier to remarriage on the enumerated factors. ***Author's note:*** This factor seems to be irrelevant in determining a *temporary* maintenance award.

In the event that the court determines that the presumptive award is "unjust or inappropriate," it must determine a different amount based on 17 factors, which are the same factors the court must consider when determining whether to apply the payor's income in excess of the cap, except for the length of the marriage and the substantial difference of the parties' income. If the court deviates from the presumptive amount, it must state in its written decision what the presumptive amount should have been and the reason for the deviation.

The court must set forth in a written decision the factors it considered and the reasons for its decision. Pursuant to DRL 236B(5-a)D, the court shall determine the "duration of temporary maintenance by considering the length of the marriage. Temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first." In the prior statute, there was no consideration of the duration of the temporary award, and it would terminate upon the issuance of the final order.

If the court does not have sufficient evidence, it may award support based on the needs of the recipient spouse or the standard of living of the parties prior to the commencement of the divorce action, whichever is greater. The order may be retroactively modified without a showing of change of circumstances upon the production of newly discovered or obtained evidence.

Author's note: The purpose of temporary maintenance is to maintain the financial *status quo* of the parties during the pendency of the action, but this formula does not seem to support such ideology. The formula does not consider the parties' *pro rata* contribution towards the carrying charges of the marital home, their standard of living and needs, or whether or not child support is to be paid. Interestingly, the Legislature's stated purpose of the bill was not reported.

Post-divorce maintenance awards: DRL 236B6, amended, effective October 12, 2010

Regarding post-divorce maintenance awards, no formula is applied like the new *pendente lite* maintenance statute. Rather, the court considers the 20 factors which are to be considered under the temporary maintenance guidelines for the payor's income in excess of the cap, with the addition of one extra factor: "the ability of the parties seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor." Standard of living is listed as a factor to be considered in temporary maintenance; however, for post-divorce maintenance, it is not listed as a factor, but rather contained in paragraph 6 which describes post-divorce maintenance awards.

Law Revision Commission Study: DRL 236B amended, new subdivision 6-a

The statute provides, in pertinent part "Serious concerns have been raised that the implementation of New York state's maintenance laws have not resulted in equitable results. Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable. This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes." Therefore, the Legislature found that the Law Revision Commission must make a comprehensive review of the state's maintenance laws and propose revisions. A final report is due by December 31, 2011.

Author's note: Requesting to study the impact of maintenance awards after promulgating a new temporary maintenance statute appears to be putting the chariot before the horse.

Low Income Support Obligation and Performance Improvement Act, effective October 13, 2010 (with some exceptions where indicated)

This statute relates to several issues: modifying child support orders, employer reporting of new hires and quarterly earnings, work experience programs and non-custodial earned income tax credit.

The Legislature stated that although the state has collected over $1 billion in child support annually since 1999, there is still room for improvement. The bill's stated purpose is to improve the collection of child support, and create uniformity among the factors to be used in determining modification of child support, and to keep the child support awards consistent with parental income.

There are several statutes under this Act, including the following:

Tax Law 606 (d-1) amended, new paragraph 4 and **Tax Law 697 amended** to permit the Department of Taxation and Finance to share information needed to evaluate the impact of the Noncustodial Parent Earned Income Tax Credit.

Tax Law 171-a and **171-h amended**, **effective July 15, 2011** requires employers to report the availability of employer-sponsored family health insurance as part of the quarterly wage report and the new hires report.

FCA 451 and **DRL 236B(9)(b**) amended. These statutes only apply to child support orders which incorporate but do not merge stipulations or settlement agreements if the stipulation or agreement was executed on or after the effective date of the bill, to wit: October 13, 2010.

Currently, there is no uniform threshold for modifying support awards. The DRL specifies that a child support order may be modified based on "a substantial change in circumstances," whereas the FCA only provides for a "change in circumstances." The stated purpose of the bill is to create uniformity between the two statutes.

Both amended provisions provide for a "substantial change in circumstance" as a basis for modification of an order of child support or an order incorporating without merging an agreement or stipulation. The section

provides two new bases for modification: the passage of three years since the order was entered, last modified, or adjusted; or a 15% or greater change in either party's gross income since the order was entered, last modified or adjusted. The statute codifies case law by specifying."A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience."

The parties may opt out of the two new bases for modification in a validly executed agreement.

Incarceration is not a bar to finding a substantial change in financial circumstances provided that such incarceration is not the result of nonpayment of child support order or an offense against the custodial parent or child.

FCA 440 and **DRL 236B(7)** amended to require that all orders establishing a child support obligation contain a notice regarding the right to modify the order if there has been a substantial change in circumstance or the occurrence of the additional two bases for modification (unless the parties opted out of these two bases).

New FCA 437-a authorizes the Family Court to require the noncustodial parent of a child to seek employment, or to participate in job training, employment counseling or other programs designed to lead to employment, where such programs are available if s/he is unemployed at the time the court is establishing the support order, unless the noncustodial parent is in receipt of supplemental security income or social security disability benefits.

New SSL 111-h provides that if the respondent is required to participate in work programs or activities, and if the order of support is made payable on behalf of persons in receipt of public assistance, the support collection unit may not file a petition to increase the support obligation for twelve months from the date of entry of the order if the respondent's income is derived from the work activity or program.

Confidentiality of registration records in certain cases: new Section 5-508 of the Election Law, effective May 5, 2010

This statute authorizes the Supreme Court to issue a court order providing for the confidentiality of election registration records of a victim of domestic violence. The definition of a victim of domestic violence mirrors the language under the Family Court Act.

Orders of protection: FCA 446, 551, 656, 759, 812, 842 and 1056 and DRL 240, amended, effective August 13, 2010

This amendment attempts to redress the case law trend that attempts to instill a statute of limitation on when a victim of domestic violence can plead incidences of abuse. Orders of protection shall not be denied nor applications dismissed solely on the basis that the events alleged are not "relatively contemporaneous" with the date of the application or the conclusion of the action. The length of the duration of a temporary order shall not be determinative, by itself, of the length of a final order.

Extensions of order of protection: FCA 842 amended, effective August 13, 2010

The prior law provided that the court may extend an order of protection for a reasonable period of time upon a showing of "special circumstances." The amendment provides for such an extension upon a "showing of good cause or consent of the parties." In addition, the fact that no abuse occurred during the original order is not, in itself, a reason to deny extension of the order. The court must articulate a basis for its decision on the record.

Service of orders of protection

FCA 153-b, SSL 240, DRL 252 amended, effective July 30, 2010

The amendment permits the service of temporary and final orders of protection by fax or other electronic means as defined by CPLR 2103.

FCA 153-b, DRL 240 (3-a) amended, effective August 30, 2010

This amendment requires peace or police officers to serve, without charge, temporary and final orders of protection, including application to extend and petitions for violations of orders of protection. Lifting the burden from victims of domestic violence of arranging for service of orders of protection is considered essential to the effort to make civil prosecution in Family Court an effective avenue of relief, especially if the victim did not want to prosecute in criminal court, where such provisions were already authorized by statute. Once the order of protection or temporary order is served, the officer shall provide the court with an affirmation/affidavit of service and shall provide notification of the date and time such service to the statewide computer registry established pursuant to Sec. 221-a of the Executive Law.

Orders of protection to protect witnesses: FCA 352.3, amended, new subdivision (1-a), effective November 30, 2010

Where a court makes a finding that the respondent in an order of protection proceeding previously or is likely to intimidate a witness in the proceeding, the court has discretion to issue an order against the respondent to refrain from intimidating the witness, as defined by Penal Law 215.15, 215.16 and 215.17.

Penal Law 130.00 and 260.31 amended, effective October 13, 2010

The definition of "sexual contact" is expanded, and the exemption for marital rape is removed.

Restoration of parental rights: Article 6 of the FCA, amended, new part 1-A, effective November 11, 2010

This statute provides a process for a petition to restore previously terminated parental rights under certain circumstances.

Abandoned Infant Protection Act: Penal Law 260.03 repealed, Penal Law 260.00, 260.10 and 260.15, amended, effective August 30, 2010

This statute provides that a person is not guilty of the crime of abandonment of a child when s/he abandons the child with the intent that the child be safe from physical injury and cared for in an appropriate manner, the parent leaves the child with an appropriate person or in a suitable location and promptly notifies an appropriate person of the child's location, and the child is not more than 30 days old. It also increases the age of the child from 5 days to 30 days old.

Real property liens: CPLR 5203 amended, new subdivision c, effective August 30, 2010

In matrimonial actions, where there is an award of real property, often there is a delay between the time a court makes the property award and the time the prevailing party reduces the award to final judgment and it is docketed in the county where the property is located. Since docketing determines the priority of the lien, the delay causes havoc to the prevailing party because the losing party can file for bankruptcy prior to the lien being filed and thereby undermine the integrity of the award. To redress this problem, the Administrative Judge proposed this amendment, which deems a state court award of real property senior in priority to a bankruptcy lien where the court makes the property award on the record (whether orally or in writing), the bankruptcy petition is filed on or after the date of the award, and the award properly is reduced to final judgment, entered and docketed within 30 days of the award. The date of the docketing of the order shall be deemed one day prior to the date of the determination for purposes of establishing priority against a bankruptcy proceeding.

E-Discovery: NYCRR 202.12(b) amended, effective August 18, 2010

On August 18, 2010, Uniform Rules for the New York State Trial Courts 202.12(b) was amended, effective immediately, in an effort to improve the way electronic discovery is handled. The new rule requires that at the preliminary conference, counsel for both parties shall be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery. Counsel may bring a client representative or outside expert to assist in the e-discovery discussions.

Cases of Interest

Court of Appeals Round-up

Concealing child born out of wedlock's paternity from husband is not considered egregious fault

***Howard S v. Lillian S*, 14 NY3d 431, 902 NYS2d 17 (4/29/2010)**

The husband (plaintiff) brought an action for divorce, on the grounds of cruel and inhuman treatment and adultery, and for fraud. Plaintiff alleged that the defendant (wife) concealed from him that one of their sons was the product of her adultery, which was confirmed by DNA testing shortly before he commenced his action. Plaintiff sought to have the defendant's conduct deemed "egregious" for purposes discovery and to limit his wife's share of equitable distribution, and to recover the amounts he paid for child support expenses for the child, the fees for the parties' collaborative law process, and profits from the couple's investments.

The Supreme Court denied the defendant's motion to dismiss or sever the cause of action for fraud, and denied the plaintiff's cross-motion for liberal discovery, holding that the defendant's conduct did not rise to the level of egregious fault. The Appellate Division affirmed.

The Court of Appeals also affirmed, holding that "[egregious conduct] should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the [marital] assets." Here, because defendant's conduct neither endangered the physical well-being of her family nor was deliberately done to inflict emotional or physical abuse upon them, her conduct did not rise to the level of egregious fault which may be considered in determining equitable distribution. At most, it simply provided the factual basis for the plaintiff's action for divorce on the grounds of adultery.

Author's note: If this is not egregious, I don't know what is. The court continues to use a narrow definition of "egregious conduct" to mean only in situations of extreme abuse or attempted murder.

Three high court cases were decided on the same day involving "equitable estoppel." Two such cases, *Debra H* and *H.M.*, involved same-sex couples which reached the opposite conclusion on a similar set of facts.

***Debra H v. Janice R*, 14 NY3d 576, 904 NYS2d 263 (5/4/10), *lv to reargue denied*, 15 NY3d 767, ___ NYS2d___ (7/1/10)**

A former same-sex partner of a six year old child's biological mother brought an action for child custody and

visitation, seeking joint legal and physical custody of the child who was born during the parties' Vermont civil union but conceived through artificial insemination prior to the parties' union. The biological mother rebuffed the partner's repeated requests to become the adoptive parent.

The partner moved for a hearing on whether she stood in loco parentis to the child and whether the biological mother should be equitably estopped from denying the partner's parental relationship with the child. The Supreme Court, New York County, granted a hearing, and the biological mother appealed. The Appellate Division reversed.

The Court of Appeals reversed, holding that under Vermont law, the partner was a "parent" of the child and as a matter of comity, the partner was a "parent" of the child for purposes of conferring standing to seek visitation and custody under New York law. The court upheld *Alison D* as good law, and therefore the equitable estoppel doctrine could not be invoked to bar the child's biological mother from denying the partner's parental relationship with the child since she is neither the adoptive nor the biological parent of the child.

***H.M. v. E.T.*, 14 NY3d 521, 904 NYS2d 285 (5/4/2010), *on remand*, 76 AD3d 528, 906 NYS2d 85 (2d Dept 8/3/10)**

This case also involved a same-sex couple who conceived a child through artificial insemination from an anonymous donor, although they were not legally married nor had a civil union. The non-biological partner did not adopt the child. Both parties participated in the child's care after the child's birth. Four months after the child's birth, the parties' relationship ended. During their ten-year separation, the former partner continued to send monetary gifts to the child.

The biological mother of the child petitioned to have her former same-sex partner adjudicated a parent of the child, and sought an award of child support. The Support Magistrate granted the former partner's motion to dismiss for lack of jurisdiction. Subsequently, the Family Court granted the biological mother's objections and reversed the dismissal, and ordered a hearing on whether the same-sex partner should be equitably estopped from denying parentage and support obligations. The Appellate Division reversed.

On appeal, the Court of Appeals reversed in a 5-3 opinion, and held that the Family Court had subject matter jurisdiction to adjudicate the biological mother's petition for child support. The matter was remanded to the Appellate Division to determine whether H.M.'s petition sufficiently states a cause of action for child support. The Second Department held that where the same-sex partner of a child's biological mother "consciously chooses, together with the biological mother, to bring that child into the world through AID [Artificial Insemination by Donor], and where the child is conceived in reliance upon the partner's implied promise to support the child, a cause of action for child support under Family Court Act article 4 has been sufficiently alleged." The court remitted the matter to the Family Court for a hearing on the issue of whether E.T. should be equitably estopped from denying her responsibility to support the child.

***Juanita A. v. Kenneth Mark N.*,15 NY3d 1, 904 NYS2d 293 (5/4/10)**

In an action seeking adjudication of paternity and award of child support, the mother had led the putative father, Kenneth, to reasonably believe he was not the child's father. The mother acquiesced in the development of a close relationship between the child and another man, Raymond, who lived with her and was the biological father of the child's older and younger siblings; this man was listed as the child's father on the child's birth certificate, and the child had referred to him as her father for most of her life. Therefore, the putative father could properly assert an equitable estoppel defense to prevent the child's mother from asserting biological paternity (even though he acquiesced in genetic testing and was determined to be the biological father) because the child's best interests would not be served by having someone else declared her father.

It should be noted that when the child was seven, during a family dispute, she became aware that Raymond may not be her biological father. The mother called the biological father Kenneth, and had the child speak to him for ten minutes on the phone and question him about his physical characteristics. Raymond did not permit any further contact between Kenneth and the child. Five years later, the mother brought this proceeding.

The matter was remitted to the Family Court for a hearing to determine whether it would be detrimental to the child's best interest to disrupt the relationship that the mother already established between the child and Raymond.

Where down payment of marital home derived from separate property, but mortgage paid during the marriage, marital home deemed "marital property"

***Fields v. Fields*, 15 NY3d 158, 905 NYS2d 783 (2010)**

The parties were married for nearly 30 years and had one child. The wife was 60 and the husband 69 years old at the time of the divorce. Eight years into the parties' marriage, the husband, with his mother's assistance, purchased a five-story Manhattan townhouse for $130,000 with 10 apartments and a basement. (At the time of trial, the townhouse was valued at $2,625,000.) The townhouse was purchased by the husband with a $30,000 down payment. One-half of those funds were received by the husband from his grandparents and the remaining one-half was from a loan that the husband's mother

was responsible for paying. The balance of the purchase price, $100,000, was paid through two mortgages paid off during the parties' marriage. While the townhouse was initially purchased in the husband's sole name, he later converted one-half of his interest to his mother.

The husband and his mother managed the townhouse through a partnership. The rent proceeds were deposited into a partnership bank account, from which the mortgage payments were made. The major factual disagreement between the majority and dissent is whether the husband commingled marital property with the arguably separate property partnership account where rent proceeds were deposited. The majority finds that the husband did, and the dissent finds that the husband did not.

The parties lived in the townhouse and raised their son there. They paid rent for the use of the apartment and basement. Similarly, the husband's mother occupied three apartments and paid rent for the use of them. The court found that both parties were employed and made economic and non-economic contributions to the marriage, their child and the townhouse.

The matter was heard by a Referee who recommended that the townhouse be classified as marital property and that the wife receive 35% of the husband's one-half interest in the townhouse based upon her direct and indirect contributions to the townhouse, less his $30,000 down payment which was separate property. The Supreme Court confirmed the Referee's report. The Appellate Division affirmed, with two justices dissenting.

The Court of Appeals affirmed. The Court reasoned that since the husband's $30,000 down payment paid for only a fraction of the cost of the townhouse, and the husband was unable to prove that the mortgage payments, which paid for the remaining $100,000 of the purchase price, were paid solely from rent proceeds (the majority holds that the husband testified that he commingled the funds in the partnership account with marital property), he failed to rebut the "statutory presumption" that the townhouse was marital property. (***Author's note:*** The majority discusses a "statutory presumption that a residence acquired during the marriage is marital property." First, this presumption is rebuttable if it is shown that the property was acquired with separate property. Also, this rule does not only apply to marital residences, it applies to all assets). Therefore, the majority holds from the very beginning that the townhouse was marital property, and therefore, an appreciation analysis was never reached (unlike the determination by the lower court and Appellate Division).

The dissent reasons that the townhouse was the husband's separate property, and the only issue in the case should have been the appreciation in the value of the townhouse. The dissent found that the mortgage payments were repaid "entirely" from rental proceeds and clearly rejects the factual finding that the partnership account was commingled with marital funds. The dissent goes one step further to say that if the mortgages were paid back in part with marital funds, that this would make the interest in the townhouse, in part, marital. Great time was invested by the dissent to set forth why the majority erred in concluding that the partnership account was commingled with marital funds. In sum, the difference between the majority and the dissent is less about the interpretation of the law in this area, and more about interpretation of the facts in the record regarding this account.

Other Cases of Interest

Downward modification denied: receipt of Social Security benefits by itself is not sufficient proof of inability to work

Karagiannis v. Karagiannis, 73 AD3d 1064, 901 NYS2d 669 (3d Dept 2010)

The father failed to establish a substantial change in circumstances warranting a downward modification of his child support obligation where, although he was diagnosed with cancer in December 2007, he did not bring a petition seeking modification until May 2008 when he completed chemotherapy one month after filing the petition and his cancer was in remission. The mere fact that the father was receiving Social Security disability benefits does not, by itself, preclude the court below from finding that he is capable of working.

Relocation denied where mother relied on grandmother for child care

Messler v. Simovic, 73 AD3d 1180, 900 NYS2d 890 (2d Dept 2010)

The court below properly denied the mother permission to relocate to North Carolina, where she intended to live with the maternal grandmother, who would care for the child while the mother attended college to obtain a degree in special education. The court found that it was not in the child's best interest to uproot him from the only area he has ever known (the case does not state the age of the child), where he is thriving academically and socially, and where a relocation would qualitatively affect his relationship with his father, who visits with him on alternate weekends and twice a month mid-week for three hours.

Discovery of non-party witnesses

Kooper v. Kooper, 74 AD3d 6, 901 NYS2d 312 (2d Dept 2010)

In a divorce action, the wife sought discovery by subpoena duces tecum from five non-party financial institutions for certain financial records, including periodic statements for accounts in the husband's name for the time period January 1, 2002 through the present. The subpoena stated that "The circumstances or reasons said

disclosure is sought or required are to identify and value certain martial property, which is material and necessary in the prosecution or defense of this action."

The Appellate Division granted the plaintiff's motion to quash the subpoenas served on the non-parties because 1) the defendant's notice "amounted to no more than a statement that the information would be relevant and material and necessary to the prosecution or defense of the action," 2) defendant's opposition to the motion to quash failed to add to that showing and 3) the subpoenas were served before plaintiff's time to respond to discovery demands expired.

The *Kooper* court made clear that "special circumstances" do not have to be shown to successfully oppose a motion to quash a subpoena duces tecum served on a non-party. The only department that still holds that "special circumstances" must be shown is the Third Department. Nevertheless, *Kooper* reminds the bar that a mere showing that the documents demanded in the subpoena are material and necessary is not sufficient. The party must also set forth the circumstances or reasons that such disclosure is sought or required.

While the court specifically declined to set forth a list of what circumstances and reasons would be sufficient to withstand a motion to quash a subpoena because the court has discretion based on the relevant facts of the case, the court set forth a few examples as follows:

1. "a party's inability to obtain the requested disclosure from his or her adversary or from independent sources"; (It is to be noted that courts have held that a significant factor in determining whether there were "special circumstances" was whether the disclosure sought was material and necessary and could not be obtained from a party or other independent source. Therefore, while the *Kooper* court dispenses with the need to prove "special circumstances," the very same analysis employed to prove same is given as an example to prove "circumstances and reasons" for the disclosure.);
2. "conflict in statements between the plaintiff and nonparty witness";
3. "unexplained discontinuance of the action against the witness, formerly a party";
4. "previous inconsistencies in the nonparty's statements."

Kooper does not address whether a failure to set forth the circumstances and reasons that such disclosure is sought in the subpoena or in an attached notice will prove fatal, or whether same can be alleged in opposition to a motion to quash. The Fourth Department holds that a subpoena is facially defective if it fails to set forth the circumstances and reasons for the disclosure in the subpoena or attached notice. The First Department holds that the subpoena is not facially defective under these circumstances and may be remedied by showing the circumstances and reasons in response to a motion to quash. The Fourth Department, in *dicta*, followed this reasoning. *Kooper*, also in *dicta*, appears to follow the First Department's reasoning since it looked to the defendant's opposition for an additional showing of circumstances and reasons for the disclosure, which the court found did not add to the showing.

Endnote

1. The language in the amended statute "any experts" is unclear. It does not state that both parties must disclose any retainer agreements with experts and to what extent those experts have been paid.

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