NYSBA WINTER 2008 | VOL. 40 | NO. 4

Family Law Review

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

Notes and Comments

Elliot D. Samuelson, Editor

Matrimonial Law: Collapsing Like a House of Cards?

The recent economic crisis in this country has caused many economic scholars to reflect on the root causes. Paul A. Samuelson, the first American to become a Nobel Laureate in economics, opined in a recent column in the *Herald Tribune* that there were perhaps several principal reasons for the decay, which included the lack of government intervention to police the banks and Wall Street from obvious financial excesses, the geo-politics of the sitting President, and the pathetic alchemy utilized by the enunciators of "excesses" that sought to change manure into gold. The financial deck of cards that was used to construct a foundation for a skyscraper of economic abuses came back to haunt the business community, and the stock market declined by some 40% during 2008, foreclosures of one-family residences reached an all time high, $700 billion was earmarked for financial rescue by the government, which plan to purchase bad debts of the banks was usurped by the British plan to invest equity into failing banks. As this column is written, no one seems to know what plan will work or if any formula can be applied to avert a national depression similar to that of 1929.

Is the practice of matrimonial law in New York constructed on the same faulty foundation as a deck of cards, about to implode and send litigants into emotional panic? Can anything be done now to avoid such catastrophic result? Can the New York Legislature take immediate action to rectify the wrongs that have permeated the practice of matrimonial law? Can the judicial system be saved by an immediate pay raise to judges who have served without one salary increase for the past eight years because of political concerns rather than the pursuit of judicial excellence, as should have been the proper basis?

What is the root cause of such problems in the matrimonial arena? I believe the following factors are responsible:

1. New York is the only jurisdiction in the country that requires fault to obtain a divorce.
2. New York is the only jurisdiction in the country that values professional licenses and enhanced earning capacities of wage earners in various fields of endeavors. Professionals who obtain licenses but cannot sell them still are subject to evaluations by the courts, which may be an unconstitutional exercise by providing unequal protection under the law to non-professional spouses and business people who have no such licenses.

Inside

3. New York is one of the few jurisdictions that require litigants to appear in court for no other purpose than to sit in the courtroom for sometimes hours on end without participating in any way in the court conference called by the court. This serves only to increase already out-of-hand legal fees to the clients as well as their loss of time from their work, which, in turn, creates bitter resentment for the judicial process that countenances such waste.
4. Litigants without grounds for a divorce must seek, at great expense, to change their residences to sister states of either New Jersey or Connecticut to obtain such relief and then be able to address the financial issues of the marriage in New York.
5. Courts that require attorneys to submit endless papers and trial notebooks engender needless expense.

What can New York and its legislature do about it right now? This is the action I suggest.

1. Enact legislation that will increase judicial salaries to come in line with attorneys' compensation in the private sector. This would not only make attractive the black robes as a position of honor and respect, but also one of judicial excellence by getting the best and the brightest to apply or run for these positions, and to inject a boost in morale to sitting judges.
2. Judges should not be forced to enter into the elective process and all future appointments should be made by a blue ribbon judicial panel selected by the Governor with the approval of the legislature, similar to the appointments of judges to the Supreme Court of the United States.
3. Legislation must be enacted to eliminate fault as a prerequisite for divorce, and a new statute enacted that will permit divorce based upon incompatibility.
4. Valuation of professional licenses and enhanced earnings capacity should be prohibited.
5. Paperwork required to process divorce litigation should be streamlined, and instead of in-person court conferences, telephone conferences should be instituted and clients should not be required to make court appearances except when their testimony is required.

If no action is taken, another example of insidious neglect will rise to the level of fiddling while New York's judicial system burns. Turning one's head and denying the mounting problems in matrimonial is akin to what the Bush administration did in contributing to the eco-catastrophe that has befallen the nation.

Elliot D. Samuelson is the senior partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP and is a past president of the American Academy of Matrimonial Lawyers, New York Chapter, and is included in *The Best Lawyers of America* and the *Bar Registry of Preeminent Lawyers in America*. He has appeared on both national and regional television and radio programs, including "Larry King Live." Mr. Samuelson can be reached at (516) 294-6666 or info@samuelsonhause.net.

The Use of Irrevocable Life Insurance Trusts in Divorce

Michael Stutman and Stephen A. Zorn

As a family goes through the process of a divorce, existing financial relationships are unwound and another set of financial relationships is established. Two of the post-divorce relationships that are frequently created are spousal maintenance and child support. Often the parties intend that these relationships will continue for many years, whether as a result of a dependent spouse's inability to support himself or herself or as the result of there being very young children of the marriage.

In either case, the longer the period of support, the greater the possibility that the payor spouse will not survive for the entire term of the obligation. In the negotiation of settlement agreements, the possibility of the death of the payor spouse before all payment obligations have been met is usually addressed by provisions for the continuation or acquisition of appropriate amounts of life insurance. In addition, New York Domestic Relations Law § 236B(8)(a) gives the Supreme Court the authority to "purchase, maintain or assign a policy of . . . insurance on the life of either spouse. . . ."

In this article, we discuss the use of an irrevocable life insurance trust (ILIT) to hold whatever life insurance policies are appropriate for securing post-divorce payment obligations. The ILIT is an often useful alternative to the common practice of having the policy owned by the payor spouse directly. We do not, however, discuss the calculation of the appropriate amount of life insurance, whether the payor should be directed to obtain a new policy, the specific identification of beneficiaries, or the source of funds for the payment of premiums—all matters that will be addressed in negotiations based on the facts and circumstances of the family at issue.

Once a need for insurance has been identified and the amounts roughly determined, one can then consider whether to use an ILIT to hold the policy. Although ILITs are a frequently used tool in estate planning, especially where the addition of insurance proceeds to a decedent's estate would otherwise cause the estate to be subject to federal and state taxes, the ILIT device is too often overlooked by matrimonial law practitioners.

For a variety of reasons, though—some concerned with the inherent nature of divorce proceedings and some reflecting the tax advantages of using the ILIT structure—it may often be advantageous to satisfy the insurance obligations in a divorce settlement agreement by establishing and ILIT to own a life insurance policy. With an ILIT, it will be a trustee, rather than the payor spouse, who will see to the payment of premiums and the distribution of proceeds.

Most people own life insurance policies in their own name and, while married or as an incident to divorce, designate their spouse or former spouse as the beneficiary of the proceeds. For a number of reasons this scheme of ownership and beneficiary designation may not be appropriate in a post-divorce setting. It is not uncommon for one spouse to be concerned about the other's spendthrift nature or the other spouse's lack of financial sophistication. These fears may be exacerbated as a result of either the hostility that can accompany a divorce or the realization that the proceeds from the life insurance policies may create a fund larger than the amount of liquid assets that the marriage ever created.

"It is not uncommon for one spouse to be concerned about the other's spendthrift nature or the other spouse's lack of financial sophistication."

These concerns often create a desire on the part of both parties that the insurance necessary to secure post-divorce payment obligations be held in a vehicle that provides the necessary liquidity, yet prevents a dissipation of the proceeds before the need to use the money has ended. An ILIT serves these purposes and can also ensure professional and, presumably, competent management of the corpus of the Trust. Depending on the particular situation, these concerns may arise on the part of either party, but attorneys for both sides will see the advantages in having the insurance policies preserved by virtue of prudent management in order to meet foreseeable needs.

Tensions may arise when the desire of one party to protect the fund conflicts with the desire of the other party to have access to the fund. These tensions may affect both the selection of a trustee or trustees and the negotiation of the terms of the trust. But, considering the other tensions that are addressed and resolved in the process of a matrimonial settlement negotiation, it seems to us that the resolution of these other issues is child's play because the incentive for the parties to resolve these differences is great. There are significant tax disadvantages for both parties to owning life insurance policies outside of an ILIT, as described below, making this mechanism worth implementing in a substantial number of the cases that we see.

When correctly structured and drafted, ILITs are useful tax and estate planning tools because they have the ability to shelter life insurance proceeds from both estate and income taxes, a double advantage that ultimately works toward the benefit of the insured's designated ben-

eficiaries. However, these potential tax benefits do come at the cost of a certain amount of complexity, and it is essential that the ILIT be painstakingly drafted to reflect the specific circumstances of the former spouses.

Life insurance is the only investment that can be rendered completely tax-free under the Internal Revenue Code. All other investments are potentially subject to income (or capital gains) tax. Only with a life insurance policy does the insured's death completely eliminate the income tax. In addition, when the insurance policy is held through an ILIT, then the proceeds of the insurance policy are not includible in the decedent's estate and can be paid to the beneficiaries free of gift, estate or generation-skipping transfer taxes. Other tax-related benefits of using an ILIT in a post-divorce situation include the ability to minimize gift-tax consequences on the payor's payment of premiums on the policy and complete protection of the insurance proceeds against claims by the payor's creditors.

To be fully effective, the grantor of an ILIT (i.e., the former spouse who has undertaken obligations to pay the other ex-spouse post-divorce) must meet the following requirements:

- There must be a competed gift of the insurance policy or cash to fund the ILIT.
- If an existing insurance policy is transferred to the ILIT, the insured must survive three years after the transfer for the insurance proceeds to escape inclusion in the decedent's gross estate, thus incurring an estate tax liability, assuming that the policy would otherwise be included in the insured's gross estate. This three-year rule can be overcome by having the payor spouse transfer cash to the ILIT, and then having the trustee purchase a new policy on the payor's life. The choice of whether to use an existing policy or purchase a new one depends on the relative costs of the policies, the payor's insurability and other specific facts and circumstances. If a paid-up whole-life policy is being transferred to the ILIT, it may make sense also to have the trustee purchase a three-year term life policy on the payor, if such a policy is available, which would compensate for the additional estate tax, both federal and state, that would result from the inclusion of the whole-life policy proceeds in the payor's estate if death occurs within three years.
- The grantor must not retain any beneficial interest in the ILIT or in the transferred insurance policy.
- The payor/grantor must not provide that the possession or enjoyment of the transferred property can be obtained only by surviving the grantor, and must not retain a reversionary interest in the transferred property or in the ILIT that is greater than 5% at the time of the grantor's death.
- The grantor must not retain the power to alter, amend, revoke, or control the beneficial enjoyment of the transferred property, or the power to alter, amend, or revoke the ILIT.
- The grantor must not hold a power of appointment over the insurance policy or the ILIT.
- The grantor must not retain any "incidents of ownership" in the insurance policy or the ILIT.
- The grantor must not possess or exercise any powers over the ILIT.
- The grantor may not serve as the trustee of the ILIT.

Some of the disadvantages of using an ILIT might be (i) the cost of establishing the ILIT; (ii) the complexity of making gifts to an ILIT because of the need for *Crummey* withdrawal rights or the use of the grantor's gift tax applicable exclusion amounts (currently $1 million lifetime, in addition to the $12,000 per year per donee (increasing to $13,000 effective in 2009) that can be transferred without it even counting as a gift); (iii) the ongoing expense of trust administration, including annual *Crummey* withdrawal right notices; (iv) the possible income tax disadvantages if the ILIT is taxed as a separate taxpayer (and is not taxed as a grantor trust in its entirety); (v) the "irrevocability" of the ILIT and inability to change beneficiaries; (vi) the insured's lack of control over the life insurance policy, its cash value, and lack of control over the other ILIT assets; and (vii) the potential of I.R.C. § 2035 applying to a policy transferred within three years of the insured's death and the loss of the federal estate tax marital deduction if the ILIT is not drafted carefully. These concerns, however, can generally be dealt with by careful drafting and should not generally interfere with the use of an ILIT as an important planning tool to secure payments of future amounts that have been promised in a divorce settlement, while at the same time minimizing the amounts that need to be paid to the tax authorities.

An ILIT may not be appropriate in all circumstances, but it is certainly one of the tools that a matrimonial lawyer should have in his or her portfolio. The ILIT will guarantee payment of obligations of a decedent payor, assure prudent management of insurance proceeds, and achieve significant tax savings. If payment obligations post-divorce need to be secured, an ILIT will be the appropriate vehicle for accomplishing that task.

Forfeiture of Support by a Self-Emancipated Child

By Donald M. Sukloff

It is well established that a minor child of employable age and in full possession of his or her faculties who voluntarily and without cause abandons the parent's home against the will of the parent, and for the purpose of avoiding parental control, forfeits his or her right to demand support.[1] By the same token, forfeiture occurs where, against the will of the non-custodial parent, the child of employable age refuses or resists visitation or any significant contact with that parent which, in many cases, may be encouraged by the animosity of the custodial parent.

"It is undisputed that the best interests of the children mandate a relationship with both parents. Indeed, with the advocacy of 'father's rights groups,' most states recognize, if not favor, joint custody."

Because most divorces occur fairly early in the marriage when there are minor children, divorcing parents are encouraged to "co-parent" their children. Numerous programs have been designed to foster such involvement, especially at encouraging and recognizing the importance of the non-custodial parent's (usually the father) involvement in the lives of their children. It is undisputed that the best interests of the children mandate a relationship with both parents. Indeed, with the advocacy of "father's rights groups," most states recognize, if not favor, joint custody.

The constructive or self-emancipation of a child arises when the active involvement by the non-custodial parent is discouraged, if not eliminated. Instead of working together, the parents may carry over their divorce animosity to the children. Thus, despite education and dispute resolution services, there are too many cases where, against the will of a non-custodial parent, the child still does not have significant contact with that parent. This article does not encompass the denial or interference with visitation as theorized in the celebrated Richard Gardner's "parental alienation syndrome," but deals primarily with the unwilling child who expresses hatred for the other parent or makes ridiculous complaints about the other parent or justifies the desire not to have any communication with the other parent by relating fiction. Where there is a finding of constructive emancipation, child support is forfeited and it may well be that such forfeiture, or threat of forfeiture, may be effectively used to reestablish a healthy communication between the non-custodial parent and the child or children.

A review of the representative cases and burden of proof on what constitutes constructive emancipation or self-emancipation sufficient to forfeit support is helpful.

1. The child must be of employable age. This doesn't apply where the interference was caused by the custodial parent; but otherwise a 14- or 16-year-old cannot, as a matter of law, emancipate themselves.[2]
2. The non-custodial parent, because of the presumption of unemancipation until age 21, has the burden of proof to show the breakdown of the relationship is not the result of his own misconduct.[3]
3. The burden is also to show no justification by the child in refusing to maintain contact.[4]
4. The non-custodial parent cannot consent to or accede to regular or little or no contact by agreement or conduct.[5]
5. The father must show serious efforts;[6] it cannot be simple delinquency or disobedience.[7]
6. Must show unjustified refusals and, perhaps, affirmative action such as adopting the stepfather's name[8] or renouncing his or her religion, etc.[9]
7. Psychiatric counseling should be shown to be nonproductive.[10]
8. Must show reasonable efforts to mend and serious attempts do not include a few phone calls.[11]
9. Unemancipation or curing the emancipation may occur, thus reviving the support obligation[12] ". . . but experience teaches us that such hostilities do abate and rapprochements are soon effected."[13]
10. A removal from one parent to another, of itself, is not emancipation,[14] but a move to avoid abiding by reasonable rules of a parent does constitute an emancipation.[15]
11. A hearing is necessary.[16]

In an unusual case in Nassau County,[17] Supreme Court Judge Falanga reasoned that although the 18-year-old child unjustifiably refused to have contact with his father, he did not forfeit support because the parties' agreement did not define that refusal is an emancipation event.

Conclusion

It is recommended that in addition to the usual list of emancipation events in the typical separation agreement there is a clause setting forth that a failure without cause to adhere to reasonable visitation and communication in accordance with a parent/child relationship is an emancipation event. In any event, where there is self-emancipation in spite of efforts to cure the rejection, the forfeiture of support is appropriate and, indeed, a possible tool to encourage a reconciliation in the best interests of all.

Endnotes

1. *Roe v. Doe*, 29 N.Y.2d 188 (Ct. of Appeals 1971); *Chamberlin v. Chamberlin*, 240 A.D.2d 908 (3d Dep't 1997).
2. *Foster v. Daigle*, 25 A.D.3d 100 (3d Dep't 2006).
3. *Kershaw v. Kershaw*, 268 A.D.2d 829 (3d Dep't 2000); *Lipsky v. Lipsky*, 115 A.D.2d 361 (1st Dep't 1985).
4. *Wiegart v. Wiegart*, 267 A.D.2d 620 (3d Dep't 1999); *Chestara*, 47 A.D.3d 1046 (3d Dep't 2008).
5. *Merotta v. Fariello,* 207 A.D.2d 450 (2d Dep't 1994); *Naylor v. Galster*, 48 A.D.3d 951 (3d Dep't 2008).
6. *Wikoff v. Whitney*, 179 A.D.2d 924 (3d Dep't 1992).
7. *Roe v. Doe*, 29 N.Y.2d 188 (Ct. of Appeals 1971).
8. *Rosemary N. v. George B.*, 103 Misc. 2d 1036 (FC Dutch. 1980); *Cohen v. Schnapf*, 94 A.D.2d 783 (2d Dep't 1983).
9. *McCarthy v. Braiman*, 125 A.D.2d 572 (2d Dep't 1986).
10. *Reznick v. Zoldan*, 134 A.D.2d 246 (2d Dep't 1987).
11. *Radin v. Radin*, 209 A.D.2d 396 (2d Dep't 1994); *Jaffee v. Jaffee*, 202 A.D.2d 264.
12. *Jeanne S. v. Salvatore E. S.*, 49 A.D.3d 330 (1st Dep't 2008).
13. *Roe v. Doe,* 29 N.Y.2d 188 (Ct. of Appeals 1971).
14. *Burns v. Ross*, 19 A.D.3d 801 (3d Dep't 2005).
15. *Donnelly v. Donnelly*, 14 A.D.3d 911 (3d Dep't 2005).
16. *Labanowski v. Labanowski*, 49 A.D.3d 1051 (3d Dep't 2008).
17. *M. M. v. M. M.*, N.Y.L.J., Dec, 8, 1994.

Donald M. Sukloff is a partner in the firm of Sukloff & Schanz, Binghamton, New York; a former vice president and member of the Board of Governors of the American Academy of Matrimonial Lawyers, New York Chapter; New York State Family Law Executive Committee; past president of the Broome County Bar Association; and chairman and emeritus of the Broome County Family Law Committee.

Abuse of Alcohol Can Be Egregious Conduct

By Bruno Colapietro

In a recent article in the Fall 2008 issue of the *Family Law Review*, Robert S. Grossman stated that "matrimonial courts will continue to accord little or no weight to marital misconduct. New York remains a 'no fault' state when it comes to equitable distribution, and to the discredit of the legislature, a 'fault state' when it comes to the divorce itself."

We have to advise our clients that fault plays little or no role in the division of the marital property except if the fault is "egregious." In cases where the fault was deemed egregious, the court properly awarded the victim spouse more than 50% of the assets. In *Brancoveanu v. Brancoveanu*,[1] the husband, an attorney, attempted to hire a person to murder his wife, had continually threatened her and had assaulted her to a degree where she needed medical assistance.[2]

In *Havell v. Havell*,[3] the defendant made a motion to bar testimony of his conduct. The court denied the motion because the husband assaulted the wife on the face and head with a barbell. He was indicted for attempted murder and pleaded guilty to first degree assault.[4]

In *Levi v. Levi*,[5] the husband attempted to bribe the presiding judge and the wife was awarded 100% of the sole marital asset.

The Appellate Division, First Department, affirmed an award to the wife of 65% and the husband of 35% of the marital estate, citing serious economic fault because of the "parties respective unequal contributions to the marriage."[6]

In a recent case I tried, *F- v. F-* (not officially reported), the Broome County Supreme Court, Honorable Phillip R. Rumsey, presiding, made the following decision as to equitable distribution:

> There is no issue concerning grounds for divorce. Defendant has withdrawn his answer to allow Plaintiff to proceed to seek a divorce as alleged in her complaint. Parties were married on June 23, 19__, they have three children; _____19, student at _____ College, _____, 14, and _____, 11.
>
> Both having earned master's degrees Plaintiff earns approximately $37,900 as a director of a discovery center and with ____, Defendant had earned about $92,872. Although his written summation seeks joint custody and primary placement of the children with their mother and alternate weekend visitation, he testified that he would accept that Plaintiff have sole custody of the children. The Court finds sole custody in favor of Plaintiff to be in the best interests of the children. Not only has Plaintiff been primary care giver for the children since their birth, the Defendant has exhibited a pattern of alcohol abuse and irresponsible behavior.
>
> After ten years of marriage, Plaintiff recognized Defendant's drinking alone and secretive, his resulting mood swings, poor sleeping habits and hidden vodka bottles. According to Plaintiff's unrebutted testimony, the alcohol abuse caused Defendant's stomach ailments and hospitalization for pancreatitis in 1999, and again from drinking, hospitalizations in 2002 and 2003. During this period of time, defendant was advised by medical professionals not to drink, but he continued. The parties had arguments. Defendant physically abused Plaintiff. They separated and for a time Defendant resided with his mother.
>
> In 2004 Defendant was diagnosed with hepatitis caused, at least in part, by his alcohol abuse. During a business trip to Virginia in April 2005, Defendant had a psychotic episode and wandered the hotel. Plaintiff notified the hotel and ultimately he was taken by ambulance to a Virginia hospital where he was admitted for about ten days, while Plaintiff stayed with relatives and commuted each day to the hospital. Defendant was mostly incoherent and sedated and without insurance or transportation, patient paid for an ambulette to transfer the patient to a Binghamton hospital. There the Plaintiff said Defendant was expected to die, but after a colon resection was admitted to a hospital in Rochester, New York in consideration for a liver transplant.
>
> With Defendant's promise not to consume alcohol, the requirement of six months of sobriety was waived and he received a transplant in early June 2005. While he stayed in the hospital until August 5, Plaintiff arranged for children to be cared for by her parents, brought them from Binghamton to Rochester on occasion and worked at a full-time job three or four days each week.

Because Defendant has driven a motor vehicle under the influence of alcohol, Plaintiff says she provides all of the transportation needed for the children. In October 2006, Defendant was irresponsibly intoxicated while caring for the middle child, then age twelve. Parties then separated. When Defendant returned, Plaintiff obtained an order of protection against him. She commenced this action in December 2006. At trial he claimed to be in, quote, "fairly good health," end quote, while admitting that he had last consumed alcoholic beverages only two weeks previously.

Plaintiff shall have sole custody of the children with visitation as mutually agreed, with consideration given to the wishes of their daughters. Visitation shall not be overnight. Defendant shall not consume alcoholic beverages during a period 12 hours prior to and during any visitation. Plaintiff shall provide all transportation of the children to and from visitation and Defendant shall have access to all of his children's medical and educational records. Plaintiff will share relevant health and school information with the Defendant.

Equitable distribution. Plaintiff, age 43, and Defendant, age 47, have had a long-term marriage and Defendant's conduct, as partially summarized herein, has caused tremendous emotional, financial turmoil and heartache for Plaintiff. Prior to Defendant's alcohol abuse, which caused major health problems, Plaintiff, at the expense of her own career, relocated with Defendant when his employer changed his job location from Maryland to Poughkeepsie to Binghamton. She cared for the children and Defendant when his self-inflicted health problems required her to assist him in Virginia, Rochester and Binghamton. She incurred expenditures in excess of $14,000, including $3,800 for his expenses, which he, but not she, was reimbursed by_____, see Exhibit 4. Her credit card balances grew with some charges on her card made by Defendant himself to more than $18,000, Exhibit 3. During 2005, the critical time of Defendant's health concerns, Plaintiff worked as much as possible and cared for Defendant and children, she used as much vacation benefits as she could, but ultimately lost some income.

In 2007, Defendant canceled the policy of insurance on his life with a death benefit of $250,000. He said he could not afford the premiums, yet he was still being paid his salary. He was in poor health and had a family of dependents.

It is equitable that Defendant sign all necessary documents conveying his interest in the marital residence to Plaintiff and that she continue to pay the mortgage, taxes, insurance on the home requiring a monthly payment of approximately $1,000. If he does not sign the necessary papers by December 31, 2008, she has been appointed, without bond, as receiver of the real estate for the purpose of conveying his interests to herself. This provides her with the full equity in the home of approximately $78,000.

Defendant shall retain the cash value of $3,389 in the New York Life Insurance policy and the savings in the amount of $2,400 that he disclosed in his net worth statement. In addition, he retains his Columbia Fund account in the amount of $11,614, which is his separate property.

Defendant's pension, with a value of approximately $120,000, shall be divided equally by the appropriate instrument, QDRO or other. The ____ stock, with value at trial of approximately $16,000, was proposed by Plaintiff to be retained by the Defendant. However, Defendant has brought a post-trial motion by order to show cause dated October 7, 2008, for an order allowing sale of the stock and equal division of the proceeds. A ruling on this motion will follow this decision. For the reason set forth herein, the Court finds that the distribution of marital property and allocation of debt is equitable, although not equal and with more appropriately distributed to Plaintiff. See *Holmes v. Holmes*, 25 AD3d 931 (2006).

Life insurance and Defendant's estate. Pursuant to this Court's order dated August 25, 2008, resulting from Plaintiff's post-trial motion, Defendant shall designate Plaintiff trustee of the proceeds that would be paid to the benefit of the children of the New York Life policy, number ending 573, and Defendant shall name Plaintiff irrevocable beneficiary of the proceeds of the Prudential policy, ending number 847, for which Plaintiff may now be responsible

to pay the premiums. Defendant was and is ordered to transmit all necessary documents to effectuate the changes to Plaintiff or her attorney.

As agreed by Defendant, he shall make a Last Will and Testament providing proof to Plaintiff's attorney by November 28, 2008, that he has done so, naming his three children beneficiaries of his entire estate.

By order to show cause dated October 14, 2008, Plaintiff moves for an order finding Defendant in contempt of failing to comply with this Court's order dated August 25, 2008, which had an effective date of August 15, 2008, requiring him to take certain action concerning life insurance policies, as also stated herein, and for sanctions and attorney's fees.

Plaintiff's counsel submits that Defendant has failed to show compliance with that order, that he has sold some ____ stock and holds a joint check for some amount of proceeds from the sale.

Counsel further submits that Defendant is in arrears for having failed to pay the child support and maintenance of $2,500 per month since May 2008. Today there is no suggestion or allegation to the contrary that Defendant is in arrears of approximately $12,500 since May 2008, for payments owed to Plaintiff, and that he has not complied fully with the order of August 25, 2008.

As a result, Defendant shall, by October 31, 2008, turn over all ____ stock—or if it has already been sold—all the proceeds from its sale to Plaintiff.

A hearing will be conducted within the next few weeks to determine Defendant's request to modify his support payments.

As to the motion for contempt for failure to comply with the directives concerning life insurance policies, the Court does find Defendant in contempt of that Court order, that would be civil contempt, that he has impaired the rights, remedies of the Plaintiff and that if he does not produce papers for Plaintiff to reinstate and pay for the insurance policy by October 31, 2008, a further hearing to consider local jail for that contempt will be scheduled.

This record shall constitute the decision of the Court as to the divorce action and the two pending post-trial motions concerning the action for divorce. Plaintiff's counsel shall submit papers supporting the final judgment of divorce by December 12, 2008. That concludes the matter for today.

Thus, as can be seen from the court's decision, the defendant's actions in abusing alcohol to the degree that he put his family in jeopardy was a proper basis for the plaintiff-wife to receive the substantial portion of the marital estate.

Perhaps the courts should take a closer look at making fault somewhat of a factor even though it might not arise to the level of "egregious."

Endnotes

1. 145 A.D.2d 395 (2d Dep't 1988).
2. *See also Wenzel v. Wenzel*, 122 Misc. 2d 1001 (Suffolk Co. 1984).
3. 186 Misc. 2d 726 (N.Y. Co. 2000).
4. *See also DeSilva v. DeSilva*, 2006 N.Y. Misc. LEXIS 2489, 236 N.Y.L.J., 46 2006 and *McCann v. McCann*., 156 Misc. 2d 540 (N.Y. Co. 1993).
5. 46 A.D.3d 520 (2d Dep't 2007).
6. *K. v. B.*, 13 A.D.3d 748 (2d Dep't 2004).

Bruno Colapietro is a 1960 graduate of the Cornell Law School and he is associated as "Of Counsel" with the Broome County Law Firm of Levene Gouldin & Thompson, LLP. He has been a member of the American Academy of Matrimonial Lawyers since 1975. For 30 years he was an Adjunct Professor of Law at the Cornell Law School. His practice is primary Family Law. As an aside he has played in 608 consecutive hockey games in the Rivermede Senior Hockey League (20 years without a miss).

Graev v. Graev: It's Time to Define and/or Refine the Standard Cohabitation Clause

By Elena L. Greenberg

Most matrimonial agreements containing maintenance provisions provide for their termination upon "[t]he cohabitation of the wife with an unrelated adult for a period of sixty (60) substantially consecutive days." Significantly, most of those agreements do not define or otherwise refine the term "cohabitation." Until now, the term has been interpreted by the courts to contain both economic and sexual components along the lines of DRL § 248, which required a "holding out" between a former wife and her paramour in order to relieve a former husband of his maintenance obligations. The Court of Appeals, however, recently held in the case of *Graev v. Graev*[1] that the term "cohabitation" in a matrimonial agreement is inherently ambiguous, requiring a court to make findings of fact to determine what the parties intended the term to mean. Therefore, careful definition of this term in those agreements can serve to avoid and/or narrow the scope of such potential future litigation.

"The Court of Appeals . . . recently held in the case of Graev v. Graev *that the term 'cohabitation' in a matrimonial agreement is inherently ambiguous, requiring a court to make findings of fact to determine what the parties intended the term to mean."*

Background

The facts in *Graev* are not uncommon, as they describe the nature of many adult relationships between the sexes. In the Supreme Court, Mrs. Graev admitted that her relationship with her boyfriend was sexual, at least at one point, and remained romantic and exclusive for more than three years. They participated in social activities with friends and family and performed chores and errands together.

The Graevs's separation agreement stated that maintenance would cease upon any of the stipulated "termination events," one of which was "the cohabitation of the wife with an unrelated male for a period of sixty (60) substantially consecutive days." Through the use of a private investigator, Mr. Graev was able to present evidence that Mrs. Graev and her boyfriend did in fact spend at least 60 nights together at her vacation home during the summer of 2004. Accordingly, Mr. Graev ceased support payments in accordance with the cohabitation clause of their agreement.

After a hearing, the Supreme Court concluded that prior New York cases "find that an essential element of cohabitation is a shared residence with shared household expenses" and that the couple "functioned as an economic unit," likening Mrs. Graev and her boyfriend to "an adult dating relationship."[2]

On appeal, Mr. Graev argued that the term "cohabitation" is ambiguous under New York law, and extrinsic evidence should be admitted to establish the intent of the parties. Relying on a series of prior New York decisions,[3] the Appellate Division held that the term cohabitation "has a plain meaning which contemplates changed economic circumstances and is not ambiguous." The gravamen of "changed economic circumstances," according to the Court, was a showing that the couple "share household expenses" and "function as an economic unit."[4]

In reversing the ruling of the Appellate Division, the Court of Appeals found that "neither the dictionary nor New York case law supplies an authoritative or plain meaning" and that the term "might mean any number of things in a separation agreement." The Court further stated that cohabitation is not necessarily determined by whether a couple share household expenses or function as a single economic unit, but by a variety of factors, with no single factor being dispositive. In distinguishing *Scharnweber v. Scharnweber,*[5] on which Mrs. Graev relied, the Court was explicit in stating that the prior decision does not stand for the proposition that "cohabitation" is synonymous with "changed economic circumstances." "We have never taken this position and we decline to do so now."[6] The Court stressed that whether Mrs. Scharnweber and her boyfriend shared a bedroom was an equally relevant factor.

Practical Implications of *Graev*

The Court of Appeals' decision in *Graev* to no longer ascribe a plain meaning to the commonly used term "cohabitation," when used in settlement agreements, is not a novel concept. In fact, courts in other states have found the term ambiguous as well. For example, in *In re Marriage of Dessler,*[7] the Oregon Supreme Court found the term "inherently ambiguous" and that it could have been intended to make support contingent on the wife's cohabiting sexually with another man, on the wife's receiving some amount of support from another man, or, as the husband urged, on the wife's merely living in the same house with another man. Thus, because of that ambiguity, admission of testimony about the intent of the parties was proper.[8]

To avoid the "proliferation of litigation . . . where maintenance termination provisions are sought to be enforced" predicted in the dissenting opinion,[9] attorneys should resist the temptation to simply insert the standard "cohabitation" clause into matrimonial agreements. As one commentator observed, "at this point, a cohabitation clause requires a more surgical precision."[10] As the Court noted in the concurring opinion, "the wisest rule, of course, is for parties in the future to make their intention clear by more careful drafting." Taking the extra time during negotiations to determine specifically what the parties' understanding of cohabitation is will prove crucial.

Which spouse you are representing should influence the language you choose. In *Famoso v. Famoso*,[11] the parties' agreement stipulated that maintenance would cease upon the "wife's residing with an unrelated adult male for a period of 120 days in one year," with residing defined as "staying overnight." The Court found the provision acceptable, but ultimately denied the husband's application to cease payments because he failed to show that the requisite amount of overnight visits had occurred. When representing the monied spouse, a practitioner should try to get a similar provision into the agreement. While simple, the language is specific, avoids ambiguity, and can easily be proven.

On the other hand, representing the non-monied spouse will require more thoughtful drafting. The Court of Appeals in *Graev* is careful to note several prior New York decisions that the Supreme Court considered. This portion of the decision is valuable in that it sets forth several specific conditions that courts have found important in deciding whether a "cohabitation" had taken place. For example, the distinction between habitually living with a man and "intermittent intimacy";[12] the sharing of household expenses;[13] the wife's new boyfriend filing a change-of-address card and re-listing his telephone number to the wife's residence, receiving mail at the wife's residence and listing the wife's address on his tax return;[14] the wife casually referring to her boyfriend as "her husband" in front of the a process server;[15] and the wife and new boyfriend jointly running a business from the wife's home.[16]

While this is not a conclusive list by any means, it is representative of the breadth of factors that courts have been willing to consider in ascribing a meaning to "cohabitation." Be sure to take the time to find out what specific aspects of your client's relationship may be considered in construing a cohabitation clause, and draft it accordingly.

Endnotes

1. *Graev v. Graev*, 2008 WL 4620698 (N.Y.), 2008 N.Y. Slip Op. 07945 (Ct. App. 2008).
2. *Graev v. Graev*, 6 Misc. 3d 1024(A), 800 N.Y.S.2d 346 (Sup. Ct., N.Y. Co. 2005).
3. *Scharnweber v. Scharnweber*, 105 A.D.2d 1080, 482 N.Y.S.2d 187 (4th Dep't 1984); *Salas v. Salas*, 128 A.D.2d 849, 513 N.Y.S.2d 770 (2d Dep't 1987); *Ciardullo v. Ciardullo*, 27 A.D.3d 735, 815 N.Y.S.2d 599 (2d Dep't 2006); *Clark v. Clark*, 33 A.D.3d 836, 827 N.Y.S.2d 159 (2d Dep't 2006).
4. *Scharnweber, supra*.
5. *Id.*
6. *Graev v. Graev*, 2008 WL 4620698 (N.Y.), 2008 N.Y. Slip Op. 07945 (Ct. App. 2008).
7. *In re Marriage of Dessler*, 56 Or.App. 812, 643 P.2d 655 (1982).
8. Divorced or separated spouse's living with member of the opposite sex as affecting other spouse's obligation of alimony or support under separation agreement, 47 A.L.R. 4th 38, sec. 6[a].
9. *Graev*, *supra*.
10. *Ruling Finds Couple Must Clearly Define Cohabitation*, N.Y.L.J. 1, Oct. 22, 2008 (col. 4) (quoting Elliot Scheinberg, *amicus curia* for the plaintiff).
11. *Famoso v. Famoso*, 267 A.D.2d 274, 700 N.Y.2d 62 (2d Dep't 1999).
12. *Watson v. Watson*, 39 A.D.2d 660, 331 N.Y.S.2d 730 (1st Dep't 1972).
13. *Scharnweber v. Scharnweber*, 105 A.D.2d 1080, 482 N.Y.S.2d 187 (4th Dep't 1984); *Brown v. Brown*, 122 A.D.2d 762, 505 N.Y.S.2d 648 (2d Dep't 1986).
14. *Markoff v. Markoff*, 225 A.D.2d 1000, 639 N.Y.S.2d 565 (3d Dep't 1996).
15. *Id.*
16. *Olstein v. Olstein*, 309 A.D.2d 697, 766 N.Y.S.2d 189 (1st Dep't 2003).

Elena L. Greenberg is a partner in the Garden City, New York matrimonial law firm of Fass & Greenberg, LLP and a lecturer for the New York State Bar Association, Nassau County Bar Association, and National Business Institute. She is also a featured columnist on matrimonial law for the *New York Law Journal*. Ms. Greenberg can be reached at 516-742-8111 or egreenberg@fglaw.net.

Special thanks to Daniel Howard and John Whiteman for their assistance with this article.

A *Keane* Double-Dipping Miscalculation and the Vanishing Monied Spouse

By Peter J. Galasso, Jeffrey L. Catterson and Joel Rakower

Exhaustive scholarly analyses on the double-dipping, or double-counting, phenomenon have adorned the pages of various legal publications since its initial recognition in *McSparron v. McSparron*.[1] As we all know, in *McSparron*, the Court of Appeals held that maintenance awards are not to be drawn from the income stream that was relied upon in the calculation of the value of an equitably distributed marital asset. And, as an integral part of that decision, the *McSparron* Court wisely cautioned the lower courts to be vigilant in fashioning maintenance awards to avoid double-dipping:

> Moreover, care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license such as the licensed spouse's professional practice. The courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses. *McSparron* at 286.

Five years later, in *Grunfeld v. Grunfeld*,[2] the Court of Appeals amplified the *McSparron* admonition as follows:

> Most significantly for the case at hand, *McSparron* also cautioned lower courts to "be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses" (*id.*). To allow such duplication would, in effect, result in inequitable, rather than equitable, distribution. In contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependant upon the future labor of the licensee. The asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. To the extent, then, ***705** that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being twice charged with distribution of the same marital asset value, or with sharing the same income with the nonlicensed spouse. *Grunfeld* at 704.

In both *McSparron* and *Grunfeld*, the proscription against double dipping was applied with equal force to the enhanced earnings that was produced by a law license. Those same double dipping safeguards were eventually applied to the dynamic between the value of a professional practice, like a law firm or medical practice, or of a business where the valuation was dependent on the conversion of the projected future income stream. As the Second Department held in both *Sodaro v. Sodaro*[3] and *Murphy v. Murphy,*[4] when a business or practice is valued by converting a projected future income stream into a present value, that income stream is not to be utilized in the calculation of a maintenance award.

Heeding the direction given by *McSparron, Grunfeld,* and its progeny, matrimonial practitioners began to get a handle on the double-dipping dynamic and the arithmetic to be invoked in cases where a spouse attained a professional license during the marriage and thereafter utilized that license to create a practice that further enhanced his or her earnings. In constructing the valuation equations, forensic accountants would first calculate the actual, as opposed to reported, annual income of the owner of the professional practice. From that amount, a statistically based "reasonable compensation" figure of the license holder is subtracted to arrive at the "excess earnings" that the owner derives from the practice. If the license was obtained before the marriage, the arithmetic pertinent to the forbidden income stream would end here. However, if the license was obtained during the marriage, then the license value would be equitably distributed as well, resulting in the exclusion of two distinct income streams from the calculation of maintenance. To compute the value of enhancement derived from the license, the income of a comparably situated college student would be subtracted from the statistically higher average income of the license holder, thereby identifying the projected future income stream that would be unavailable in calculating an award of maintenance.

By way of example, assume that:

(i) Jake attained his law license and established his law practice during the marriage;

(ii) Jake earns $400,000 per year from his practice;

(iii) A comparably situated associate earns $200,000 per year; and

(iv) A comparably situated college graduate earns $100,000 pear year.

Based upon *Sodaro*, if the value of Jake's practice is equally distributed to his wife, then only $200,000 will

be deemed available for an award of maintenance. If the value of Jake's license is also equally distributed to his wife, then a total of $100,000 of Jake's $400,000 annual income will be deemed available for an award of maintenance. Prior to *Keane v. Keane*, it seemed to make perfect sense that a spouse could not be permitted extract a share of the value of the title holder's license or practice, which are the vehicles that drive up one's earnings, and then also receive a second benefit from that asset, by sharing in the income created by that asset.

As contrasted with the double dipping issue in the context of a professional practice or service-oriented business, *Keane v. Keane*[5] involved the equitable distribution of two real property assets. Specifically, the marital residence was awarded to the wife, while the parties' commercial building of comparable value was awarded to the husband. While the potential value of the marital residence as a rental was disregarded, the income actually generated by the commercial building was viewed as available income for the purposes of awarding the wife maintenance. Despite the husband's double-dipping lament, the Court of Appeals held:

> We do not see why an inquiry as to double counting should depend on the valuation method used. After all, any valuation of an income-producing property will necessarily take into account the income-producing capacity of that property. To prevent any income derived from any income-producing property from being "double counted" would, therefore, significantly limit the trial court's considerable discretion in equitably distributing marital property and awarding maintenance. Significantly, we have already differentiated between a professional license and tangible income-producing property, because "where a professional license is at issue, '[t]he asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived' (*Grunfeld v Grunfeld*, 94 NY2d 696, 704 [2000]). Hence, a trial court must convert the enhanced earnings attributable to the license into a monetary marital asset to achieve equitable distribution. In contrast, a court can transfer title to real or personal property in order to equitably distribute the asset" (*Holterman v. Holterman*, 3 NY3d 1, 9 n 5 [2004]).
>
> We agree with dissenting Justice Goldstein that this distinction applies here.
>
> Double counting may occur when marital property includes *intangible* assets such as professional licenses or goodwill, or the value of a service business. As we said in *Grunfeld*, "[i]n contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependant upon the future labor of the licensee" (94 NY2d at 704). It is only where "[t]he asset is totally indistinguishable and has no existence separate from the [income stream] from which it is derived" (*id.*) that double counting results.
>
> Here, the rental property was split between the parties for distributive purposes. The rental income from that property was then considered in determining maintenance.
>
> The property will continue to exist, quite possibly in the husband's hands, long after the lease term has expired, as a marketable asset separate and distinguishable from the lease payments. The mortgage payments, in contrast, were properly distributed as an asset and not counted for maintenance purposes because the payments themselves *were* the marital asset. (*Keane* at 121).

Many matrimonial practitioners were troubled by the *Keane* myopia, given the incongruency of awarding each party a $1 million asset, yet reserving for the wife a maintenance interest in the $1 million asset awarded to the husband. Clearly, the type of asset awarded should not confer an advantage upon one spouse over another. However, that is precisely what *Keane* concluded.

In *Griggs v. Griggs,*[6] the Second Department adapted the *Keane* analysis to the husband's medical practice and concluded that the husband's total income from the already equitably distributed practice was fair game in determining the maintenance to be awarded to the wife, which obviously conflicts with the Second Department's decision in *Sodaro*, where the value of a psychiatric practice was addressed and the double-dipping into its value proscribed. In rejecting the double-dipping contentions of the husband, the Second Department in *Griggs* stated:

> The plaintiff's contention that the court "double-counted" his Practice is without merit. The Court of Appeals recently held that the prohibition against double counting does not apply where, as here, the asset to be distributed is a "tangible income-producing asset," rather than an intangible asset, such as a professional license, the value of which can only be determined based on projected earnings (*see Keane v. Keane,* 8 N.Y.3d 115, 119, 828 N.Y.S.2d 283, 861 N.E.2d 98).

Judging by the absence of discussion on the issue, it appears that the *Griggs* panel failed to recognize that the hypothetical sale of a professional practice logically and economically relegates the titled spouse to a statistically based reasonable compensation level. In doing so, *Griggs* reversed the enlightened compartmentalization of the income of an owner or partner in a professional practice that was historically observed by forensic accountants in identifying the income stream created by a professional practice. The equation simply recognized the difference between the earnings of a business owner and a similarly experienced employee-professional.

Lawyers whose practices are substantial enough to justify hiring associates generally earn more than those lawyers who are their employees. Since law practices are not saleable except under certain defined circumstances, under *Griggs*, the Court can now award the non-titled spouse an interest in the value of the business, which is based on the same earnings that *Grigg*s will now allow the Court to consider in calculating the maintenance award. Before *Griggs*, the excess earnings of the professional derived from the practice would have been excluded from maintenance award consideration. Indeed, if *Griggs* is to be followed, the only income stream that is to be excluded going forward is the income stream created by the license acquired during the marriage and which was previously equitably distributed.

It should be noted that in *Griggs*, the valuation methodology adopted by the forensic accountant did not reference the excess earnings produced for the owner of the professional practice being valued. As a result, no "income stream" was identified in the valuation methodology that could be "double dipped." Misguidedly following *Keane,* the *Griggs* Court has effectively vitiated a double-dipping concern in cases involving the equitable distribution of the value of a medical practice. Hence, despite *Keane dicta* that double-dipping adjustments should not depend on the valuation methodology adopted by the valuator, the *Griggs'* Court applied *Keane* in narrowing the double dipping pool to cases involving licenses and other specified educational attainments that have the tendency to enhance one's earnings. By virtue of *Griggs*, professional practices that can be sold by reference to a formula that does not consider the owner's enhanced earnings will no longer warrant double-dipping adjustments in the calculation of a maintenance award.

Returning once again to the twisted dictum of *Keane*:

> Double counting may occur when marital property includes *intangible* assets such as professional licenses or goodwill, or the value of a service business. As we said in *Grunfeld*, "[i]n contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependant upon the future labor of the licensee" (94 NY2d at 704). It is only where "[t]he asset is totally indistinguishable and has no existence separate from the [income stream] from which it is derived" (*id.*) that double counting results.

A potential key to the *Keane*, *Griggs* debacle lies within an often overlooked segment of appraisal reports provided for professional practices. It is referred to as the standard of value. The standard and premise of value typically assigned to a business entity in a divorce action within New York State is "fair market value" on an ongoing basis and assumes the premise of value in use; that is, one considers the business on the basis of an ongoing enterprise, on an "as is, where is" basis. The term "fair market value" is often defined as the most probable price that the business should bring if exposed for sale on the open market as of the valuation date. It assumes that the buyer and seller are each acting prudently and knowledgeably and that the price is not affected by any undue stimulus.

Unfortunately, the term "fair market value," while holding standard acceptance by each of the four departments within New York as to non-service oriented businesses, is not so for professional or service- oriented businesses, e.g., a solo practice neurosurgeon who, for all intents and purposes, cannot sell his/her practice. As an additional example, prior to the adoption of DRL § 2-111 in 1996, a lawyer in New York could not sell a legal practice and recognize "goodwill" (that amount which exceeds the net tangible assets of the practice or equity). Yet for purposes of a matrimonial dissolution, each has been assigned a value at times associated with the "goodwill" of the practice under the guise of the definition of "fair market value. "However, the term "fair market value" is a misnomer in that said definition recognizes that the asset can indeed be sold, recognizing in certain instances the existence of various discounts, such as for a minority interest and marketability discounts.

A minority interest discount is measured in terms of the relative degree of control a minority owner has over the operation and important decisions made on behalf of the company. The concept of marketability, however, deals with the liquidity of an ownership interest; that is, how quickly and easily it can be converted to cash if the owner chooses to sell.

If one considers the fact that some professional practices cannot, in reality, be sold to a third party, then the resultant discount for lack of marketability would have to be 100%; hence, no value in terms of "fair market value" (at the very least, as to its application to the existence of goodwill). However, based upon case law in New York State, the application of discounts for minority interests and marketability have not been applied under the

standard of value known as "Value to the Holder," which recognizes personal or professional goodwill.

The concept of "Value to the Holder" recognizes a form of human capital dependent upon the future labor of the licensee which is totally indistinguishable and has no existence separate from the [income stream] from which it is derived. Thus, it would appear that should the appraiser deviate from the standard of "fair market value," the concept of double dipping reappears. It is then incumbent upon the attorney to work with the appraiser to identify if, and to what extent, the goodwill is personal in nature and not transferable, and again within the realm of double dipping and the spirit of *McSparron* and *Grunfeld*.

To suggest in this economic climate that the courts have lost their way would be a colossal understatement. The so-called monied spouse has already been beaten down unmercifully by the absurd judicial recognition of intangible assets that only New York State continues to include on the marital balance sheet. In that regard, Justice Smith's dissent in *Holterman v. Holterman,*[7] condemning the majority's misallocation of the monied spouse's earnings in that case, seems to have represented the beginning of the end of the monied spouse:

> [The majority has imposed] a very significant burden on defendant--to require him, for several years, to pay to his ex-wife more than two thirds of his net income, and even in the more distant future to pay her as much as he keeps for himself. Defendant's brief in this Court contains the following chart, which summarizes the burden on him in the first year following Supreme Court's award:
>
> | | |
> |---|---|
> | Income | $181,837 |
> | Minus FICA (1233) | ($ 7,403) |
> | Minus Maintenance | ($35,000) |
> | Minus Taxes | ($46,882) |
> | Minus Child Support | ($34,875) |
> | Minus Equitable Distribution (with interest) | ($21,288) |
> | Minus Attorneys' Fees | ($20,000) |
> | NET MONEY AVAILABLE FOR DEFENDANT APPELLANT | $16,389 |
>
> Plaintiff's brief notes, correctly, that the $20,000 attorneys' fee payment is a one-time obligation. With that exception, however, plaintiff takes no issue with the above-quoted calculation. Even if the attorneys' fees are ignored, defendant is left with approximately $36,000 of a pretax income of $181,000.
>
> It is true that the burden on defendant remains at this level only for four years after the award; after that, child support will be reduced because the parties' older child will become emancipated, and a year later maintenance will drop to a lower level pursuant to Supreme Court's order. But even then, the burden will be a major one. My own calculations suggest that, assuming defendant's income does not much change (and again ignoring the attorneys' fee award) defendant is required to pay more than two thirds of his after-tax income to plaintiff for the first four years; some 60% in the fifth year; about half of it in years 6 through 10; and nearly a third of it for five years after that. It is not until 15 years after the award that defendant's obligations (at that point consisting only of maintenance) diminish to something like 12% of his income (calculating both the income and the obligations on an after-tax basis).
>
> When income-producing property is owned by a husband or wife who is divorced, it is often appropriate to order part or even all of it equitably distributed to the other spouse. When that is done, however, it makes no sense at all to calculate child support as though no such distribution had occurred--as though the transferring spouse still owned the asset and received the income it generated. Yet the majority concludes that this irrational procedure is required by the CSSA—as indeed it would be, except that the CSSA expressly permits departure from its formula to avoid an "unjust or inappropriate" result. *(Holterman* at 776).

To appreciate how pugnacious the law has become to the alleged monied spouse, the reader is invited to consider the following real-world scenario in the context of an oppressive body of law. Suppose a husband brings to the marriage a $300,000 annual income as a highly paid associate in a New York City law firm. Having had two children with his previous wife, the husband pays annual support totaling $100,000 to his first wife over the first seven years of his marriage to his second wife.

Five years into his second marriage, the husband goes out on his own and over the next five years establishes his own general practice on Long Island and earns $300,000 from the practice by year 10. In year 11, his second wife,

who did not work during their marriage and who is now 53 years old, seeks a divorce, equitable distribution and lifetime maintenance.

As part of her attorney's letter-demand, the wife demands one-half of the $700,000 paid to the prior wife in support over their 10-year marriage. Amazingly, both the First and Second Departments have inexplicably decided that diverting marital earnings to pay obligations that stem from a prior marriage potentially entitles the new spouse to an equitable distribution of an amount of the marital estate so diverted.[8] She also seeks one-half the value of his practice, which the forensic accountant determines is saleable at 1 times gross revenue or $600,000. As the cherry on her sundae, the wife demands a maintenance award based on the $300,000 derived from the practice. After 11 years of marriage, assuming a 50-50 division of marital estate, your client could owe his second wife a distributive award of $650,000 with 9% interest, and pursuant to *Keane* be compelled to pay her lifetime maintenance based on income of $300,000.

If Dr. Holterman thought that he was left with virtually nothing for his own needs, consider the fate of the so-called monied spouse in our hypothetical, who now recognizes that being the monied spouse in New York State has become part of an evolving judicial vanishing act.

Endnotes

1. *McSparron v. McSparron*, 87 N.E.2d 275, 639 N.Y.S.2d 265, 662 N.E.2d 745 (1995).
2. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (2000).
3. *Sodaro v. Sodaro*, 729 N.Y.S.2d 731 (2d Dep't 2001).
4. *Murphy v. Murphy*, 6 A.D.3d 678, 775 N.Y.S.2d 370 (2d Dep't 2004).
5. *Keane v. Keane*, 8 N.Y.3d 115, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006).
6. *Griggs v. Griggs*, 44 A.D.3d 710, 844 N.Y.S.2d 351 (2d Dep't 2007).
7. *Holterman v. Holterman*, 3 N.Y.3d 1, 814 N.E.2d 765, 781 N.Y.S.2d 458 (2004).
8. *Johnson v. Chapin*, 49 A.D.3d 348, 854 N.Y.S.2d 18 (1st Dep't 2008); and *Mahoney-Buntzman v. Buntzman*, 51 A.D.3d 732, 858 N.Y.S.2d 698 (2d Dep't 2008).

Peter J. Galasso, Esq. and Jeffrey L. Catterson, Esq. are members of Galasso, Langione, Catterson & LoFrumento, LLP, 377 Oak Street, Suite 101, Garden City, NY 11530, (516) 222-6500. Peter J. Galasso is a Fellow to the Academy of Matrimonial Lawyers. They can also be contacted at jcatterson@galassolangione.com.

Joel Rakower is President of Financial Appraisal Services, Ltd. located at 200 Parkway Drive South, Suite 200, Hauppauge, New York 11788 and can be contacted at (631) 543-1333.

Start Saving Time on Document Preparation!

AUTOMATED FORMS

New York State Bar Association's Family Law Forms

Automated by HotDocs®

■ AUTHORITATIVE

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

■ CONVENIENT

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

■ QUICK AND ACCURATE

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

EDITOR AND COMMENTATOR:

Willard H. DaSilva, a member of DaSilva, Hilowitz & McEvily LLP, is a veteran matrimonial law practitioner with offices in Garden City and New City, New York.

- **Uniform Uncontested Divorce**
- **Adoption**
- **Child Protection**
- **General Family Court**
- **Uniform Child Custody Jurisdiction and Enforcement (UCCJEA)**
- **Request for Judicial Intervention and Application for Index Number**
- **Office of Child and Family Services**
- **IRS**

$434*

1 compact disc (single-user, annual subscription) PN: 6260
Annual Renewal $353

Members of NYSBA pay:

$377*

1 compact disc (single-user, annual subscription) PN: 6260
Annual Renewal $296

*Multi-user pricing is available. Please call for details. Prices include shipping and handling but not applicable sales tax.

Prices subject to change.

Hot Docs® renewal pricing does not include shipping or applicable sales tax as charged by LexisNexis.

NYSBA

CALL 800/582-2452

Mention source code PUB0426 when ordering

Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Connecticut is the second state in the nation to allow same-sex marriage

On October 10, 2008, Connecticut joined Massachusetts as the second state to permit same-sex marriage in *Kerrigan and Mock v. The CT Department of Public Health*. The court found that civil unions in Connecticut (permissible since 2005), while providing some protections and responsibilities akin to marriage, were "separate but not equal rights" and therefore violated the state constitution's equal protection clause.

In November, a question is on the Connecticut ballot on whether to hold a constitutional convention which would potentially open the door for anti-gay rights groups to seek a ban on same-sex marriage.

California originally was the second state in the nation to recognize same-sex marriage as a result of a decision of California's highest court overturning the state's ban on same-sex marriage. However, during the November, 2008 general elections, Proposition 8, a proposed constitutional amendment entitled Eliminate Right of Same-Sex Couples to Marry Act, passed. The Supreme Court agreed to hear several challenges to Proposition 8 as early as March, 2009.

Same-sex divorce in New York

CM v. CC, No. 301842-2008 NY Slip Op. 28398, 2008 N.Y. Misc. LEXIS 6011 (Sup. Ct., N.Y. Co., Oct. 14, 2008) (Richter, J.)

The court questioned whether it had subject matter jurisdiction to grant a divorce to a same-sex couple who legally married in Massachusetts but lived in New York. The court held that the common law doctrine of comity required recognition of the parties' marriage in the same way that this court recognized a same-sex couple's Canadian marriage in *Beth R v. Donna M*, 853 N.Y.S2d 501 (Sup. Ct., N.Y. Co. 2008) (Drager, J.), as reported in my previous column. There is no positive law barring recognition of out-of-state same-sex marriage, as the New York Legislature has not enacted any statute that would have prohibited recognition of a same-sex marriage from another jurisdiction, nor is there any constitutional amendment barring recognition of such marriages. Moreover, recognition of foreign same-sex marriage is consistent with Governor Paterson's recent Executive Directive dated May 14, 2008.

As discussed in my previous column, Governor Paterson's Executive Directive dated May 14, 2008 ordered all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions. The New York Taxpayers unsuccessfully challenged such Executive Directive, *Golden v. Paterson*, 2008 N.Y. Misc. LEXIS 5838, 240 N.Y.L.J., 48 (Sup. Ct., Bronx Co. 2008) (Billings, J). The court found that the directive did not violate State Finance Law § 123-b since the directive was lawful, did not encroach on the legislature's power to regulate same-sex marriage within the state, and merely implemented the Appellate Division's ruling of providing comity to out-of-state same-sex marriages.

Recent Legislation

DRL § 240(1)(a) (A7089/S6201), effective September 4, 2008

In the past, some judges have sanctioned parents who brought allegations of abuse and neglect that could not be proven, even though based in good faith, by depriving them of custody or visitation. This caused some parents who had good-faith concerns of their child's safety not to bring abuse and neglect proceedings in fear of losing custody. In response, on September 4, 2008 the Governor signed into law an amendment to DRL § 240(1)(a) (A7089/S6201), which added the following language to the statue:

> If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child.

Section a-1 added to DRL § 240(1) and section (e) added to FCA § 651, effective January 23, 2009

The new provisions provide that prior to rendering a permanent, temporary or successive temporary order of custody or visitation, the courts must review Article 10 court proceedings relating to the parties, the statewide computerized registry regarding orders of protection and warrants of arrest, and the sex offender registry. Any information obtained from this review must be conveyed to the attorneys, parties (if *pro se*) and the law guardian. However, courts may issue emergency temporary orders of custody or visitation in the event time does not permit such a review, provided such order is in the best interests of the child. However, the mandated review must be conducted subsequent to the issuance of the emergency order.

New DRL § 240 (3)(8), and new FCA § 446(h), effective December 3, 2008

A court may issue an order of protection directing a party to refrain from intentionally injuring or killing any companion animal of the petitioner.

New DRL § 75-l, effective March 24, 2009

Subdivision 1 provides that a court is prohibited from issuing a permanent order to modify, amend or change any judgment or order relating to child custody that existed at the time a parent was activated, deployed or temporarily assigned to military service, where the reason is due to such military service.

Subdivision 2 provides that when a parent is in military service, a court may issue a temporary order to modify or amend a previous child custody judgment or order where it is found, by clear and convincing evidence, that same is in the best interest of the child(ren). An attorney for the child must be appointed in all matters where a temporary modification or amendment will be made. The court shall provide for contact between the child(ren) and the parent in military service (i.e., e-mail, Webcam or telephone) and a parenting schedule, provided it is in the child's best interest.

Subdivision 3 provides that upon the parent's return from military service and upon either parent's request, a hearing shall be held to determine whether a change in circumstances has occurred to warrant a change, amendment or modification of the previously issued child custody order or judgment.

Subdivision 4 clarifies that the provisions of DRL § 75-l do not apply to "assignments to permanent duty stations or permanent changes of station."

Various amendments and additions to CPLR Article 52 regarding collection of money judgments, effective January 1, 2009

Subdivisions (l), (m) and (n) are added to CPLR 5205 (personal property exempt from satisfying money judgments).

Most substantively, subdivision (l) includes as an exemption the first $2,500 in a bank account which contains funds that were directly or electronically deposited within the last 45 days. This amount will be adjusted annually for inflation. The amendment to CPLR 5222(h) makes clear that the first $2,500 containing exempt funds in a bank account cannot be restrained. CPLR 5230(a) is amended to, *inter alia*, reflect that an execution notice must include this new exemption.

Amendments to CPLR 5222 (b), (d), (e) were also made. Amendment to subdivision (e) changes the content of the restraining notice form that must be sent to a judgment debtor.

Subdivision (h) [discussed above], (i) and (j) are added to CPLR 5222.

Subdivision (i) sets forth that funds in a judgment debtor's banking institution account equal to or less than 240 times the federal or state minimum hourly wage, whichever amount is greater, cannot be restrained, except where the court determines that any part of said sum is not necessary for the judgment debtor's and his/her dependents' reasonable requirements [needs]. CPLR 5230(a) is amended to, *inter alia*, include this addition. See also related amendments to CPLR 5231(b) regarding the issuance an income execution for the enforcement of a money judgment.

CPLR 5222-a is added, which sets forth the procedure when serving a restraining notice on a natural person's account at a banking institution.

Related to the additions/amendments discussed above; see also CPLR 5232, which added subdivisions (e), (f) and (g).

Voluntary mediation program Instituted in the Matrimonial Part of the Nassau County Supreme Court

The Matrimonial Part of the Nassau County Supreme Court has instituted a voluntary mediation program. The purpose is to provide a reasonable, cost-effective alternative dispute resolution forum for the parties in divorce litigation. Litigants are encouraged to take advantage of the process with assistance of counsel, while reserving their rights to utilize litigation. All

written and oral communications during mediation are confidential. At the preliminary conference, counsel for the parties and the judge can identify issues that are ripe for mediation. A panel of approximately 15 mediators made up of divorce lawyers and retired judges will be available at a reduced rate. Other counties such as Suffolk, New York, and Erie have similar programs.

Court of Appeals Round-up

Farkas v. Farkas, No. 144, Slip Op. 7988, 2008 N.Y. LEXIS 3294 (Oct. 23, 2008)

This case was reviewed at the appellate level in one of my prior columns. Since then, the Court of Appeals had reversed that decision. The parties' judgment of divorce provided that the wife could enter a money judgment against the husband for the amount due and owing to the bank in a foreclosure action ($750,000) "without further order of the court." Thereafter, the wife made a superfluous motion for the same relief, which was granted. Five years later, the wife served a proposed order with notice of settlement. The husband opposed, claiming that the wife abandoned the judgment because she failed to serve the proposed judgment within 60 days as required by 22 N.Y.C.R.R. 202.48. The Supreme Court signed the proposed judgment, but the Appellate Division vacated it as abandoned pursuant to court rules. The Court of Appeals reversed, finding that 22 N.Y.C.R.R. 202.48 is not applicable to the case at bar, since it only applies to decisions and orders, and not the underlying divorce judgment. The fact that the wife brought a superfluous motion does not change this result.

Graev v. Graev, No. 139, Slip Op. 7945, 2008 N.Y. LEXIS 3252 (Oct. 21, 2008)

Pursuant to the parties' divorce agreement, the husband was to pay the wife $11,000 per month maintenance until, *inter alia*, the wife's "cohabitation" with an "unrelated adult for a period of sixty substantially consecutive days." "Cohabitation" was not defined by the agreement. The ex-husband moved to terminate the ex-wife's maintenance payments based on her boyfriend living with her in her summer home for the aforementioned time period. The lower court denied the ex-husband's request to terminate maintenance, ruling that while the ex-wife may have had a "warm" relationship with her boyfriend, it fell short of "cohabitation," since it was platonic and they were not financially interdependent because her boyfriend maintained a separate residence. The First Department affirmed, finding that cohabitation has been held to involve an element of financial interdependence by the couple sharing living quarters, and in this case, they did not. The Court of Appeals reversed, finding that the word "cohabitation" was ambiguous as used in the parties' separation agreement. In addition, neither the dictionary nor New York case law interpreting Domestic Relations Law § 248 supplied an authoritative or plain meaning. Therefore, the case was remanded to the trial court for further proceedings to determine the parties' intent as to the cohabitation clause.

Author's note: As a result of this ruling, the practitioner should define "cohabitation" in the agreement. One suggestion is as follows: "The wife living in or residing overnight in the same residence with an unrelated male for a reasonably consecutive period of 60 days or more, regardless of whether the wife and the unrelated male have a sexual relationship or receive financial contributions from one another."

Other Cases of Interest

Electronic Discovery

Moore v. Moore, 240 N.Y.L.J., 32, 2008 N.Y. Misc. LEXIS 5221 (Sup. Ct., N.Y. Co., Aug. 4, 2008) (S. Evans, J.)

The husband sought to suppress certain on-line chats with an unrelated female that were downloaded and saved on the hard drive of his laptop computer. The parties stipulated to copying the hard drive of this computer. The court held that the wife did not violate Penal Law § 250.05, because she did not intercept a communication, since this was a saved conversation in a computer file. Nor did the wife violate Penal Law §§ 156.05 (using a computer without authorization), 156.10 (computer trespass) and 156.35 (criminal possession of computer related material) since the parties stipulated to the copying of the hard drive, there was no need to run the operating system while making the copies, and the files on the computer were not encrypted nor were passwords.

Author's note: New York is the only state that does not have a no-fault statute. This case is a typical example of the three-ring circus and "airing the dirty laundry" required to prove grounds. Two no-fault bills are currently pending before the state Assembly, including the Bradley Bill (A-9398) and the Paulin Bill (A-10446).

Federal Crime of Failure to Pay Support

USA v. Kerley, No. 07-1818, 2008 WL 4349237 (2d Cir. Sept. 25, 2008)

Defendant father was convicted by a jury in the Southern District of New York of two counts of willful failure to pay a court-ordered child support obligation for his two daughters ($106,000) in violation of 18 U.S.C. § 228(a). One question of first impression was whether violation of a single child support order that covers two children gives rise to one or two convictions of 18 U.S.C. § 228. The court ruled that the defendant should be prosecuted on only one count.

Author's note: 18 U.S.C. § 228, the Child Support Recovery Act (CSRA), criminalizes willful failure to pay past due support obligation for a period of one year, or more than $5,000) for a child who resides in another state. As noted in my previous column, New York state enacted its own criminal statute regarding failure to pay support, New York Penal Law § 260.05(2), which was effective November 1, 2008.

Support Enforcement

***Brinckerhoff v. Brinckerhoff*, 53A.D.3d 592, 862 N.Y.S.2d 98 (2d Dep't 2008)**

Where the former husband failed to make timely payments of maintenance without litigation, the Supreme Court properly exercised its discretion in directing the former husband to post security with the court to guarantee future maintenance payments. However, the security amount of $350,000 was deemed excessive, and was reduced to $140,000.

QDRO

***Berardi v. Berardi*, 54 A.D.3d 982, 865 N.Y.S.2d 245 (2d Dep't 2008)**

The parties' divorce agreement provided that the wife was entitled to one-half of the husband's "pension, disability payment, variable supplement and 457 Fund with the NYCPD" pursuant to the Majauskas formula, with a cutoff date of July 7, 1998. After the parties divorced, the ex-husband continued working for the NYPD, but in 2001 he sustained significant lung ailments from his involvement in the September 11 rescue and recovery operation. The ex-husband applied for accident disability benefits, which were granted by his employer.

The former wife moved to amend the parties' QDRO to conform it to their stipulation of settlement regarding the allocation of defendant's NYPD retirement pension, and to incorporate her allocable share of a 25% increase in defendant's pension resulting from his retirement on accidental disability. The trial court granted the relief.

On appeal, the order was modified only to the extent of denying that portion of the former husband's retirement which resulted from his accident disability because the agreement did not specifically state "accident disability benefits." The matter was remanded to the court below for further determination as to which portion of the pension constitutes marital property and is subject to equitable distribution rather than compensation for personal injuries, and therefore separate property.

Interim Counsel Fees

In the wake of *Prichep v. Prichep*, 52 A.D.3d 61, 858 N.Y.S2d 667 (2d Dep't 2008)

As discussed in my previous column, the Second Department in *Prichep* held that pursuant to DRL § 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied nor deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." Several cases following *Prichep* have granted large interim awards, including *Cohen v. Cohen*, 2008 N.Y. Misc. LEXIS 3890, 239 N.Y.L.J., 121 (June 17, 2008) (Ross, J.) ($30,000 interim counsel fee award); *Rosenbaum v. Rosenbaum*, No. 2007-03316, Slip Op. at 2, 2008 N.Y. App. Div. LEXIS 7679 (2d Dep't Oct. 14, 2008) ($75,000 interim counsel fee award); *Gordon v. Gordon*, No. 202475/06, Slip Op. at 6, 20 Misc. 3d 1133A (Sup. Ct., Nassau Co., July 24, 2008) (Marber, J.) ($75,000 additional interim counsel fee award).

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 age 45-and-under division and was featured as one of the top New York matrimonial attorneys in *Super Lawyers*, 2008.

Ms. Samuelson may be contacted at (516) 294-6666 or info@samuelsonhause.net. The firm's Web site is www.newyorkstatedivorce.com.

A special thanks to Carolyn Kersch for her research assistance in the New Legislation section of this article.

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar.

Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), 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.

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

ISSN 0149-1431 (print) ISSN 1933-8430 (online)

NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

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