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Notes and Comments

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Appellate Division, First Department Attempts to Compromise the *Christian* Doctrine

Cases never cease to amaze me. The recent decision in *Kojovic v. Goldman*[1] appears to be an attempt by the Appellate Division in the First Department to compromise the Court of Appeals decision in *Christian*[2] that imposed a fiduciary relationship between husband and wife in the negotiation and execution of separation or settlement agreements. Upon the most questionable factual predicate, *Kojovic* failed to protect a wife from her husband's fraud and concealment of material financial information. The gross unfairness of the decision to an unmonied spouse is especially clear in this case when the decision by Justice Lobis in the court below, as well as the motion papers, to dismiss the wife's complaint for failure to state a cause of action and the responding arguments are carefully studied. Fortunately, since a motion was made to the Court of Appeals for leave to appeal (but characteristically denied) the record is readily found in any court library.

It is to be remembered that the husband in *Kojovic* moved to set aside the complaint for failing to state a cognizable cause of action. This was not a motion for summary judgment. However, rather than accepting the facts alleged by the wife to be true, as the court must on a motion to dismiss, the First Department, without so much as a dissenting opinion, ignored the facts pled, and came to its own conclusion that once an asset is disclosed, relevant facts that may affect the value of the asset may be concealed. The appellate court went on to inexplicably hold that a spouse with special knowledge of the value of an asset has no duty to disclose such facts even though the failure to do so would provide an extraordinary windfall profit to the spouse concealing such information . . . which was tantamount to ignoring the equitable principle of unjust enrichment. The law appears to be otherwise in all other judicial departments.

You decide for yourself. Consider the facts. A husband during the negotiations for a settlement of his divorce litigation with his wife forwards a letter through his attorney stating that he has no intention to sell his shares in a dot-com fledgling business, and later makes an untrue oral representation that there were no negotiation talks to do so. He further urges his wife to accept cash for the value of the dot-com business, rather than accept part of the shares in kind. The wife alleged all of such facts in her complaint, and the husband on his motion to dismiss did not deny that he made such false representations to her.

Shortly after the execution of their settlement agreement, the wife learned that not only was the husband's representation false, but he was in negotiations to sell the business at the time he represented he had no intention to sell it. A sale was consummated and the husband received $18 million for his shares.

After learning of such facts, the wife served a complaint alleging fraud, sought to rescind the agreement and receive her equitable share of the proceeds from the sale of the husband's shares.

Inside

Before reviewing the allegations of the complaint the reader should be conversant with the elements necessary to state a cause of action for fraud, which include the following:

1. That defendant made a false representation to a material fact;
2. That defendant knew the representation to be false;
3. That the representation was made for the purpose of inducing the plaintiff to rely upon it;
4. That the plaintiff relied upon the representation in ignorance of its falsity; and
5. That the reliance upon such representation created an injury to the plaintiff.[3]

The complaint contained, *inter alia,* the following allegations.

> 33. Mr. Goldman misrepresented his financial circumstances to then wife, Ms. Kojovic, in the June 4th Letter, *inter alia*, by advising her that "he will not again have the approval for the sale of any of his stock unless and until the company should be liquidated, which is not contemplated," and that his "restriction from selling any more stock has a negative impact on exercising the options" and that the "stock is now completely non liquid as it cannot be sold and will be subject to market, competitive and execution risk for several years."
>
> 34. Mr. Goldman misrepresented his financial circumstances to then wife, Ms. Kojovic, by failing to advise her in the June 4th Letter of the possible sale of Capital IQ to The McGraw-Hill Companies or its subsidiary, Standard & Poor's.
>
> 35. Mr. Goldman misrepresented his financial circumstances to then wife, Ms. Kojovic, by failing to advise her during the negotiations of their Stipulation of Settlement in the matrimonial actions of the possible sale of Capital IQ to The McGraw-Hill Companies or its subsidiary, Standard & Poor's.

Based on these facts, Justice Lobis in the matrimonial part of the court below held that the primary issue to determine is what the defendant knew about the sale, and when he knew it. She correctly held that on a motion to dismiss the complaint she was bound to construe the facts most favorably to the wife, and accept her allegations as true. Specifically, she referred to the allegations in the complaint regarding the husband's alleged misrepresentations and concealment of the sale. In essence, Justice Lobis concluded that the wife's complaint could not be dismissed for failure to state a cause of action, and she permitted discovery to go forward.

By contrast, the *Kojovic* appellate court granted the motion to dismiss and essentially ruled that although there is a duty by a spouse to disclose an asset, there is no corresponding duty to disclose its value . . . causing a dichotomy between rationality and irrationality. Expressed another way, does a spouse who is mandated by the *Christian* doctrine to act as a fiduciary during marriage need only do so with respect to but one-half of this rule and disregard the balance with impunity? Could Judge Benjamin Cardozo, one of our best and brightest jurists who sat on the New York Court of Appeals and the Supreme Court of the United States, have ever fashioned such a rule in a court of equity? Would his sense of fairness and equity compel a far different result? We think so! Consider his holding in *Beatty v. Guggenheim Exploration Co.*,[4] when he sat on the New York Court of Appeals and explained with terseness and clarity the application of equitable principles:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Although a constructive trust case, the legal principle cited in *Beatty, supra*, is even more applicable to spouses in matrimonial litigation.

Thereafter, Judge Charles S. Desmond, another distinguished Court of Appeals jurist, wrote for our high court in *Latham v. Father Devine*,[5] and similarly found: "A constructive trust will be erected whenever necessary to satisfy the demands of justice."

Finally, in yet another expression of the learned jurist deciding whether to invoke the powers of equity, Judge Cardozo concluded:

> Though a promise in words was lacking, the whole transaction, it might be found, was "instinct with an obligation" imperfectly expressed.[6]

The First Department never considered such judicial philosophy in coming to its conclusion in *Kojovic*. Rather, in reaching its decision and attempting to justify it, the court selectively quoted from *Christian* but failed to recite its most significant pronouncement:

> Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. There is a strict surveillance of all transactions between married per-

> sons, especially separation agreements. Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract. These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity. (Citations omitted). 42 N.Y.2d at 72; 396 N.Y.2d at 823.

With these words from the *Christian* decision in mind, it must be asked whether the First Department chose to ignore the mandate that created a fiduciary relationship between husband and wife when a separation agreement is negotiated? It must further be asked whether the First Department should have refused to enforce the agreement since it appears quite clear that it was born of and subsisting in inequity?

What is more shocking about this result, to dismiss the wife's complaint, is that the First Department has clearly held otherwise in the commercial sector, where it reasoned that the managing partners of a limited liability company who purchased the interest in realty from its other members were guilty of fraud and breach of fiduciary duty because they withheld from the other members that they were engaged in talks to sell the realty for about three times more than it had been appraised at. Despite disclaimers in the sales agreement, the court held in *Blue Chip Emerald LLC v. Allied Partners, Inc*.[7] that the sellers were "owed a duty of undivided and undiluted loyalty" and dismissed a motion to dismiss the complaint. The *Blue Chip* court went on to explain that the defendants had "no right to keep to themselves or misrepresent material fact."

The *Blue Chip* court made clear, in the context of a commercial case, that a fiduciary must disclose any information which could bear on the value of an asset. In this regard it is important to remember that the *Christian* court also commented that ". . . separation agreements must not be permitted to be employed as instruments for the improper exaction in the inducement of execution of unconscionable terms within the framework of inequitable conduct."

It has long been the law that any waiver contained in an agreement is voidable if it can be shown that it was obtained because of a fiduciary's failure to make full disclosure. As such, any waiver made by the wife in *Kojovic* should have been deemed void under the circumstances of the case, and should not have been sanctioned by the court.

Armed with such principles, the decision in *Kojovic* reveals its injustice. Although the court remarked that the facts were straightforward, not all of the facts were recited. Glaringly absent were the allegations in the complaint of the husband's oral and written misrepresentations that no deal was being discussed and no sale was being contemplated. Perhaps the *Kojovic* court was swayed by the facts that the parties were involved in but a six-year childless marriage and the wife did in fact receive a $1.15 million settlement, and $87,500 in maintenance for four years. However, Justice Lobis in the court below obviously disagreed, and failed to dismiss the complaint, believing that the alleged fraud was nevertheless actionable.

Kojovic makes the distinction between the concealment of an asset and the concealment of its value . . . which appears to be the very "distinction without relevance" that the appellate court accused the wife of making in its own decision. What is most perplexing is that the *Kojovic* court concluded that it was *irrelevant* that the husband had information concerning the sale or value of the business which he kept to himself, and then went on to blame the wife for not investigating the husband's misdeed.

Even viewed in the context of a short-term childless marriage, to deny the wife any interest in a marital asset, which produced a windfall to the husband of $18 million, seems unfair and unconscionable. I can't help but speculate what equitable principles Judge Cardozo would have brought to bear in this case to prevent such an unjust enrichment.

Endnotes

1. 35 A.D.3d 65 (2006).
2. 42 N.Y.2d 63 (1977).
3. *See Abbate v. Abbate*, 82 A.D.2d 368 (2d Dep't 1981).
4. 225 N.Y. 380 (1919).
5. 299 N.Y. 22 (1949).
6. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).
7. 299 A.D.2d 278 (1st Dep't.2002).

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The Marriage Toll: Prenuptial Agreements and the Tolling of the Statute of Limitations

By Elliott Scheinberg

Public Policy and Agreements

Albeit a slow churning process, public policy, as voiced by the legislature and the judiciary, is often a barometer that paces and marks legal evolution and forward thinking in society either by mirroring fluxes in principles, values, and mores,[1] clinging to time-honored societal tenets, or by adamantly declining to shed antiquated notions and perceptions. A collision of public policies makes for exciting decisions especially when one involves concerns over contractual enforcement between private parties.

In general, strong public policy favors individuals ordering and deciding their own interests through contractual arrangements, including prenuptial and postnuptial agreements.[2] The corollary to this principle is that policy interests favoring settlements are furthered only if settlements are routinely enforced rather than morphing into portals to litigation.[3] The usual and most important function of a court is to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare.[4]

However, the power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things; parties cannot make a binding contract in violation of law or of public policy.[5] A court must balance the weight of the public policy at issue, and the extent to which enforcement of a contract possibly undermines that policy, against the public interest in seeing private agreements enforced.[6]

In *New England Mut. Life Insurance Co. v. Caruso*,[7] the Court of Appeals emphasized the governing principle when issues implicate or touch on public policy concerns:

> Generally, parties may contract as they wish and the courts will enforce their agreements without passing on the substance of them. Their promises are unenforceable only when statute or public policy dictates that the interest in freedom to contract is outweighed by an overriding interest of society. Courts refuse to enforce contracts in such cases because they wish to discourage undesirable conduct by the parties or others and to avoid use of the judicial process to give effect to an unsavory transaction. Freedom of contract itself is deeply rooted in public policy, however, and therefore a decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties.

Clash of Policies: Marriage v. Statute of Limitations

Not surprisingly, the Court of Appeals has observed that "notably, in matrimonial cases, public policy considerations abound."[8] What is, therefore, the result when public policy favoring agreements between parties clashes with a statute of limitations? Tapering this question a bit, what if the agreement is a prenuptial agreement? Assume that a party dissatisfied with a prenuptial agreement challenges the agreement at the time of divorce after the six-year statute of limitations to rescind an agreement (CPLR 213(1)) has expired (rescission is an equitable remedy with a six-year statute of limitations[9]).

There are two premises at odds. The first, although freedom of contract is deeply rooted in public policy,[10] it is settled law that an agreement between two private parties, no matter how explicit, cannot change the public policy of this State,[11] so that parties may not enter into agreements that require or lead to the termination of a marriage.[12] The second premise is that the legislature did not toll the statute of limitations for challenging prenuptial agreements during the tenure of the marriage. The inquiry does not end here. The potential consequences arising from these suddenly dueling policies must be further refined: Can regulations governing contractual enforcement mandate an outcome, which outcome would have been unquestionably void as against public policy, had the outcome been drafted as a substantive provision of the agreement by the parties themselves? Framed differently, can compliance with a statute be enforced in a manner such that the very outcome prohibited by public policy, the breakdown of a marriage, becomes a necessary by-product of the enforcement? Does our jurisprudence sustain an act of violence against public policy indirectly, which act would have been interdicted had it been done directly, a back door assault versus a front door assault?[13] Distilled into different language still, does strict compliance with a statute, the statute of limitations, supersede public policy even if such enforcement will undeniably extirpate marriages, ergo, a consequence void as against public policy due to the time-honored policy that the law fosters and preserves marriages (discussed below)?[14]

This is precisely the dilemma confronted by a spouse who has signed a prenuptial agreement and, depending on the county of residence, may have no choice but to initiate litigation to challenge the agreement during the course of a harmonious marriage prior to the expiration of the limitations period and risk certain disintegration of the marriage, or abandon the right to challenge the agreement once the statutory period has expired. In essence, enforcement of the CPLR potentially leads to the impermissible end that a contract between parties could never have accomplished had it been their intention to do so.

In essence, may the judiciary save the day by creating a tolling feature where none exists in the statutory scheme to foster the state's strong position favoring the preservation of marriage? Or must a disgruntled spouse do combat in a judicial arena prior to the expiration of the statutory period during the height of a viable marriage or be relegated to a permanent forfeiture of her rights to challenge the agreement?

Answer: departmental schism. The First Department, standing on public policy, firmly stands on the principle that marriage tolls the limitations period because it is in contravention of public policy to foment dissension and compel litigation amongst spouses, that litigation not be required until such time that the marriage has broken down with nothing left to preserve or salvage.

The Second Department insists that absent a legislative exception to the statute, courts are not free to carve out their own brand of exceptions. Thus, in the Second Department, a spouse dissatisfied with a prenuptial agreement must initiate litigation within the six-year period from its execution, irrespective of how happily married, or forever surrender the right to contest the agreement.

The First Department: *Lieberman, Zuch*

In *Lieberman v. Lieberman,*[15] a decision emanating from Supreme Court, New York County, the husband cross-moved, *inter alia*, for partial summary judgment to dismiss the wife's counterclaim seeking a judgment which rescinds and vacates in its entirety the parties' premarital agreement. The husband argued that an action for rescission of a prenuptial agreement is an equitable remedy[16] which is controlled by a six-year statute of limitations (CPLR 213(1)).

Noting settled state policy to protect marriages,[17] *Lieberman* held that public policy required the tolling of the statute as between spouses. To hold otherwise, *Lieberman* reasoned, would be repugnant to public policy, which fosters the preservation of marriage because lawsuits between spouses are not favored. A contrary ruling would have compelled Mrs. Lieberman to review and challenge the premarital agreement while the parties were still living together as husband and wife in an ongoing marital relationship and before their child was even three years old. Such a requirement would encourage lawsuits between spouses, dissension, and likely destruction of marriages rather than enhance marital relationships.

Lieberman reviewed New York's traditional recognition that pre- and postmarital agreements must be viewed differently from other types of contracts in which the parties are strangers to each other; the rules appropriate to commercial agreements cannot be strictly applied to spouses. *Lieberman* observed that during the course of a continuing marital relationship, and most likely more than six years down the road, it is conceivable that the parties would change their agreement, as often happens with testamentary dispositions. A surviving spouse's challenge to a premarital agreement and right to claim under a deceased spouse's estate or to abrogate a waiver of a statutory right of election (EPTL 5-1.1) are routinely entertained by the courts whatever the length of the marriage, it being doubtful that any such claims would otherwise have matured during the deceased spouse's lifetime. It would be illogical that the "event of divorce" clause and "the event of death" clause in the very same premarital agreement should be controlled by different statutes of limitation:

> In the face of such long standing and strong policy considerations, it would be anomalous to say that, irrespective of whether the marriage relationship is viable and continuing, the husband and wife must review their premarital agreement and assume adversarial positions with respect thereto within the first six years of their marriage or forever lose their right to challenge the agreement. Indeed, during the course of a continuing marital relationship, and most likely more than a mere six years down the road, it is conceivable that the parties would change their agreement, as often happens with testamentary dispositions.
>
> It would appear that the public policy of this state demands that the six-year statute of limitations applicable to challenges to premarital agreements be tolled until the parties physically separate or until an action for divorce or separation is commenced, or upon the death of one of the parties. This is consistent with the view of a majority of the states. As set forth in 3 Lindey, supra, section 90.16, p. 90-125: "Whatever statute [of limitations] may be applicable in a particular jurisdiction, the general rule is that the statute is tolled during the parties' marriage, as suits between spouses are not favored." See, also, 54 C.J.S., Limitations of Actions,

> section 111, p. 149. Similarly, section 8 of the UPA, which has been substantially adopted in 18 states, provides: "Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party."

Lieberman cited *Zuch v. Zuch*[18] wherein the First Department rejected a six-year statute of limitations in an action for a constructive trust between spouses because such a holding "would require a spouse to take affirmative action to preserve claims to potential marital assets even before there had been any hint of marital discord" or risk being barred by the statute of limitations. *Zuch* stated that such a ruling "flies in the face of logic and would be against public policy because it would critically undermine the underlying purpose of the equitable distribution statute and the vitality of marriages generally." The First Department could not tolerate or fathom a conclusion that would create such an intolerable result, especially as to marriages of long duration, where marital property had been acquired and placed in the name of one spouse, which would undermine the underlying purpose of the equitable distribution statute and the vitality of marriages generally. In essence, the First Department views a prenuptial agreement as a fail-safe against protracted and bitter litigation wherein the parties, in advance of their marriage, predetermine the conclusion. The First Department finds the logic defeating in compelling the parties to resort to the fail-safe at a time when nothing is going awry.

Although reversed by the Court of Appeals on other grounds, the Appellate Division, First Department, in *Bloomfield v. Bloomfield*,[19] reaffirmed the philosophical initiative and direction set forth in *Lieberman* and *Zuch*.

Second Department: No Exception to the Limitations Period

The Second Department strictly adheres to the statute and rejects an automatic tolling of the statute of limitations even during the viability of a marriage and the likely consequences of statutorily impelled litigation. *Pacchiana v. Pacchiana*[20] held that, absent continuing duress which tolls the six-year statute of limitations, a contract induced by duress or undue influence is voidable and the right to rescind accrues upon the execution of the contract; a cause of action to rescind the provisions of a marital agreement must be commenced within six years of the execution of the agreement.[21] *Pacchiana* rejected the notion that an antenuptial agreement remains executory until the death of either spouse and that no cause of action to void it can accrue until then.[22]

Zipes v. Zipes: Difference Between Pre- and Postnuptial Agreements

In *Zipes v. Zipes*[23] the wife counterclaimed to have two postnuptial agreements declared null and void. In holding the wife to the six-year statute of limitations, *Zipes* cleverly anchored its ruling on a "critically distinctive factor" between itself and *Lieberman*, to wit, that, even according to the wife, the *Zipes* marriage had ceased to be viable from well before the time the agreement was executed and continuing on until the time of the action. *Zipes* emphasized that the wife had been represented by counsel at each and every stage of the negotiations. The various agreements were signed precisely because this had been a troubled marriage. Accordingly, it could not be said that the statute of limitations was ever tolled in this case, and she could not hide behind the defense of the viability of the marriage:

> It would be wrong to hold that the Wife is permitted to take advantage of the Husband by knowingly agreeing to a property distribution which she believed was invalid at the time she signed it, a time when she was represented by counsel . . . By signing each of the agreements, the Wife represented to the Husband that each agreement was acceptable to her. Permitting her to knowingly enter into the agreement and now, more than eight years later, claim that the agreement was invalid, would itself be unconscionable under the circumstances of this case.

Although the *Zipes* distinction is very appealing, we will see, below, that the Court of Appeals is reluctant to sound the death knell even for marriages involving stormy separations.

In *Freiman v. Freiman*,[24] on the night before the wedding, the parties executed a prenuptial agreement which had been negotiated by their respective attorneys. The wife contended that she felt undue pressure to execute the agreement since the plaintiff insisted on its execution prior to the wedding. She further complained that the husband never provided her with the necessary documents relating to his financial status, and contends that it was not until later that she became aware that the husband possessed in excess of $10 million in assets and earned more than $600,000 per year notwithstanding the fact that they filed joint tax returns across many years. She further claimed that had she known this prior to the execution of the prenuptial agreement, she would never have agreed to accept the paltry sums afforded to her under the agreement.

The Court dismissed the wife's various counterclaims to set aside the prenuptial agreement on the ground that they were barred by the six-year statute of limitations. The Court, however, distinguished between a general

claim that the prenuptial agreement was unconscionable in its entirety and the claim that the spousal maintenance provisions alone are unconscionable. Overall unconscionability as to any property distribution contained in the agreement is governed by the six-year time limitation for equitable causes of action encompassed by CPLR 213(1). Unconscionability is not barred by any durational limitation when it relates to spousal maintenance provisions in the agreement because it is governed under DRL § 236B(3), to wit, that the amount and duration of maintenance must be fair at the time made and not be unconscionable at the time and entry of final judgment. Consequently, the maintenance provisions in the parties' prenuptial agreement were deemed not to be time-barred and reviewable for their conscionability at any time prior to the entry of final judgment, even if that date is well beyond six years after the execution of agreement.

Freiman noted the modern trend, expressed in Section 8 of the Uniform Premarital Agreement Act (9B ULA 379), and adopted by at least 18 states other than New York, that the statute of limitations on a spouse's cause of action challenging the validity of any aspect of an antenuptial agreement is tolled during the marriage and does not begin to run until one party physically separates from the other, or commences an action for divorce or separation, or dies.

Freiman distinguished the Court of Appeals pronouncements in *Scheuer v. Scheuer*[25]and *Dunning v. Dunning*,[26] which rejected the broad proposition that marriage tolls any statute of limitation pertaining to a cause of action one spouse may have against the other, on the grounds that those cases were decided 25-30 years prior to the enactment of DRL § 236B(3).

In *Dubovsky v. Dubovsky*,[27] the wife's complaint asserted three causes of action sounding in negligence, fraud, battery and misrepresentation, seeking compensatory damages based on her having contracted HPV from her husband. The husband asserted the defense of statute of limitations. The wife contended that her action was tolled during the marriage; that absent such a "marriage toll," she would be compelled by law to seek redress for her injuries at the cost of the destruction of the marital relationship. Although the Supreme Court agreed with such reasoning as prevalent in the First Department, it was constrained to follow governing law in the Second Department, which strictly enforces the six-year limitations period.

Dubovsky found further support within the statutory scheme that neither public policy nor any relevant statute or precedent tolled the statutes of limitations as evidenced by the statutes of limitations provisions in DRL §§ 140(e), 171(3), and 210. These statutes of limitations do not express a public policy determination that a spouse's claim against his or her spouse is tolled to protect a marriage until such time as the marriage is no longer viable. Rather, the clear legislative intent underlying the enactment of the statutes of limitations in the Domestic Relations Law was to implement the long-standing public policy which disfavors the granting of matrimonial relief on grounds which have been acquiesced in by the parties for years relating to "offenses" which are presumed by law to have been pardoned.[28]

In *Garguilio v. Garguilio*,[29] the Second Department held that the wife's contention that the agreement was invalid based upon the husband's fraudulent inducement was time-barred under both CPLR 213(8) and CPLR 203(g). The Appellate Division found that there was no question that the wife had ample opportunity years before to discover the husband's alleged fraud in inducing her to execute an "inequitable" agreement 17 years earlier. The court also rejected her claim that the husband waived the statute of limitations defense by not asserting it in earlier reply papers.

In re Neidich[30] involved an SCPA 1421 proceeding wherein the wife sought to assert her right of election regarding the decedent's estate, on the ground that her waiver of her right of election in the prenuptial agreement was void by reason of fraud, undue influence, and overreaching. The Appellate Division applied the various limitations periods and concluded that she was time-barred on all grounds because in the absence of continuing duress or undue influence, an action to rescind a prenuptial agreement accrues and the statute of limitations begins to run once the agreement is executed.[31] The court also stressed the wife's inability to explain her failure to discover the alleged fraud at the time she executed the prenuptial agreement by reading the document she signed. Finally, no marriage toll was recognized.

DeMille v. DeMille

In *DeMille v. DeMille*[32] the parties entered into a prenuptial agreement on September 17, 1988. In August 2002, the plaintiff filed for divorce wherein she sought to vacate the agreement on grounds that it was procured through misrepresentation, duress, and coercion, and unconscionability. The motion court held that the wife's attack on the agreement was not time-barred. The Appellate Division reversed because a prenuptial agreement is a contract[33] and an action for rescission is governed by a six-year statute of limitations in CPLR 213(1); that absent continuing duress or undue influence, an action to rescind a prenuptial agreement accrues and the statute of limitations begins to run once the agreement is executed.

The Second Department underscored the difference between the prenup as a sword and as a shield under the statutory scheme: citing the Practice Commentaries,[34] *DeMille* held that, pursuant to CPLR 203(d), once the six-year statute of limitations has expired, a defendant may attack the validity of a prenuptial agreement, but only as a defense in a counterclaim against a claim asserted by the plaintiff, never affirmatively to seek relief in the first

instance. Otherwise stated, under CPLR 203(d) a defendant may assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes; it does not permit the defendant to obtain affirmative relief.[35]

The Appellate Division observed that Mrs. DeMille could not have benefited from CPLR 203(d) since she as the plaintiff was seeking to affirmatively attack and set aside the prenuptial agreement because at the time she commenced her action the claims were time-barred pursuant to CPLR 213(2). Citing earlier Court of Appeals cases,[36] discussed below, *DeMille* further underscored its steadfast position that marriage does not toll the statute and no court has the authority to create such an exception to the statute of limitations.

Scheuer (1955) and *Dunning* (1950)

Scheuer v. Scheuer[37] and *Dunning v. Dunning*[38] have been cited repeatedly by the Second Department in support of the proposition that marriage does not automatically toll the statute of limitations. In *Scheuer* the wife sought to impose a constructive trust upon the marital residence which the husband purchased in his own name instead of joint names, as he had promised. The wife claimed that she had contributed 50% of the purchase price of the home. The husband continuously promised to rectify the situation and add her name to the house but never did. After the statute of limitations expired the husband admitted that it had never been his intention to do so. The Court of Appeals declined to adopt the position that an "abuse of the confidential relation" of marriage should allow for an estoppel of the statute of limitations: "the statute of limitations is not tolled merely because the parties are husband and wife."

In *Dunning*, a case based on promissory notes, the defense of statute of limitations was never pleaded or raised in a motion to dismiss. It was, therefore, unavailable and was not considered as a determinative factor on appeal. The principle for which it is cited originates in dictum wherein the appeals court noted, "we point out that no such exception [the Statute of Limitations does not run in favor of one spouse as against the other while they are living together] is found in article 2 of the Civil Practice Act, or elsewhere in our statutes, and the creation thereof is beyond the power of any court."

Scheuer has evolved, appearing in many constructive trust cases. Except for the philosophical differences between the First and Second Departments surrounding the marriage toll, *Scheuer* has been applied consistently in both departments.[39] *Scheuer*'s application is best summarized in *Accounting of Sakow*:[40]

> A constructive trustee may acquire property wrongfully thus holding it adversely to the beneficiary's interest from the date of acquisition, or he may wrongfully withhold property which he has rightfully acquired from the lawful beneficiary. In either case, the cause of action accrues when the acts occur upon which the claim of constructive trust is predicated, the wrongful withholding . . . Thus, it is irrelevant when the aggrieved party learns of the wrongful act giving rise to the action.

Augustine v. Szwed[41] involved the timeliness of the plaintiff's action to impose a constructive trust on the proceeds of life insurance on her husband's life, which were received by the defendant after his death. *Augustine*, citing *Scheuer*, examined the applicable statute of limitations to an action for a constructive trust: "The cause of action accrues when the property in dispute is held adversely to the beneficiary's rights. If the beneficiary knows, or should know of the circumstances giving rise to the constructive trust, he will be barred if he fails to act within the statutory period as measured from that date . . . the cause of action accrues when the acts occur upon which the claim of constructive trust is predicated, the wrongful withholding":

> [*Scheuer*] held that this cause of action arose on the date the deed was accepted because it was then that the promise was broken and that his ownership was adverse to his wife. Consistent with this ruling, it has been held that when parties agree that property will be acquired or held in one of their names with the understanding that it will be later transferred, the possession at the time of acquisition is not adverse and it does not become so until the promise to transfer is broken or repudiated.

Arnold v. Mayal Realty; Mack v. Mendels

In *Arnold v. Mayal Realty Co.*,[42] cited in *DeMille*, the plaintiff sought leave to bring in an additional defendant. The Court of Appeals stated that a statute of limitations was not open to discretionary change by the courts no matter how compelling the circumstances, and when given its intended effect such a statute is one of repose, and experience has shown that "the occasional hardship is outweighed by the advantage of outlawing stale claims."

Mack v. Mendels,[43] also cited in *DeMille*, stated:

> The Legislature determines under what circumstances the time limited by statute for commencing an action shall be suspended. The courts construe provisions made by the Legislature creating exceptions or interruptions to the running of the time limited by statute in which an action may be begun. They may not

> themselves create such exceptions . . . General language in judicial opinions must be regarded as merely a gloss on the text of the statute under consideration, not as the formulation by judicial authority of a general rule.

However, *Mack* addressed the application of a statutory toll, not a toll arising in equity making the case unrelated to the entire question of the marriage toll as an equitable remedy.

Guidance may also be sought from the principle that "the choice of the applicable Statute of Limitations is properly related to the remedy rather than to the theory of liability:[44] The general principle (is) that time limitations depend upon, and are confined to, the form of the remedy."[45] *Johnson v. Albany & S.R. Co.*[46] elucidated the concept and facilitates the understanding of the role of a statute of limitations:

> The statute of limitations [has] never paid a debt, although it [has] barred a remedy . . . The moral obligation to pay always remains, although the remedy cannot be enforced in the courts. This moral obligation was always a good consideration for a subsequent promise to pay . . . Some distinction has been suggested, mainly upon the question of pleading, between a debt barred by the statute of limitations and the obligations of a debtor discharged under the insolvent laws; but it is, I think, nowhere held that a debt is paid because the remedy of the party to enforce it is suspended or gone. At all events, it is not too much to say that a party who claims to have paid a debt by a successful plea of the statute of limitations, and seeks an affirmative remedy on the ground of such a fortunate venture, is not to be regarded as the especial favorite of a court of equity.
>
> The judgment could only be the more effective if it extinguished the debt or the moral obligation to pay; but by the law of this State [the statute of limitations] does not have that effect. This statute, it may be suggested, can be used as a shield, but not as an aggressive weapon, and is entirely like the statute giving the presumption of payment in respect to a sealed obligation after twenty years. It is available as a bar to an action, but ineffectual where a party seeks affirmative relief, based upon the fact of payment. Where such relief is sought, payment in fact must be shown. An insolvent's discharge or a successful defence of the statute of limitations will not answer.

Mack, Scheuer, Dunning

Mack, Scheuer, Dunning, et al. notwithstanding, ongoing duress is an equitable consideration that extends the unimpaired right found in the statutory scheme (see, *Johnson, supra*)—enforcement of a contract by tolling the statutory period of limitations, in essence it is a non-statutory (equitable) remedy that tolls a statutorily enumerated event.

Greene v. Greene

Citing, *inter alia*, *Pacchiana, supra, DeMille v. DeMille*[47] concluded that "no court has the authority to create such an [marriage] exception to the statute of limitations."[48] *Pacchiana* without analysis or discussion cites the Court of Appeals decision, *Greene v. Greene*,[49] which, aside from the coincidence of the identity of names of the parties, is not a matrimonial action. The facts in *Greene* arose out of the plaintiff's action against her former attorneys seeking rescission of a trust agreement and an accounting for mismanagement of her fund, including self dealing.

The two primary issues in *Greene* were: (1) whether the plaintiff had stated a cause of action for rescission and (2) whether the cause of action was barred by the statute of limitations.

In 1964, when the plaintiff was a college sophomore, she received treatment for a mental illness at a hospital. She remained a patient at that facility and a related one until 1967. While in those institutions the plaintiff was approached by a family lawyer (not associated with the defendants) and at his urging signed a trust agreement, dated February 5, 1965, in which she virtually surrendered to him all management and control over her inheritance for her lifetime. Upon her release from the hospital in 1967 she retained the defendants to have the 1965 trust agreement set aside. The court concluded that the attorney who drafted the agreement and later became the trustee was chargeable with overreaching.

A few months after the decision the defendants drafted a new trust agreement for the plaintiff in 1969. This 1969 agreement designated her as a cotrustee of the fund. The other trustee was the defendant Theodore Greene, a member of the defendant firm but not related to the plaintiff. That automatically renewable agreement also compensated the attorneys very generously for the management of the fund including relieving themselves of ordinary fiduciary liability arising from investments which "are not of the type customarily made by trustees."

In 1977 the plaintiff terminated the trust and commenced the action. The plaintiff alleged that her trust funds were invested in companies which were clients of the defendant law firm or in which partners of the law

firm had an interest as investors, officers or directors, without full and adequate disclosure to the plaintiff.

Finding many commonalities in *Greene* that parallel the origin of "the doctrine of continuous treatment" in medical and legal malpractice cases, the First Department held that the plaintiff's right of action did not accrue until she became aware of the alleged breach of the fiduciary relationship and terminated the trust. The Court of Appeals affirmed.

The Court of Appeals rejected the defendant-attorneys' argument to strictly impose the statute of limitations, to wit, that the cause of action be deemed to have accrued at the time the client was "induced" to sign the agreement because the plaintiff's action for rescission was based on the special rule applicable to contracts between an attorney and his client, which does not rest on a theory of fraud or undue influence. *Greene* noted that although the doctrine of trust that reposes in the professional originated within the realm of medical malpractice cases it logically extended to other professions as well:

> In a broader sense, the rule recognizes that a person seeking professional assistance has a right to repose confidence in the professional's ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered . . . On this basis the continuous treatment rule has been held applicable to other types of professionals, including lawyers.

Greene made two critically defining statements:

- In medical malpractice cases the continuous treatment doctrine is now controlled by statute; but with respect to other types of professional dereliction, judicial authority has been left intact, and
- *The operative principle may also be applicable in other situations, including claims for equitable relief*.[50]

The Court of Appeals reasoned that "a client who entrusts his assets to an attorney for professional assistance often faces the same dilemma as the client who entrusts his case to an attorney for possible litigation."

> In neither instance can the client be expected, in the normal course, to oversee or supervise the attorney's handling of the matter, and thus in neither case is it realistic to say that the client's right of action accrued before he terminated the relationship with the attorney.

The parallel application is inescapable with respect to an ongoing marriage; the Court of Appeals specifically stated, "the operative principle may also be applicable in other situations, including claims for equitable relief," and rescission is an equitable remedy, and divorce and all ancillary relief is an action in equity.

Speaking of *Greene*, Prof. Vincent Alexander[51] notes that "the approach taken in *Lieberman* is analogous to the judiciary's evolution of the 'continuous treatment' toll in professional malpractice cases . . . The purpose of the continuous treatment doctrine is to avoid destroying an ongoing client-professional relationship with a lawsuit. Surely the husband-wife relationship is equally deserving of a toll with respect to an agreement the very purpose of which is to prevent strife and secure peace between the parties. See 2 Williston on Contracts § 270B, p. 160 (3rd ed. 1959)."

> Subsequent developments in the law demonstrate that the recognition of a toll in this context lies within the judicial power . . . The purpose of these tolls is to avoid destruction of an ongoing client/patient relationship with a lawsuit. The marital relationship is equally deserving of preservation, and the toll adopted in *Bloomfield* serves this goal. Agreements that are designed to avoid marital strife should not become the precipitating events that lead to dissolution within the first six years of the marriage.

Hernandez v. New York City Health and Hospitals Corp.

That the Court of Appeals has declined to impose a cold absolute reading of the statute of limitations without an examination of its human consequences is evidenced in *Hernandez v. New York City Health and Hospitals Corp*.[52] In *Hernandez,* the decedent died intestate at a New York City hospital, leaving her infant son as her sole distributee. Letters of guardianship were eventually issued to the decedent's niece, who was granted authority to commence the wrongful death action. The plaintiff was granted leave to file a late notice of claim. The defendant moved to dismiss as time-barred. The Court of Appeals held that the statute of limitations was tolled until the appointment of the infant's guardian.

Hernandez' Perfect Storm of Statutes Would Have Favored a Strict Application of the Limitations Period

In a perfect storm of a "confluence" of statutes[53] that would have brought about a harsh result on the decedent's child, "who [would] bear the full burden of dismissal of the claim" via a strict application of the statutes, the Court of Appeals instead found room to create an exception to the statute:

> We decline to reach that unnecessarily harsh result, and instead would construe the toll of CPLR 208 to apply until the

> earliest moment there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first.
>
> This result strikes the appropriate balance among competing policy considerations. On the one hand, Statutes of Limitation serve to bar stale claims, adding an element of certainty to human affairs . . . Against this important interest must be weighed the fairness of not unreasonably denying a claimant the right to assert a claim (emphasis provided).

Bloomfield: A Lost Opportunity; Not Unlikely the Court of Appeals Would Affirm the First Department

When the Court of Appeals granted leave to hear *Bloomfield* it was much anticipated that the schism between the First and Second Departments—divided sharply along philosophical lines—would be resolved. Regrettably, the appeals court passed on the opportunity. Nevertheless, we have two cases arising outside the matrimonial domain wherein the Court of Appeals not only applied a newly crafted toll, as in *Greene*, but also, in *Hernandez,* in *deus ex machina* fashion crafted a toll as indicative of its reluctance to render decisions with unduly harsh consequences, where equitable considerations were integral to the decision.

It can, therefore, not be overemphasized that if the appeals court acted in this manner with respect to these cases that it could hardly be imagined that it would decide differently if presented with the rift that separated the First and Second Departments.

Notwithstanding Its Strict Adherence to the Statute of Limitations the Second Department Recently Resolved a Contest Between Competing Public Policies in Marital Contests in a Manner That Broadened Rather than Restricted Marital Rights

Kessler v. Kessler

In *Kessler v. Kessler,*[54] the Second Department recently resolved a contest between two competing concerns: (1) resolution of marital disputes as set forth in the terms of the agreement, and (2) the leveling of financial disparity between spouses to assure that matrimonial outcomes are not predetermined based on "the weight of the wealthier litigant's wallet."[55] The approach was consistent with the spirit in *Greene* and *Hernandez*.

The Second Department awarded the wife counsel fees to seek property distribution notwithstanding a provision in the prenuptial agreement that could have dictated a contrary result. The court thus favored a ruling consistent with the spirit and public policy of the right to pursue equitable distribution.

Kessler underscored that the right to resolve a dispute by contract, although favored, has never been without limitation; that the state is deeply concerned with marriage and "courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." Indeed, *Kessler* continued, in numerous contexts, agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general":

> (1) contracts may not violate any law or public policy; and
>
> (2) the State retains a supervisory role in matrimonial matters exercising heightened scrutiny beyond that afforded contracts in general:
>
> (i) taint by fraud and duress;
>
> (ii) amounts and duration of spousal maintenance "must be fair and reasonable at the time [] made, and not unconscionable at the time of entry of final judgment . . .";
>
> (iii) spouses may not contractually relieve each other of the requirement of support to the extent that either may become a public charge
>
> (iv) the child support recitations and calculations subject to continuing judicial discretion;
>
> (v) unenforceability of custody provisions in prenuptial agreements; and
>
> (vi) relocation of children.

In light of *Greene* and *Hernandez*, it is especially difficult to understand how or why the Second Department approached this issue so liberally and by the same token adheres to a strict enforcement of the statute of limitations. Clearly, the foundation of marriage and its preservation can hardly be considered less sacred than the enforcement of the ancillary rights arising from the marital relationship.

Public Policy Favors the Preservation of Marriages

It is settled public policy that the law's purpose is to preserve rather than to destroy the marriage institution: "strong public policy" favors the continuity of marriage

which finds expression in statutes and in case law.[56] The broad foundation in which the statutory rule is imbedded is the uncompromising determination of the state to preserve the important incidents of the marriage relationship during its continuance whatever the contrary sentiments of the parties themselves may be.[57] Current policy echoes traditional views. At no former period has it been more emphatically the dictate of sound public policy to preserve sacredness of a marriage relation, by protecting its confidence and guarding against discord and dissension.[58] In *Haymes v. Haymes*,[59] the Appellate Division stated:

> . . . common sense teaches that it is consistent with the public policy of this state that couples enduring marital disharmony should be encouraged to attempt reconciliation, particularly when, as here, the marriage is one of long duration. That the courts should, when practicable, encourage the preservation of families, in all their permutations, is so painfully obvious, that the lack of appellate authority so declaring can only be explained by the failure heretofore of anyone to contest such a basic proposition.

In *Schlachet v. Schlachet*,[60] the supreme court stridently stated:

> It is the public policy of our state to honor marriage and perpetuate its continuance. Statutes and judicial precedents bar any attempts, innocent or insidious, to interfere with, deprecate or destroy our government's interest in protecting and preserving the family unit, sanctified by marital vows.

Contracts to Alter Marriage, Void

Contracts against public policy are illegal.[61] Where an agreement is void because it is in violation of the prohibition against contracts to alter or dissolve the marriage, the entire agreement must fall;[62] however, the severability doctrine applies with equal effect where the bar of the statute applies because the agreement is one to alter the marriage status.[63] The Court of Appeals, pointing to the state's deep interest in the preservation of marriage, declared that every agreement between husband and wife must be viewed in the light of this continuing interest of the state.[64] This is in tandem with the principle set forth in *In re Wilson Sullivan Co.*,[65] that if a statute and the common law rule can stand together, the statute should not be so construed as to abolish the common law rule, so that the common law sentinel position of zealous guardianship of the vitality of marriages remains unimpeached.

The Legislature, Aware of Existing Common Law, Has in Recent Decades Shored Up Its Vigilance over Marriages

The Domestic Relations Law is a creature of the legislature[66] and the Court of Appeals has "recognized in numerous cases that the jurisdiction of the courts of this State in matrimonial actions is limited to such powers as are expressly conferred upon them by statute."[67] The legislature is presumed to be aware of the decisional and statutory law in existence at the time of an enactment, and to have abrogated the common law only to the extent that the clear import of the language used in the statute requires;[68] otherwise stated, it is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law.[69] It is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation.[70] Accordingly, it is a matter of law that the legislature has always remained aware of this foundational principle of public policy to protect marriages from disintegration, a policy which it has never abrogated.

The legislature is further presumed to have known the common law, and to have made its enactments with reference to the decisions of the courts.[71] By way of example, in 1859, Supreme Court noted the legislature's mindfulness of the common law in the enactment of legislation:

> Precisely so, in construing the [] acts of 1848 and 1849, we are to presume that the Legislature passed them with the knowledge of the husband's common law rights, and that these rights were not intended to be taken away any further than was necessary to secure to married women, as against their husbands, the free, sole, separate use, and enjoyment, and absolute disposition of their property. These are all the beneficial rights of property that could be conferred on them, or secured to them.[72]

Legislative vigilance of the common law remains a key tenet of statutory construction as embodied in Statutes § 301:

> a. Rule of strict construction: Generally, statutes in derogation of the common law receive a strict construction.
>
> COMMENT
> The Legislature in enacting statutes is presumed to have been acquainted with the common law, and generally, statutes in derogation or in contravention thereof, are strictly construed, to the end that the common law system be changed only so far as required by the words of the act and the mischief to be remedied.

> The common law is never abrogated by implication. Statutes in contravention thereof cannot be extended by construction or by doubtful implication, to include cases or matters not fairly within the terms of the act, or within the reason as well as the words thereof. Thus, rules of the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires.
>
> Among those statutes which have been deemed derogatory of the common law, and hence have received a strict interpretation are statutes abolishing dower; statutes permitting adoption; statutes preventing common-law marriages; statutes forbidding sales in bulk without notice; and statutes granting right to sue in forma pauperis.

Accordingly, it challenges reason that the legislature, aware of a history of judicial and legislative literature (the spousal privilege, see below) that have placed the preservation of marriage among the centerpieces of public policy, could be deemed to allow an interpretation of the statute of limitations in a manner that denudes this important public policy.

Public Policy to Foster Marriages as Evidenced through Spousal Privilege

Directly on point is the principle of spousal privilege, which is "designed to protect and strengthen the marital bond."[73] This concept is anchored in public policy that comprehends that many events are said and done[74] precisely because of the marital relationship "induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship"[75] and that it is "the dictate of sound public policy to preserve sacredness of a marriage relation, by protecting its confidence and guarding against discord and dissension."[76]

Another court phrased it this way:

> I hope the legislature will pause to inquire whether in this respect the ancient ways are not best and wisest; whether the marriage relation, which is the foundation of civilized society, is likely to be preserved in its purity, by laws which permit the parties to be constrained, against each other, to disclose whatever transpires in its privacy; and to testify for or against each other under the temptation of gain or the fear of "implacable discord and dissension."[77]

Presumption of the Viability of a Marriage; Troubled Marriages Are Inviolable Even During "Stormy Separations"; *People v. Fediuk*

In *People v. Fediuk*,[78] a case involving testimony by the wife against the husband, the Court of Appeals emphasized that a marriage may remain viably inviolate notwithstanding its navigation through troubled waters; that not even a separation for months sounds the death knell of the marriage:

> Communication between spouses is presumed to have been conducted under the mantle of confidentiality, a presumption that is not rebutted by the fact that the parties are not living together at the time of the communication, or that their marriage has deteriorated, for even in a stormy separation disclosures to a spouse may be induced by absolute confidence in the marital relationship.

People v. Oyola

In *People v. Oyola*[79] the father stood accused of having raped his daughter. The wife had the husband arrested after which time they were separated. The prosecutor called the wife to testify to a call from the husband following the arrest and separation wherein he admitted the crime. The wife testified:

> "it was true what he done"; "he [said he] was sorry for what he did to his daughter, and then I told him that I couldn't forgive him for what he had done to her" and "that he violated his rights as a father, and then he told me about this other woman that he had."

The appeals court stated that, the physical separation aside, the objection to introduction into evidence of the aforementioned statement should have been sustained on the ground that it was a confidential communication between husband and wife induced by the marriage relation: *Oyola* ruled:

> It is true that they had been living separately for a short time after appellant's arrest, but the circumstances indicate that (if spoken at all) this statement was part of an attempted reconciliation between husband and wife.

It challenges clear thinking to invoke the sanctity of the marital relation to shield the admission of so heinous a crime as rape of one's own child especially after the wife had the husband arrested and they were living apart—clearly, an already seriously devastated marriage—and, nevertheless, refuse to apply the same philosophy to what is tantamount to a certain destruction of the marriage via compelled litigation of a prenuptial agreement during an uncheckered marriage. It tests logic.

People v. Fields

In *People v. Fields*,[80] the wife was called as a rebuttal witness to testify to a telephone call she received from her husband shortly after certain shootings in which he told her of them and, because the couple had been living apart for several months and the defendant was in fact living with another woman, he asked permission to come to her apartment to stay for a while. She also testified to seeing a revolver of the kind used in the shootings in the defendant's possession some weeks before the shootings.

The district attorney sought to add an additional exception to the spousal privilege: that the purpose of the privilege is to preserve a normal marital relationship, and where the relationship no longer has a genuine existence no purpose remains in fostering the privilege. That once the husband was living with another woman the marital relationship had ended. Although extremely compelling the Appellate Division rejected the argument.

Fields: Courts Should Not Pass on the Viability of Marriages

Fields, citing *Oyola*, concluded that it is neither desirable nor sound for a court to preside over a determination regarding the viability of a marriage, to wit, when was it still sound, when was reconciliation a possibility, when did it become irretrievably broken as opposed to retrievably broken, etc.:

> the difficulty with the situation is a pragmatic one. It calls upon the trial judge in determining whether the proposed testimony is admissible to decide whether the marriage is viable, that is, whether there is a possibility of reconciliation. And while there are decisional hints that this ground of exception might attain recognition, the invariable holding has been that the possibility of reconciliation has not been negated.

In light of the above, *Zipes*' test as to the viability of a marriage falls.

Stare Decisis

Arguing that *Scheuer* and *Dunning* are no longer applicable because of contemporary public policy reflected in the Equitable Distribution Law, supreme court, in *Freiman*, made a valiant effort, as a lower court, to strike antiquated thinking that has neither been abandoned nor formally addressed by the high court since 1950 (even though the Court had the opportunity to revisit this question in *Bloomfield*).

A review of the principle of *stare decisis* is instructive. Speaking in the context of a personal injury case, the Court of Appeals, in *Heyert v. Orange & Rockland Utilities, Inc.*, stated: "*Stare decisis* is, to be sure, not a rule of law, but a matter of judicial policy, and does not have the same force in each kind of case, so that adherence to or deviation from that general policy may depend on the kind of case involved, especially the nature of the decision to be rendered, and the result that may follow from the overruling of a precedent."[81]

In *Buckley v. City of New York*, the Court of Appeals stated while the longevity of a rule of law requires that its re-examination be given careful scrutiny and *stare decisis* is not to be cast aside lightly, longevity does not demand that its effect be given permanence. The continued vitality of a rule of law should depend heavily upon its continuing practicality and the demands of justice, rather than upon its mere tradition.[82] In *Bing v. Thunig*,[83] the Court of Appeals underscored the danger of becoming immutably and irretractably bogged down in a law whose practical vitality has long expired in the realm of justice:

> The rule . . . is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded. To the suggestion that stare decisis compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it. On the contrary, as this court [] declared, we would be abdicating "our own function, in a field peculiarly nonstatutory," were we to insist on legislation and "refuse to reconsider an old and unsatisfactory court-made rule."

In essence, the appeals court frowns upon a compelled mechanical perpetuation of an entrenched unjust rule that is "out of tune with the life about us."[84] With that in mind, it may be fairly posited that the Court of Appeals, in light of its decisions in *Greene*, *Hernandez, Fediuk*, and *Oyola*, might not reach the same conclusion it did over half a century ago and reintroduce the equitable remedy of the marriage toll were the issue reviewed today under broadened and pervasive contemporary thinking since the advent of equitable distribution.

The Marriage Toll as a Disability or Disabling Event Akin to Infancy and Intervening War

A parallel may be drawn between the cases in the First Department and the letter and the spirit of CPLR 208 (Infancy, Insanity)[85] and 209 (War)[86] in that each statute treats the condition set forth therein as a disabling event that tolls all legal consequences until the event has passed. A viable marriage similarly disables the disrupting event of mandatory litigation that would undoubtedly precipitate the downward spiral of the marriage. This

is not a ground-shattering concept because this already exists with regard to duress, supervening equitable relief that tolls the limitation period until the termination of the duress[87] without any outer limit.

Continuity of the outside force is the fuel that drives the toll of duress. Its rationale is that certain torts occur over a stretch of time, not just at the single identifiable moment when the cause of action accrues. When a plaintiff is subject to a "continuous wrong," the moment of accrual still determines when judicial relief is first available, but equity begins to run the limitations period from when the tortious conduct ceases. We presume that a plaintiff is unable to file suit so long as—but no longer than—she is subjected to a duress-based tort.[88] The marriage toll is, similarly, based on the continuity of the event, albeit not a tort but rather a socially desirable situation.

Limitation Periods as a Means to Avoid Stale Evidence

Leonard Florescue argues compellingly against the automatic marriage toll:[89]

> The other reason to apply the statute [of limitations] is one of fundamental equity. It is fair to say that the wealthy people who enter into prenuptial agreements would not have married without the agreement having been signed. Otherwise, why would they bother with the agreements? The Courts of this state have regularly held that such agreements are fully enforceable as other contracts are. These people entered into a marriage contract in reliance on that law.
>
> Now, take the poorer spouse. When the agreement is attacked it is not an academic exercise. He or she does not want to be put back where the parties would be without the agreement, i.e., unmarried and with no rights at all [rescission restores the parties to the original *status quo* before the agreement]. No, he or she wants all the rights of marriage without having to accept the obligations of the very document without which there would have been no marriage in the first place. Does that sound equitable to you? It doesn't to me and indeed it cries for an estoppel to be asserted. Also, why doesn't the enjoyment of the marriage itself (without the agreement, remember there is no marriage) constitute a ratification of the agreement?
>
> In short, on first principles alone, Prenuptial Agreements should be enforced, the statute of limitations should apply (unless tolled by one of the recognized statutory tolls such as continuing duress or recent discovery of the alleged fraud) and the concern for whether these attacks are raised in complaints or answers should be put out of our minds.

The argument that the statute of limitations is intended to encourage a timely action when the relevant evidence is fresh and available rather than at a time when witnesses and documentary evidence are no longer available is sensible and a linchpin in not perpetuating claims that cannot be supported. However, although this argument can defeat the indefinite tolling occasioned by continuing duress—after all, tolling is tolling irrespective of the cause, time marches on with the same results, evidence becomes stale, witnesses become unavailable, documents are no longer extant, etc.—it is not. An application of the tolling period to a viable marriage no more violates that which already exists in governing law for continuing duress.

In *Kaufman v. Cohen*,[90] the court observed that if the relief from a breach of a fiduciary duty seeks an equitable remedy, the relevant period is six years under CPLR 213(1), as to which there is no date-of-discovery accrual rule. Clearly, such a tolling can go on indefinitely, again, with the same concerns of stale and unavailable evidence and witnesses.

Conclusion

There is absolutely no dispute that claims of any kind grounded in duplicity must be rooted out. Bench and bar are long weary of the surfeit of baseless proceedings to vacate pre- and postnuptial agreements. In *Kojovic v. Goldman*,[91] the First Department expressed "its disdain for post-divorce claims of concealment." The dissent in *Gottlieb v. Such*[92] bemoaned "the prevalence of excessive post-divorce litigation" and the necessity "to find ways to discourage baseless post-judgment proceedings and offer instead protection against the enormous financial burden they entail."

In light of the appeals court's own language and reasoning in the various decisions cited herein, where contrary results would have been anticipated, it may be fairly submitted that this question remains wide open and that it is not implausible that, in the legal climate of the 21st century, the thinking in *Lieberman et al.* could well prevail, thereby consigning *Scheuer* and *Dunning* to the legal archives.

Endnotes

1. The most preeminent exception to this rule is evidenced by the fact that New York State remains the only state without a true no-fault statute.
2. *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 764 N.E.2d 950, 738 N.Y.S.2d 650 (2001); *In re Estate of Greiff*, 92 N.Y.2d 341, 703 N.E.2d 752, 680 N.Y.S.2d 894 (1998); *Christian v. Christian*, 42 N.Y.2d 63, 71-72, 396

N.Y.S.2d 817, 365 N.E.2d 849 (1977); *Trump v. Trump*, 179 A.D.2d 201, 582 N.Y.S.2d 1008 (1st Dep't 1992).

3. *Total MRI Management, LLC v. Greenfield Imaging Associates Imaging, LLP* 11 Misc. 3d 1062(A), 816 N.Y.S.2d 702 (Sup. Ct., Nassau Co. 2006).

4. *Miller v. Continental Insurance Co.*, 40 N.Y.2d 675, 389 N.Y.S.2d 565, 358 N.E.2d 258 (1976) (quoting *Baltimore & Ohio Ry. Co. v. Voigt*, 176 U.S. 498 (1900); *Chase Manhattan Bank v. New Hampshire Insurance. Co.*, 193 Misc. 2d 580, 749 N.Y.S.2d 632 (Sup. Ct., N.Y. Co. 2002)).

5. *Sternaman v. Metropolitan Life Ins. Co.*, 170 N.Y. 13, 62 N.E. 763 (1902).

6. *Chase Manhattan Bank v. New Hampshire Ins. Co.*, 193 Misc. 2d 580, 749 N.Y.S.2d 632 (Sup. Ct., N.Y. Co. 2002); *see New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d 74, 535 N.E.2d 270, 538 N.Y.S.2d 217 (1989).

7. *New England Mut. Life Insurance. Co. v. Caruso*, 73 N.Y.2d 74, 535 N.E.2d 270, 538 N.Y.S.2d 217 (1989).

8. (1) Spousal maintenance: *Hirsch v. Hirsch*, 37 N.Y.2d 312 (1975); (2) custody: *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin* 1 A.D.3d 39 (1st Dep't 2003); (3) child support: *Tompkins Co. Support Collection Unit ex rel. Chamberlin v. Chamberlin*, 99 N.Y.2d 328 (2003), and (4) counsel fees: *Kessler v. Kessler*, 33 A.D.3d 42, 818 N.Y.S.2d 571 (2d Dep't 2006). Prior to *Kessler* case law described counsel fees in public policy-like language even though *haec verba* were not used: *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).

9. Vincent Alexander, McKinney's Statutes Practice Commentaries, CPLR 213; C213:1. Omnibus Statute of Limitations, Equity Actions and Declaratory Judgments, In General: "The six-year "omnibus" or "residuary" provision of CPLR 213(1) generally applies to an action seeking equitable relief or a declaratory judgment. See D. Siegel, New York Practice § 36 (3d ed. 1999); *Fitzgerald v. Hudson Nat. Golf Club*, 11 A.D.3d 426, 783 N.Y.S.2d 615 (2d Dep't 2004); *Van Dussen-Storto Motor Inn, Inc. v. Rochester Telephone Corp.*, 63 A.D.2d 244, 407 N.Y.S.2d 287 (4th Dep't 1978); *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

10. *New England Mut. Life Ins. Co. v. Caruso*, 73 N.Y.2d 74, 535 N.E.2d 270, 538 N.Y.S.2d 217 (1989).

11. *Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 425 N.E.2d 810, 442 N.Y.S.2d 422, (1981); *Morris v. Snappy Car Rental, Inc.*, 189 A.D.2d 115, 595 N.Y.S.2d 577 (4th Dep't 1993).

12. *Winter v. Winter*, 191 N.Y. 462, 84 N.E. 382 (1908); *Stahl v. Stahl*, 221 N.Y.S.2d 931 (Sup. Ct., N.Y. Co. 1961); *In re Brenner's Will*, 44 N.Y.S.2d 447 (Sur. Ct., Westchester Co. 1943), *aff'd*, 268 A.D. 1001, 52 N.Y.S.2d 792 (2d Dep't 1944).

13. *Board of Educ., Hunter-Tannersville Cent. School Dist. v. McGinnis*, 100 A.D.2d 330, 475 N.Y.S.2d 512 (3d Dep't 1984) (Because public policy prevents parties from directly contracting away certain rights or responsibilities, the law will not permit them to achieve the same result indirectly).

14. *Weiman v. Weiman*, 295 N.Y. 150, 65 N.E.2d 754 (1946); *Bigaouette v. Bigaouette*, 135 N.Y.S.2d 719 (Sup. Ct., Kings Co. 1954); *Haas v. Haas*, 298 N.Y. 69, 80 N.E.2d 337 (1948).

15. *Lieberman v. Lieberman*, 154 Misc. 2d 749, 587 N.Y.S.2d 107 (Sup. Ct., N.Y. Co. 1992).

16. *See* endnote 9.

17. GOL § 5-311 declares void any agreement between a husband and wife which, by its terms, requires the dissolution of the marriage or provides for the procurement of grounds for divorce:

> Certain agreements between husband and wife void:
> Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce.

18. *Zuch v. Zuch*, 117 A.D.2d 397, 503 N.Y.S.2d 343 (1st Dep't 1986).

19. *Bloomfield v. Bloomfield*, 281 A.D.2d 301, 723 N.Y.S.2d 143 (1st Dep't), *leave to appeal granted*, 281 A.D.2d 325, 722 N.Y.S.2d 858 (1st Dep't), *rev'd*, 97 N.Y.2d 188, 764 N.E.2d 950, 738 N.Y.S.2d 650 (2001).

20. *Pacchiana v. Pacchiana*, 94 A.D.2d 721, 462 N.Y.S.2d 256 (2d Dep't 1983); *see Rubin v. Rubin*, 275 A.D.2d 404, 712 N.Y.S.2d 626 (2d Dep't 2000).

21. *See Rosenbaum v. Rosenbaum,* 271 A.D.2d 427, 706 N.Y.S.2d 890 (2d Dep't 2000), a cause of action to rescind the provisions of a marital agreement which allocates property must be commenced within six years of the execution of the agreement; *Anonymous v. Anonymous*, 233 A.D.2d 350, 650 N.Y.S.2d 589 (2d Dep't 1996) (The wife's action to rescind a prenuptial agreement 14 years after its signing on the grounds of duress and overreaching was held barred by the six-year statute of limitations (CPLR 213[1]).); *Katz v. Katz*, __ A.D.3d __, 830 N.Y.S.2d 268 (2d Dep't 2007).

22. *Rosenbaum v. Rosenbaum*, 271 A.D.2d 427, 706 N.Y.S.2d 890 (2d Dep't 2000).

23. *Zipes v. Zipes*, 158 Misc. 2d 368, 599 N.Y.S.2d 941 (Sup. Ct., Nassau Co. 1993).

24. *Freiman v. Freiman*, 178 Misc. 2d 764, 680 N.Y.S.2d 797 (Sup. Ct., Nassau Co. 1998).

25. *Scheuer v. Scheuer*, 308 N.Y. 447, 126 N.E.2d 555 (1955).

26. *Dunning v. Dunning*, 300 N.Y. 341, 90 N.E.2d 884 (1950).

27. *Dubovsky v. Dubovsky*, 725 N.Y.S.2d 832, 188 Misc. 2d 127 (Sup. Ct., Nassau Co. 2001).

28. *I.S. v. R.S.*, 117 A.D.2d 780, 499 N.Y.S.2d 106 (2d Dep't 1986) (Second Department held that where a wife had discovered that her husband had contracted a venereal disease more than five years prior to the commencement of the wife's divorce action, the action sounding in cruel and inhuman treatment, based upon the allegation that the husband had contracted such disease, was time-barred); *Rosenbaum v. Rosenbaum*, 271 A.D.2d 427, 706 N.Y.S.2d 890 (2d Dep't 2000) (wife moved to set aside a postnuptial agreement which provided that they would maintain their separate property and waived certain statutory inheritance rights; Appellate Division held that her counterclaim should have been dismissed because the cause of action to rescind the provisions of an agreement which allocates property must be commenced within six years of the execution of the agreement. The statute of limitations is not tolled during the marriage).

29. *Garguilio v. Garguilio*, 201 A.D.2d 617, 608 N.Y.S.2d 238 (2d Dep't 1994).

30. *In re Neidich*, 736 N.Y.S.2d 694, 290 A.D.2d 557 (2d Dep't 2002), *appeal denied*, 98 N.Y.2d 606, 774 N.E.2d 221, 746 N.Y.S.2d 456 (2002).

31. See CPLR 203[g], 213[8].

32. *DeMille v. DeMille*, 5 A.D.3d 428, 774 N.Y.S.2d 156 (2d Dep't 2004); *Iuliano v. Iuliano*, 30 A.D.3d 737, 817 N.Y.S.2d 174 (3d Dep't 2006) (The court denied the cross motion to set aside the prenuptial agreement on the ground that an action for rescission had a six-year statute of limitations and defendant's claim was time-barred. While a separate action for rescission was so governed, defendant was not time-barred from challenging the validity of the prenuptial agreement because this particular argument arose from,

and directly related to, the plaintiff's claim that the agreement precluded equitable distribution of his assets. "It is axiomatic that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the [s]tatute of [l]imitations, even though an independent action by defendant might have been time-barred at the time the action was commenced. Thus, to this extent, defendant's claim survives"); *see also DeMille v. DeMille*, 5 Misc. 3d 355, 784 N.Y.S.2d 296 (Sup. Ct., Nassau Co. 2004), and *DeMille v. DeMille*, 32 A.D.3d 411, 820 N.Y.S.2d 111 (2d Dep't 2006).

33. *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 764 N.E.2d 950, 738 N.Y.S.2d 650 (2001); *Rubin v. Rubin*, 275 A.D.2d 404, 712 N.Y.S.2d 626 (2d Dep't 2000).

34. *Citing* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B, C203:9.

35. *Citing Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 764 N.E.2d 950, 738 N.Y.S.2d 650 (2001); and *Rosenblatt v. Ackoff-Ortega*, 300 A.D.2d 137, 752 N.Y.S.2d 621 (1st Dep't 2002).

36. *Scheuer v. Scheuer*, 308 N.Y. 447, 126 N.E.2d 555 (1955); *Dunning v. Dunning*, 300 N.Y. 341, 90 N.E.2d 884 (1950); *Arnold v. Mayal Realty Co., Inc.*, 299 N.Y. 57, 85 N.E.2d 616 (1949); and *Mack v. Mendels*, 249 N.Y. 356, 359, 164 N.E. 248 (1928).

37. *Scheuer v. Scheuer*, 308 N.Y. 447, 126 N.E.2d 555 (1955).

38. *Dunning*, 300 N.Y. 341; *see Anonymous v. Anonymous*, 71 A.D.2d 209, 422 N.Y.S.2d 89 (1st Dep't 1979) (It has always been the rule that the statute of limitations applies in a proceeding between husband and wife where title to property is contested.) (*Scheuer*, 308 N.Y. 447; *Dunning*, 300 N.Y. 341).

39. *Mazzone v. Mazzone*, 269 A.D.2d 574, 703 N.Y.S.2d 282 (2d Dep't 2000); *Soscia v. Soscia*, 35 A.D.3d 841, 829 N.Y.S.2d 543 (2d Dep't 2006); *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003); *Jakacic v. Jakacic*, 279 A.D.2d 551, 719 N.Y.S.2d 675 (2d Dep't 2001); *Fiore v. Fiore*, 247 A.D.2d 362, 668 N.Y.S.2d 662 (2d Dep't 1998).

40. *Accounting of Sakow*, 219 A.D.2d 479, 631 N.Y.S.2d 637 (1st Dep't 1995); *Sitkowski v. Petzing*, 175 A.D.2d 801, 572 N.Y.S.2d 930 (2d Dep't 1991) (the plaintiff and defendant were living together with the intention of marrying. They entered into a contract to purchase a home as tenants in common, for $60,000 ($20,000 in cash and a $40,000 purchase money mortgage). Plaintiff alleged that, prior to the closing, they agreed that only the defendant's name would appear on the deed and that the defendant would at a later date transfer to the plaintiff a one-half interest in the subject property. In reliance on this promise, the plaintiff borrowed approximately $20,000 to pay the cash component of the contract. The defendant took the property in his name and thereafter repeatedly postponed signing a deed of conveyance to her. Defendant eventually directed plaintiff to leave the premises since he was its sole owner. *Sitkowski* set the matter down for a hearing as to the factual questions: (1) when the defendant allegedly breached the agreement by an identifiable, wrongful act demonstrating his refusal to convey a one-half interest in the property to the plaintiff and (2) whether the plaintiff's claim was therefore time-barred.).

41. *Augustine v. Szwed*, 77 A.D.2d 298, 432 N.Y.S.2d 962 (4th Dep't 1980); Augustine has been cited in other cases, including the Second Department, *e.g.*, *Maric Piping, Inc. v. Maric*, 271 A.D.2d 507, 705 N.Y.S.2d 684 (2d Dep't 2000), which involved a constructive trust between business partners.

42. *Arnold v. Mayal Realty Co.*, 299 N.Y. 57, 85 N.E.2d 616 (1949).

43. *Mack v. Mendels*, 249 N.Y. 356, 164 N.E. 248 (1928); *King v. Chmielewski*, 76 N.Y.2d 182, 556 N.E.2d 435, 556 N.Y.S.2d 996 (1990); *Chapin v. Posner*, 299 N.Y. 31, 85 N.E.2d 172 (1949).

44. *Powers Mercantile Corp. v. Feinberg*, 109 A.D.2d 117, 490 N.Y.S.2d 190 (1st Dep't 1985); *Sears, Roebuck & Co. v. Enco Associates, Inc.*, 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977).

45. *Sears, Roebuck & Co. v. Enco Associates, Inc.*, 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977).

46. *Johnson v. Albany & S.R. Co.*, 54 N.Y. 416 (1873); *Quadrozzi Concrete Corp. v. Mastroianni*, 56 A.D.2d 353, 392 N.Y.S.2d 687 (1977); *see also Abbate v. Abbate*, 82 A.D.2d 368, 441 N.Y.S.2d 506 (2d Dep't 1981), for an analysis.

47. *DeMille v. DeMille*, 5 A.D.3d 428, 774 N.Y.S.2d 156 (2d Dep't 2004).

48. *DeMille, citing, Scheuer v. Scheuer*, 308 N.Y. 447, 126 N.E.2d 555 (1955); *Dunning v. Dunning*, 300 N.Y. 341, 90 N.E.2d 884 (1950); *Arnold v. Mayal Realty Co.*, 299 N.Y. 57, 85 N.E.2d 616 (1949); *Mack v. Mendels*, 249 N.Y. 356, 164 N.E. 248 (1928).

49. *Greene v. Greene*, 56 N.Y.2d 86, 436 N.E.2d 496, 451 N.Y.S.2d 46 (1982).

50. The history of the statute shows that the legislature's sole concern was to create a special and more restrictive statute in medical malpractice cases (*see, e.g., Simcuski v. Saeli*, 44 N.Y.2d 442, 406 N.Y.S.2d 259, 377 N.E.2d 713). It was not designed as an overall recodification or abrogation of judicial principles relating to the timeliness of all types of malpractice actions. Thus in medical malpractice cases the continuous treatment doctrine is now controlled by statute; but with respect to other types of professional dereliction, judicial authority has been left intact.

51. Practice Commentaries, McKinney's Statutes, CPLR 213, C213:1. Omnibus Statute of Limitations.

52. *Hernandez v. New York City Health and Hospitals Corp.*, 78 N.Y.2d 687, 585 N.E.2d 822, 578 N.Y.S.2d 510 (1991).

53. *Hernandez*: "the pertinent EPTL, SCPA and CPLR provisions in this case thus gives rise to an unusual—perhaps unique—problem. EPTL 5-4.1 grants the personal representative procedural authority to bring the wrongful death claim; SCPA 1001 and 707 make it impossible for anyone to assume that role until a guardian is appointed for the infant sole distributee; and CPLR 208 speaks of tolling the Statute of Limitations when the person entitled to bring the action is under a disability at the time of accrual. In that a wrongful death action accrues at the time of death, mechanical application of CPLR 208 is impossible unless the position of the infant/sole distributee under the SCPA is ignored."

54. *Kessler v. Kessler*, 33 A.D.3d 42, 818 N.Y.S.2d 571 (2d Dep't 2006).

55. *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).

56. *Weiman v. Weiman,* 295 N.Y. 150, 65 N.E.2d 754 (1946); *Bigaouette v. Bigaouette,* 135 N.Y.S.2d 719 (Sup. Ct., Kings Co. 1954).

57. *Haas v. Haas,* 298 N.Y. 69, 80 N.E.2d 337 (1948).

58. *Pillow v. Bushnell* (Sup. Ct., N.Y. Co. 1849).

59. *Haymes v. Haymes*, 221 A.D.2d 73, 646 N.Y.S.2d 315 (1st Dep't 1996), *appeal after remand*, 252 A.D.2d 439, 675 N.Y.S.2d 593 (1st Dep't 1998).

60. *Schlachet v. Schlachet*, 84 Misc. 2d 782, 378 N.Y.S.2d 308 (Sup. Ct., Kings Co. 1975).

61. *Johnston v. Fargo*, 184 N.Y. 379, 77 N.E. 388 (1906); *Chase Manhattan Bank v. New Hampshire Insurance*. Co., 193 Misc. 2d 580, 749 N.Y.S.2d 632 (Sup. Ct., N.Y. Co. 2002).

62. *Winter v. Winter*, 191 N.Y. 462, 84 N.E. 382 (1908); *Stahl v. Stahl*, 221 N.Y.S.2d 931 (Sup. Ct., N.Y. Co. 1961); *In re Brenner's Will*, 44 N.Y.S.2d 447 (Sur. Ct., Westchester Co. 1943), *aff'd*, 268 A.D. 1001, 52 N.Y.S.2d 792 (2d Dep't 1944).

63. *Taft v. Taft*, 156 A.D.2d 444, 548 N.Y.S.2d 726 (2d Dep't 1989); *Morgenstern v. Morgenstern*, 27 A.D.2d 560, 276 N.Y.S.2d 66 (2d Dep't 1966); *Stahl v. Stahl*, 16 A.D.2d 467, 228 N.Y.S.2d 724 (1st Dep't 1962).

64. *Haas v. Haas*, 298 N.Y. 69, 80 N.E.2d 337 (1948).

65. *In re Wilson Sullivan Co.*, 289 N.Y. 110, 44 N.E.2d 387 (1942); *Childs v. Moses*, 265 A.D. 353, 38 N.Y.S.2d 704 (1st Dep't 1942).

66. *Seitz v. Drogheo*, 21 N.Y.2d 181, 234 N.E.2d 209, 287 N.Y.S.2d 29 (1967); *Northrup v. Northrup*, 43 N.Y.2d 566, 373 N.E.2d 1221, 402 N.Y.S.2d 997 (1978).

67. *Langerman v. Langerman*, 303 N.Y. 465, 104 N.E.2d 857 (1952); *Lacks v. Lacks*, 41 N.Y.2d 71, 359 N.E.2d 384, 390 N.Y.S.2d 875 (1976).

68. *Arbegast v. Board of Educ. of South New Berlin Cent. School*, 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985); *B & F Bldg. Corp. v. Liebig*, 76 N.Y.2d 689, 564 N.E.2d 650, 563 N.Y.S.2d 40 (1990); *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 623 N.E.2d 547, 603 N.Y.S.2d 420 (1993); *People v. Robinson*, 95 N.Y.2d 179, 733 N.E.2d 220, 711 N.Y.S.2d 148 (2000); *Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565 (1930); *Pekelnaya v. Allyn*, 25 A.D.3d 111, 808 N.Y.S.2d 590 (1st Dep't 2005); *Morris v. Snappy Car Rental, Inc.*, 189 A.D.2d 115, 595 N.Y.S.2d 577 (4th Dep't 1993).

69. *Hechter v. New York Life Ins. Co.*, 46 N.Y.2d 34, 385 N.E.2d 551, 412 N.Y.S.2d 812 (1978); *Tzolis v. Wolff*, 829 N.Y.S.2d 488 (1st Dep't 2007); *Fleury v. Edwards*, 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964) (It is not unprecedented that the common law and the statute should continue to exist side by side).

70. *In re Delmar Box Co.*, 309 N.Y. 60, 127 N.E.2d 808 (1955); *Transit Commission v. Long Island R. Co.*, 253 N.Y. 345, 171 N.E. 565 (1930).

71. *People ex rel. Smith v. Hoffman*, 166 N.Y. 462, 60 N.E. 187 (1901).

72. *Vallance v. Bausch*, 17 How. Pr. 243, 8 Abb. Pr. 368, 28 Barb. 633 (N.Y. Sup. Gen. Term 1859).

73. *People v. Mills*, 1 N.Y.3d 269, 804 N.E.2d 392, 772 N.Y.S.2d 228 (2003).

74. *People v. Dudley*, 24 N.Y.2d 410, 248 N.E.2d 860, 301 N.Y.S.2d 9 (1969), the privilege covers acts not only speech; *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949), the applicable general rule which we have applied in this state, and which has the support of the weight of authority throughout the United States, is that the term communication means more than mere oral communications or conversations between husband and wife. It includes knowledge derived from the observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing. An act may communicate knowledge to the known observer and repose a confidence in him as clearly and unmistakably as if accompanying descriptive words were uttered.

75. *People v. Mills*, 1 N.Y.3d 269, 804 N.E.2d 392, 772 N.Y.S.2d 228 (2003); *Poppe v. Poppe*, 3 N.Y.2d 312, 315, 165 N.Y.S.2d 99, 144 N.E.2d 72 (1957), *rearg. denied*, 3 N.Y.2d 941 (1957); *People v. Dudley*, 24 N.Y.2d 410, 248 N.E.2d 860, 301 N.Y.S.2d 9 (1969); *Vanderbilt Rosner-Hickey*, 57 N.Y.2d 66, 73, 453 N.Y.S.2d 662, 439 N.E.2d 378 (1982).

76. *Pillow v. Bushnell* (Sup. Ct., N.Y. Co. 1849).

77. *White v. Stafford* (Sup. Ct., N.Y. Co. 1862).

78. *People v. Fediuk*, 66 N.Y.2d 881, 489 N.E.2d 732, 498 N.Y.S.2d 763 (1985); *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949): Certainly, the wife's knowledge gained by observance of defendant's conduct in bringing home stolen property in the early morning hours and storing it in different parts of the house and more particularly under his bed was the result of a confidential communication on his part. It cannot be supposed that the defendant would have so conducted himself except in reliance upon the free and unrestrained privacy of the marital relation and the socially desirable confidence which exists, and should exist, between husband and wife. The record makes plain that defendant made no effort to conceal or disguise his conduct at his home from his wife. He was, in a word, confiding in her the information disclosed by his conduct. "Its nature, and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact."

79. *People v. Oyola*, 6 N.Y.2d 259, 160 N.E.2d 494, 189 N.Y.S.2d 203 (1959).

80. *People v. Fields*, 38 A.D.2d 231, 328 N.Y.S.2d 542 (1st Dep't 1972).

81. *Heyert v. Orange & Rockland Utilities, Inc.*, 17 N.Y.2d 352, 218 N.E.2d 263, 271 N.Y.S.2d 201 (1966).

82. *Buckley v. City of New York*, 56 N.Y.2d 300, 437 N.E.2d 1088, 452 N.Y.S.2d 331 (1982).

83. *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

84. *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).

85. CPLR 208: If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues, except, in any action other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape.

86. CPLR 209: (a) Cause of action accruing in foreign country. Where a cause of action, whether originally accrued in favor of a resident or non-resident of the state, accrued in a foreign country with which the United States or any of its allies were then or subsequently at war, or territory then or subsequently occupied by the government of such foreign country, the time which elapsed between the commencement of the war, or of such occupation, and the termination of hostilities with such country, or of such occupation, is not a part of the time within which the action must be commenced. This section shall neither apply to nor in any manner affect an action brought pursuant to section six hundred twenty-five of the banking law against a banking organization or against the superintendent of banks.

    (b) Right of alien. Where a person is unable to commence an action in the courts of the state because any party is an alien subject or citizen of a foreign country at war with the United States or any of its allies, whether the cause of action accrued during or prior to the war, the time which elapsed between the commencement of the war and the termination of hostilities with such country is not a part of the time within which the action must be commenced.

    (c) Non-enemy in enemy country or enemy-occupied territory. Where a person entitled to commence an action, other than a person entitled to the benefits of subdivision (b), is a resident of, or a sojourner in, a foreign country with which the United States or any of its allies are at war, or territory occupied by the government of such foreign country, the period of such residence or sojourn during which the war continues or the territory is so occupied is not a part of the time within which the action must be commenced.

87. *Baratta v. Kozlowski*, 94 A.D.2d 454, 464 N.Y.S.2d 803 (2d Dep't 1983).

88. *Overall v. Estate of Klotz*, 52 F.3d 398 (2d Cir., 1995).

89. L. Florescue, Prenuptial Agreements: Claims and Defenses After "Bloomfield," 7/24/04, N.Y.L.J. 3 (col. 1). This article is required reading because it tackles key issues and raises questions not addressed by any other commentator on contracts or domestic relations.

90. *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dep't 2003).

91. *Kojovic v. Goldman*, 823 N.Y.S.2d 35 (1st Dep't 2006).

92. *Gottlieb v. Such*, 293 A.D.2d 267 (1st Dep't 2002).

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The Reluctant Teenager in Separation and Divorce Cases

By Roger Pierangelo and George Giuliani

Introduction

One of the most difficult functions facing court officials (e.g., law guardians, court-appointed therapists, and judges) is to determine the true motive behind the reluctance of a teenager to maintain visitation with a parent during separation and divorce cases. In order to fully understand the dynamics behind reluctance and the many possible motives, one must first explore the developmental characteristics and variables that influence teenagers in dealing with the stressors of separation and divorce.

The presenting problem first encountered by court officials is usually a rigid, non-negotiable stance by the teenager that involves "realistic reasons" for the reluctance of participating in visitation. If this presenting problem is taken at face value, which all too often occurs by untrained personnel, then the teenager may actually be placed in a compromising position that will aggravate his or her already stressful situation. Instead of immediately accepting the rationale of the teenager as fact, court officials need to be aware of the variety of underlying motives that all present in the same fashion, namely reluctance.

The first step in understanding the true motive behind the reluctant teenager is to understand the difference between symptoms and problems.

How Problems Generate into Symptoms

Dynamic or internal problems (e.g., conflicts, fears, insecurities) create tension. The more serious the problem, the greater the level of tension experienced by a **teenager**. When tension is present, behavior is used to relieve the tension. The more serious the problem/s the greater the tension, and the behavior required to relieve this tension becomes more immediate. As a result, the behavior may be inappropriate and impulsive rather than well thought out. Therefore, in some cases, reluctance may be a symptom of a deeper problem and not the actual problem itself.

When tension is very high it may require a variety of behaviors to relieve the dynamic stress. These behaviors then become symptoms of the seriousness of the problem. That is why the frequency and intensity of the symptomatic behavior reflect the seriousness of the underlying problem/s.

As the teenager becomes more confident or learns to work out his problems through therapy, the underlying problems become smaller. As a result, he or she generates less tension and consequently less inappropriate, impulsive or self-destructive behavior patterns.

If a teenager does not recognize or does not have the label for the problem, then the tension is usually released through some form of behavior, and in the case of the tension of separation and divorce, reluctance becomes the tension-reducing behavior. We call these outlets of tension behavioral symptoms. These behavioral symptoms are sometimes misidentified as problems and therefore treated as such. When this occurs the problem only gets worse. If one sees a fever as the problem, then treating that alone will exacerbate the problem. These behavioral symptoms become the first signal noticed by teachers, parents and professionals. Therefore, it is very important for court officials who are making decisions with serious implications to fully understand the difference between symptoms and problems. If this is not fully understood, a great deal of frustration will occur in trying to extinguish the symptom.

The identification of symptoms as an indication of something more serious is another first step in helping teenagers work out their reluctance.

Examples of typical symptomatic behaviors that may be indicative of more serious concerns may include the following:

-impulsivity
-reluctance
-fearful of adults
-fearful of new situations
-verbally hesitant
-hypoactive
-hyperactive
-fears criticism
-rarely takes chances
-moody
-defies authority
-anxious
-tires easily
-controlling
-overly critical
-forgetfulness
-painfully shy
-argumentative
-destroys property
-lazy
-inconsistency
-lies constantly
-gives many excuses for inappropriate behavior
-constantly blames others for problems
-panics easily
-distractible
-short attention span
-over-reactive
-physical with others
-intrusive
-unable to focus on task
-procrastinates
-inflexibility
-irresponsibility
-poor judgment
-denial
-daydreaming
-social withdrawal
-constant use of self criticism
-bullies other children
-needs constant reassurance

While many of these behaviors may indicate the presence of a problem, several guidelines can be used to determine the seriousness of the problem/s:

1. ***Frequency of Symptoms***—Consider how often the symptoms occur. The more serious the problem, the greater amount of tension generated. The greater amount of tension, the more frequent will be the need to release this tension. Therefore, the greater the frequency of the symptom, the greater the chance that the problem/s are serious.

2. ***Duration of Symptoms***—Consider how long the symptoms last. The more serious the problem, the greater the degree of tension generated. The greater the degree, the longer it will take to release the tension. Therefore, the longer the duration of the symptoms, the more serious the problem.

3. ***Intensity of Symptoms***—Consider how serious the reactions are at the time of occurrence. The more serious the problem, the more intense the level of tension coming off the problem will be. This level of tension will require a more intense release. The more intense the symptom, the more serious the problem.

Anger as an Insulating Emotion

Another factor in understanding the true motives of the reluctant teenager is to view anger as a lead emotion and perhaps not the real emotion. Panic, anxiety, vulnerability, fear, guilt, emotional pain or hurt are all emotions that use anger as the lead emotion. That is why there are such high levels of rage and anger between individuals who go through separation and divorce. Most of these emotions are experienced during this process and become insulated by anger. To view someone as angry may actually be missing the real emotion which lies behind it. Therefore, in the case of the reluctant teenager, it is very important to find the emotions that lie behind the anger and determine why they developed in the first place. That eventually allows for repair since the opposite of love is not anger but apathy. Anger assumes hope, and court officials need to see the fact that the teenager may not be able to sort out or label what it is he or she feels or what he or she lacks in the relationship with the specific parent he /she is resistant to seeing.

Six Factors that Need to be Addressed by Court Officials in the Cases Involving the Reluctant Teenagers and Visitation

Before any decision on the reluctance of teenagers and visitation can be made, it is imperative that court officials ascertain certain answers that may affect the outcome of the decision.

1. **Determine the motive, personality, and expectations of the parent, and the prior history of the parent/child relationship:** Court officials will need to determine the parent's motive for restoring the alienated relationship. It is very crucial to determine how genuine this motive is and make sure that the underlying reasons are not connected to revenge, anger, control or a desire to reverse child support.

   Along with the parent's motive will be the need to determine how the parent's personality style and ego strength may impact on the teenager and his or her reactions during treatment. The parent will have to be coached on the difficulty that he or she may have in restoring the relationship. The parent will need to understand the true resistance behind the teenager's behavior and work with court officials on a successful outcome. Over-reactive, controlling parents, or parents with low self-esteem may have to be worked with individually to help them understand and tolerate the process.

   Court officials need to look at the parent's history of intimacy and involvement with the child prior to the onset of reluctance. A relationship between a parent and a child that has a positive history prior to the divorce has a better prognosis and will be easier to repair. Building a relationship that never was will involve much more work. As a result, the parent's expectations on progress will need to be realistic so that frustration and rejection do not occur.

2. **Determine the etiology (real cause) of the teenager's reluctance:** Court officials will need to determine the etiology (real cause) of the teenager's reluctance. This is a crucial factor since the surface reason is rarely the real motive in these cases. If a decision is made without fully knowing the real motive behind the reluctance, serious permanent damage may occur in the teenager's psychological and emotional development. There are 12 possible reasons for teenager reluctance in separation and divorce cases. These include:

   A. **Divorce-related depression and anxiety:** Reluctance toward visitation with a parent may stem from the mental status of the child as a result of the trauma resulting from the damaging experiences of separation and divorce and not the relationship with that specific parent. If this factor can be determined as the motive behind the reluctance, then it will need to be addressed and the reluctance should not be considered as unwillingness to be with the other parent, only an avoidance of the total divorce process. Teenagers who are motivated by divorce-related depression and anxiety lack the energy for any involvement and may feel that any interaction will intensify an already hostile environment with which

the child feels totally unable to cope. Warning signs of divorce-related depression or anxiety may include:

- **Loss of spontaneity:** Normally playful children may become moody
- **Low self-esteem:** Feelings of worthlessness, comments about being stupid or unimportant
- **Poor self-care:** Poor grooming, excessive disorder in a formerly neat child's room
- **Excessive sadness or moodiness:** Prolonged withdrawal from people or moodiness, disinterest in favorite activities
- **Irrational fears or clinginess:** Fear or avoidance of normally safe people, places and things; intense crying and separation anxiety when leaving family members or friends
- **Sleep problems:** Unwillingness to go to bed, difficulty falling asleep, waking up in the middle of the night, nightmares, recurring bedwetting, refusal to wake up or go to school
- **Poor concentration:** Chronic forgetfulness, missed homework assignments, or decline in grades for an extended period
- **Inappropriate anger:** Excessive frustration, frequent angry outbursts, fights with schoolmates or siblings, yelling at parents
- **Drug or alcohol abuse:** Experimenting with tobacco, medications, household substances, drugs, or alcohol
- **Sexual promiscuity:** Engaging in sexual activity that ultimately threatens to damage your child's emotional or physical health
- **Self-injury, cutting:** Finding relief from emotional pain by inflicting physical pain or taking excessive physical risks that result in injury
- **Suicide:** Talk of killing oneself, making plans to end one's life, suicide attempts. *Immediately contact a suicide prevention organization or a mental health organization in your area.*

B. Not knowing how to bridge the relationship: Reluctance on the part of teenagers toward visitation may be nothing more than just not knowing how to bridge the relationship, especially after months or years of non-involvement with the parent. In this case, the teenager is not unwilling to have a relationship but lacks the skills or ego strength to initiate or design the "road back" to a healthy relationship. While the symptom again is the same, namely rigid resistance, the motive is very different and the repair is very positive if the court officials have determined this to be the underlying motive behind the reluctance. The degree of desire is sometimes measured by the level of anger toward the other parent since anger assumes hope. The teenager maintains the anger toward the parent to maintain some connection and in some manner send the parent messages, sometimes cryptic, about what needs to be done to win the child back.

C. Fears of betrayal to the other parent: There are times when the teenager's reluctance in seeing a parent may result from the teenager's belief that the other parent will feel betrayed by the child's relationship with the other parent. While this may not necessarily be communicated or felt by the parent, these feelings of guilt are generated by the teenager's experiences with the intense anger and hatred exhibited by the parents toward each other. As a result, the teenager feels that any relationship with one parent will be seen as a betrayal of loyalty by the other. This factor increases dramatically if the intense hatred is verbalized or acted out by one parent toward the other.

D. Discomfort and confusion over the parent's involvement with another person: There are times when a teenager's reluctance with visitation may center around a new relationship in the life of his or her parent. This new relationship can trigger off a series of emotional reactions from issues of replacement for a daughter if the father is involved with someone else, need for protection of the mother by the son if the father is involved with someone else, anger over replacing the father for a daughter if the mother is involved with someone else, or fears of betrayal against a parent which may occur in having a relationship with this other person. Many times a spouse will have a very serious reaction resulting from the reality of finality, replacement, etc. when the ex-spouse has someone else enter their lives. The teenager may be very sensitive to this reaction forcing a hesitation in visitation with the involved parent.

E. Resistance as a result of an older sibling's reluctance in having a relationship with the parent: Sometimes a teenager's reluctance to visitation can result from an older sibling's resistance to seeing the parent. The indirect

influence or overt influence of this older sibling can make it almost impossible for the teenager to visit without repercussions. This fear can become even greater if the teenager is the only sibling in the family to want a relationship with the other parent. In this case, the teenager faces the possibility of alienation of his or her family over his or her decision to have a relationship with the other parent.

F. **Parent alienation:** Parent alienation, which is not parent alienation syndrome, occurs as a result of realistic and valid reasons involving prior or ongoing emotional, physical or sexual abuse, prior neglect or some other tangible pattern of behavior that has caused the teenager reluctance because of safety issues. This issue is a very crucial one to determine since some parents are very convincing to the court that the reluctance on the part of the teenager is from the influence of the other parent.

G. **Hostile Parent Behavior:** Sometimes a teenager's reluctance toward visitation with a parent results from the hostile behavior of a parent. In our opinion, there are three states of hostile behavior that greatly affect the psychological well-being of children and mold their opinions and feelings for one of their parents. In order of severity, these are: (1) Subtle Passive State; (2) Hostile Indirect State; and (3) Hostile Direct State.

Subtle Passive State

In the first case, the parent provides subtle messages to the children, such as looking angry or becoming quiet to the children when they are leaving to see the other parent. Nothing overt is said. However, this act of emotional removal creates enormous tension within the children because the loss of approval by the parent is interpreted as a loss of love, one of the most frightening of the fears of children.

Hostile Indirect State

In the second case, the parent may argue over the phone with the other parent with the children in close proximity. The arguments can become emotionally turbulent, and many hostile words can be said. However, since the conversation has taken place over the phone, the children will hear only one side. The parent will then get off the phone and be nice to the children. Regardless, the damage is done and the child gets the clear message—don't mess with me or make me unhappy.

Hostile Direct State

The third state, Hostile Direct, is the most serious type. In this case, the parent doesn't care who is around, and exhibits the most out-of-control behavior possible (e.g., hitting a parent or throwing things in front of the children). The messages here are threefold: (1) "No one can stop me"; (2) "I will do anything I want"; and (3) "Do not trust this man or woman." This type of behavior has the most negative effect on children. Not only do such acts constitute a serious issue of emotional instability on the part of the parent, but they indicate a complete disregard for the emotional well-being of the children. In our experience, if Hostile Direct State is occurring, then it is almost certain that the two other levels are also being used.

H. **Hurt in the form of anger and resistance to test the sincerity and dedication of the parent:** There are times when the teenager's reluctance to visitation may be a test of the parent's sincerity in their desire to restore or have a relationship with their child. This may occur in instances where the parent has been alienated from the child for a long period of time and the child does not believe the parent's intentions for reconciliation are genuine. Since anger assumes hope, the teenager's continued anger toward the parent is a test that this time the parent will not give up. The problem here is that in many cases if this motive is not fully understood, then the parent gives up, believing the child wants nothing to do with him/her.

I. **Interference with friends and social life:** Sometimes, a teenager's reluctance may be as simple as not wanting to miss out on a Saturday or Sunday with their friends. While teenagers may not be able to clearly or maturely verbalize this, the need for socialization at this age is crucial and a priority in the child's life. Knowing this and working around it through compromise is crucial to maintaining the visitation schedule. However, misinterpreting the teenager's reluctance in this case can have far-reaching effects on the future of his or her relationship with the parent.

J. **Identification with the aggressor:** This is a concept that can readily be seen in teenagers during hostile stages in separation and divorce. According to Frankel (2002), when we feel overwhelmed by an inescapable threat, we "identify with the aggressor" (Ferenczi, 1933). Hoping to survive, we sense and "be-

come" precisely what the attacker expects of us—in our behavior, perceptions, emotions, and thoughts. Identification with the aggressor is closely coordinated with other responses to trauma, including dissociation. Over the long run, it can become habitual and can lead to masochism, chronic hypervigilance, and other personality distortions.

But habitual identification with the aggressor also frequently occurs in people who have not suffered severe trauma, which raises the possibility that certain events not generally considered to constitute trauma are often experienced as traumatic. Emotional abandonment or isolation, and being subject to a greater power, are such events. In addition, identification with the aggressor is a tactic typical of people in a weak position (Frankel, 2002). What often happens with teenagers who are in this type of weakened state is that they will side with whom they perceive as the most aggressive and potentially rejecting parent against the other parent in hopes that the aggressor will not turn on them. The teenager's behavior in this case will too often be to always make excuses for not wanting visitation, feigning illness, wanting to go home early, creating tension to cause shortened visitation and outright refusal to go on visitation.

K. Parent dependency syndrome: There are times when a parent will not intentionally alienate his or her children from the other parent but will instead create an unhealthy dependency through a series of subtle and/or emotional reactions. The need for this type of dependency often arises out of the parent's own fears of isolation and abandonment, low self esteem, a lack of adult anchors or meaningful relationships or sometimes unresolved issues from his or her past. While not an alienation process, the secondary effects of Parent Dependency Syndrome result in an unwillingness of the children to leave the dependent parent. The reactions of the dependent parent give the children the message that the parent is a victim, unhappy without them, in turmoil if they are not with him/her, and can only survive if the children stay with him/her. Examples include:

"It's O.K.; I'll find something to do when you are not here"

"Mommy/Daddy will miss you so much when you are with Daddy/Mommy"

"I get so sad when you leave me"

"I will be here waiting for you to come home"

"I will wait for your call"

Such guilt makes it very hard, if not impossible, for the children to leave the parent's orbit. The effects on children of this dependency syndrome can be seen not only in the unwillingness to leave the parent but may also limit the children from venturing out to new social, educational, recreational, and any other experiences that would leave the parent "alone." What inevitably occurs is an extreme limitation of the children's safety zone, the area in which the children feel safe.

L. Gender and birth order: Perhaps the most troublesome response of some adolescents to the divorce of their parents is to attempt to fill the role they perceive to be filled in the past by one of their parents. Some parents make this worse by encouraging this kind of behavior as indicating "maturity" on the part of their child (Divorceinfo, 2007).

In this case the reluctance of the teenager to visitation with the other parent results from either the male seeing himself as the protector of the mother, especially if he is the oldest sibling or the only male in the family. Likewise, the daughter may see herself as the replacement for the father's lack of female connection and see her relationship with her father as special. In this case, she will protect and take care of him resulting in reluctance toward visitation with the mother.

3. Determine the level of civility of the parents: The greater the civility between the parents, the easier it will be for the teenager to move back and forth between relationships. We call this *fluid interaction*, and it is a sign of civility and maturity in the parents' behavior. The greater the distance between the parents as a result of anger and rage, the harder it will be for the teenager to balance his or her relationship with both parents. What normally happens is an alignment with one parent. If the parents are not civil, then the court should mandate some type of civility training or coaching.

4. Determine the length of separation between the parent and child: The greater the separation between the parent and child the greater the difficulty in restoring the relationship. While there is still hope, the question of why the parent allowed this to occur needs to be answered. The parent can still do parental things, i.e., emails, cards, gifts, phone calls even if the teenager is resistant. The messages here are positive and tell the teenager that the parent is not giving up on him/her no matter what.

Pulling away out of hurt, frustration, or anger communicates a very different message, namely "this is over and you are not worth it." The parent will need to learn that this is a process and may take longer than they thought. However, a parent-child relationship is forever and any length of time given to restore it in a healthy way should be attempted for both the sake of the teenager and the parent.

5. **Determine the level of anger of the teenager toward the parent:** Our experience over the years has shown us that in the absence of alienation (discussed above), anger assumes hope. After all, one of the main reasons we get angry is that we hope that the person will change. Keep in mind that the opposite of love is not anger but apathy and if handled properly, the teenager's anger can be redirected toward working on solutions and redefining a new and better relationship.

6. **Determine the level of apathy toward the parent (sometimes hard to distinguish apathy from suppressed anger):** The most difficult relationship to restore is one in which apathy has occurred. It is these cases where the chances of success are very poor. This motive will need to be determined and diagnosed by court officials and if present, the parent may have to accept the fact that this relationship may not happen no matter what is done. The teenager who is apathetic toward a parent is normally not angry, does not scream, attack, or use any energy toward the parent. He or she is resolved and has moved on in their lives. Whether they may change their feelings at a later time in their life is not known. What is known is that this type of emotional state bodes little chance of success for re-establishing the relationship.

Conclusion

It is imperative in cases of the reluctant teenager in separation and divorce cases for court officials to be cognizant of the true motive behind the reluctance of teenagers to visitation and not take it at face value, a decision all too often made by court officials who through no fault of their own lack the dynamic understanding of the teenage mind in this situation. A decision by court officials made for the wrong reason will have long-lasting effects on the life of the teenager and the parents. Both deserve the best decision, direction, and insight available to help them through this very difficult process.

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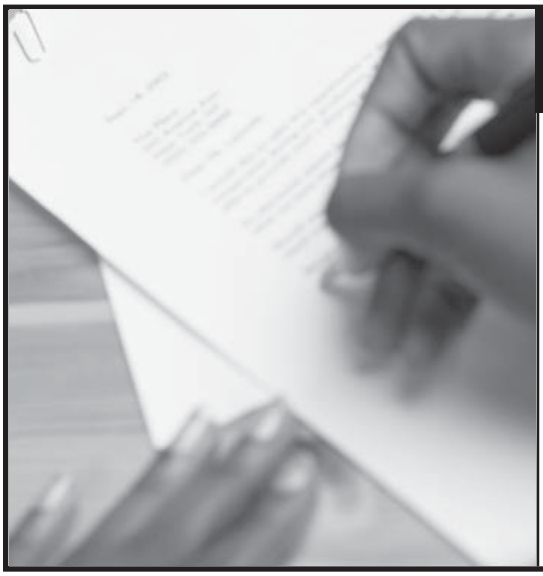

Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Gay Marriage Update

Comity of Foreign Same-Sex Marriage

***Godfrey v. Spano*, 2007 NY Slip Op. 27105, 2007 N.Y. Misc. LEXIS 853 (Westchester County 3/12/2007)**

As discussed in my previous column, the recent Court of Appeals decision *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (2006) held that the New York State Constitution does not compel the recognition of same-sex marriage in New York, and deferred to the legislature's determination on the issue.

However, recently, Judge Lefkowitz of the Westchester County Supreme Court determined that the Westchester County Executive's Executive Order requiring county agencies to recognize same-sex marriages where validly contracted out-of-state is lawful. The court distinguished the holding in *Hernandez* as prohibiting intrastate same-sex marriage, not prohibiting comity of validly executed same-sex marriages of foreign jurisdictions. The court reasoned that New York recognizes out-of-state marriages of heterosexuals that would have been invalid if made in New York if the marriage was valid where contracted even if the purpose was to evade New York law. Absent legislation or appellate court ruling that declares out-of-state same-sex marriages void in New York, though valid there, there is no positive law to prevent recognition of the marriage. The trial court is not bound by the holdings of courts of coordinate jurisdiction, and the trial court was not persuaded by the reasoning in *Funderburke* and *Martinez* that the New York Court of Appeals in *Hernandez v. Robles* has changed the law with respect to comity.

New Jersey Legislature Passes Civil Union Bill

As mentioned in my previous column, on December 14, 2006, our neighbor, New Jersey, voted 23 to 12 to recognize civil unions for same-sex couples, based on the New Jersey Supreme Court's mandate to provide equal rights and financial benefits to gay couples. The legislature was permitted to decide whether to permit gay marriage or provide a separate parallel track. The bill was signed into law on February 19, 2007. Critics of the new bill deem that separate but equal is not equal, much like in the days of racial segregation.

Among the many new benefits under the civil unions law, gay couples gain the rights to adoption, child custody, visiting a hospitalized partner and making medical decisions, and the right not to testify against a partner in state court. However, the federal government does not recognize the unions, which means that certain important rights will not be recognized. For example, a surviving member of a civil union would not be entitled to his/her deceased partner's Social Security benefits. If a partner is hospitalized in another state, and that state does not recognize the civil union, the other may not have an automatic visitation right.

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

Court of Appeals Round-up

Equitable distribution and maintenance: rental property

***Keane v. Keane*, 2006 NY Slip Op. 9660 (12/21/2006)**

The Court of Appeals determined that the *Grunfeld* prohibition against double-counting the income stream of an intangible professional license for purposes of equitable distribution and maintenance does not extend to the distribution of a tangible, income-producing asset.

The trial court awarded the husband a rental property and awarded the wife maintenance of $1,292 per month to continue through a period of time to coincide with the lease term of the property.

The Appellate Division modified, over a partial dissent, by deleting the $1,292 monthly maintenance award, reasoning that such sum was derived from impermissible "double counting" of the husband's income from the rental property after that income had been included in the valuation of the previously distributed property.

The high court reversed and remitted the matter to the trial court, finding that double-counting does not occur with the rental property because the husband will not only receive rental income, but when the lease terminates, the property itself is a marketable asset separate and distinct from the lease payments.

Grandparent Visitation

***E.S. v. P.D. O'Leary*, NY Slip Op. 1336, 2007 N.Y. LEXIS 118, 2007 (2/15/2007)**

The maternal grandmother moved into her grandchild's home to care for him after the child's mother was diagnosed with cancer, and continued to live there and care for the child after the mother died, until the father asked her to leave some five years later. The trial court considered the father's right to rear the child but found

the grandmother had a close relationship with the child and respected her and the father's separate roles in the child's life, and that no credible evidence supported his claim that she sought to usurp his parental role.

The high court determined that the grandparent in this case was properly granted visitation with her grandson pursuant to DRL § 72(1). The grandmother had automatic standing to sue for visitation since one of the child's parents was deceased. The court then determined that it was in the child's best interest to continue his close relationship with his grandmother. The father did not present competent proof that the grandmother attempted to usurp his parental role.

Moreover, the high court determined that the New York grandparent visitation statute is constitutional in view of the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000).

Other Cases of Interest

Equitable Distribution

Equitable distribution of lottery winnings

Damon v. Damon, __ A.D.3d __, 823 N.Y.S.2d 540 (2d Dep't 2006)

The proceeds of a winning lottery ticket acquired by the husband during the marriage constituted marital property. Since the jackpot award was predominately the result of luck and not of either spouse's labor, the contributions to the marriage of each party had little relevance to the manner in which the lottery jackpot should be distributed. The wife was awarded only 25% of the proceeds.

Author's note: There is no explanation why the wife was not awarded 50%, nor were there any other facts mentioned regarding the length of the parties' marriage or respective finances. But see *Ullah v. Ullah*, 161 A.D.3d 699, 555 N.Y.S.2d 834 (2d Dep't 1990), *lv to app den*, 76 N.Y.2d 704, 559 N.Y.S.2d 983 (1990) where the court divided the lottery winnings equally based on the same reasoning, that neither party contributed any labor to the winnings, and therefore neither should receive a windfall.

Pension Benefits

Stachowaski v. Stachowaski, __ A.D.3d __, 825 N.Y.S.2d 416, 2006 (4th Dep't 2006)

Pursuant to the terms of the parties' separation agreement which was incorporated into the judgment of divorce, the wife was to receive 50% of the husband's pension plan benefits in accordance with the *Majaukas* formula. The husband's attorney objected to the wife's second proposed QDRO, which provided, in part, that benefits to the wife may commence, at her option, at any time after the husband has attained eligibility to retire and that benefits would be payable for the duration of her lifetime. The trial court properly denied the motion to confirm the QDRO because this separate interest right was not explicitly stated in the agreement (*see generally Kazel v. Kazel*, 3 N.Y.3d 331, 819, 786 N.Y.S.2d 420 (2004) (in order to receive death benefits from a pension plan, the agreement and hence the QDRO must specifically state this separate and distinct interest)). In addition, the court noted in *dicta* that since the agreement did not specifically state that the wife was entitled to survivorship benefits, she was not entitled to it.

***Author's note*:** When drafting an agreement regarding pension benefits, the practitioner should be mindful to explicitly state that his/her client is entitled to pre- and post-retirement benefits.

Wallach v. Wallach, 2007 NY Slip Op. 1559, 2007 N.Y. App. Div. LEXIS 2126 (2d Dep't 2007)

The lower court erred in failing to reduce the value of the husband's pension by the portion of the value that is equivalent to Social Security benefits. As a member of the Federal Employees Civil Service Retirement System, the husband neither contributes to nor is eligible to receive Social Security benefits, and his pension constitutes, in part, the Social Security benefits to which he would be entitled if he were not a federal employee.

Maintenance and Child Support

Nondurational maintenance

Grumet v. Grumet, 2007 NY Slip Op. 1253, 2007 N.Y. App. Div. LEXIS 1721 (2d Dep't 2/13/2007)

The appellate court modified the divorce judgment by reducing the wife's award of nondurational maintenance in the sum of $16,000 per month, nontaxable to the wife to the sum of $9,000 per month, taxable to the wife. The trial court improperly focused almost exclusively on the husband's income and assets to the exclusion of all other factors, including the reasonable needs of the wife, her ability to be self-supporting and the pre-separation standard of living. The wife's updated net worth statement revealed that she needed $13,500/month for two people (her late son), but the trial court's award was greater than that amount. The appellate court determined that the reduced amount of maintenance, combined with any investment income from her "substantial" equitable distribution award and future potential employment, would be sufficient. In addition, the trial court failed to state any rationale for its decision to award nontaxable maintenance, which is a deviation from the norm envisioned by the IRC.

The appellate court reduced the wife's award of counsel and expert fees in the sum of $260,636.48 to $130,318.24 because the wife will receive a "large" distributive award and she possesses substantial assets which

are sufficient to enable her to pay one-half of the litigation expenses.

Child Support: Definition of Income

***Wallach v. Wallach*, 2007 NY Slip Op. 1559, 2007 N.Y. App. Div. LEXIS 2126 (2d Dep't 2007)**

The CSSA requires that the court determine basic child support based on the party's income as reported or should have been reported on his most recently filed tax return. Therefore, the court cannot exclude actual overtime wages nor average a party's earnings over several years.

The court properly deducted maintenance from the husband's income before applying the CSSA, but improperly included the maintenance to be paid in determining the wife's income for purposes of the CSSA. The court failed to state the amount of child support to be paid once maintenance terminates.

The trial court properly found that the wife was capable of earning $35,000 annually, based upon her education, past employment, and earnings potential, and therefore imputed that income to her.

Author's note: There were no facts recited by the appellate division to support the imputation of income to the wife where she had no actual earnings.

Child Support: Emancipation

***In re Cellamare v. Lakeman*, __ A.D.3d __, 829 N.Y.S.2d 588 (2d Dep't 2007)**

The court found that the child was not emancipated despite the fact that he was not living in either parent's home, since he was not economically independent, since the child's father still provided the child with food, the child still received mail at his father's house, and still had his own telephone line at that house, and was still covered by his father's medical insurance.

Custody

Change in Joint Custody Agreement

The court below properly modified the parties' joint custody agreement and awarded sole custody to the mother where the parties' relationship three years after the execution of the agreement became acrimonious. Therefore, the mother showed a sufficient change in circumstances and the modification would serve the child's best interests.

Author's note: The opinion does not state any facts to support its conclusion, and simply recited black letter law. Another example of the court's failure to recite the facts of the case is *In re Held v. Gomez*, 824 N.Y.S.2d 741 (2d Dep't 2006), where the court changed custody from the mother to the father and granted the mother supervised visitation.

Award of Custody to the Father

***Allain v. Allain*, 826 N.Y.S.2d 411 (2d Dep't 2006)**

The father was awarded sole custody of the parties' son, which was upheld on an appeal. One of the primary considerations of the court was that the father was more likely to assure meaningful contact between the son and the mother. The mother's animosity towards the father, demonstrated by the repeated filing of baseless charges against him, her questionable judgment with regard to her son's health matters, and her lack of veracity on a number of issues rendered her the less fit parent. In addition, the forensic psychologist also recommended that the father have custody.

Author's note: The practitioner should warn his/her client that expressing animosity towards the other parent can be detrimental to the client's quest for custody.

Counsel Fees

Charging Lien

***Zelman v. Zelman*, 2007 NY Slip Op. 27039, 2007 N.Y. Misc. LEXIS 281 (New York County 2/6/2007) J. Beeler**

After representing a client in a matrimonial litigation for approximately one year, the client discharged the attorney, retained new counsel, and a few months later settled the case. The client owed the attorney $169,192 of $393,192 billed. The court granted the attorney's motion to enforce a charging lien in the amount owed, and referred the matter to a special referee for a hearing to determine the amount of legal fees due. The court also granted the attorney's motion to place the amount allegedly owed in legal fees in escrow.

A charging lien does not attach to maintenance or child support awards, but can attach to equitable distribution awards. A charging lien is available pursuant to Judiciary Law 475 only where the attorney's efforts have created proceeds to which the lien may attach. But, where the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, no lien on that title or interest can be awarded.

The client argued that the attorney's efforts on her behalf did not create any new funds in the form of equitable distribution to which a charging lien could attach. She claimed that the money she received represented her one-half interest in properties which she jointly owned with her husband. Therefore, she argued that the settlement awarded her equitable distribution equal only to the value of real property that she already had legal title to.

The court held that the $1.6 million payable to the wife in a lump sum was not a simple translation of her share of the marital property into cash, and thus immune to a charging lien. There were issues such as each of the parties' respective separate property credits and the dis-

tribution of the husband's business which was valued by the neutral expert at $785,000. These respective claims would have affected the extent of the marital assets subject to equitable distribution.

The attorney's calculation that the $1.6 million settlement exceeded the wife's share of the actual real estate proceeds by at least $321,875 was reasonable. This amount represented the creation of a new fund by the attorney's efforts to which a charging lien could attach.

Wendy B. Samuelson is a partner of the law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature for the Continuing Legal Education programs of the New York State Bar Association and the Nassau County Bar Association. She authored two articles in the New York Family Law American Inn of Court's Annual Survey of Matrimonial Law. Ms. Samuelson has also appeared on the local radio program, "The Divorce Law Forum." She was recently selected as one of the ten leaders in Matrimonial Law of Long Island for the under age 45 division.

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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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