

# FAMILY LAW REVIEW

VOLUME 24

## Rolling the Dice “Pendente Lite”

by Peter J. Gallaso \*

During the pendency of her divorce action, and for the past eighteen (18) months, your client has been making voluntary payments to her spouse, in an amount commensurate with the Child Support Standards Act. When a minor glitch stalls negotiations, your client is suddenly served with a *pendente lite* application<sup>1</sup> which demands, among other things, that she pay one-half of the carrying charges on a marital residence long since vacated. Your client cries loudly that you must resolve this insidious power play. You naturally nod your head equivocally.

As you are well aware, a *pendente lite* application is little more than a crap shoot. Moreover, the submission of even the most patently frivolous applications are rarely if ever penalized by the courts. Yet, not unexpectedly, a pre-trial determination of such applications often sets the stage for the negotiation and ultimate resolution of a divorce action no longer mired by the uncertainty of outcome. The trouble begins when the court erroneously adopts your adversary's hyperbole.

Mindful of its ever burgeoning case load and time constraints, the court's task in addressing *pendente lite* applications is a most difficult one. Relying on voluminous affidavits and supporting documents that embody the parties' conflicting positions, judges are called upon to provide relief which will “tide the needy party over,”<sup>2</sup> while acknowledging the obligations that the non-moving party must meet. Typically, the attorneys use such applications to vent their client's anger and frustration in print, filling its pages with vituperative finger-pointing and back-biting. From a review of such high-charged prose, and without the benefit of live testimony, the judge is then faced with the unenviable task of computing a temporary support figure that balances the relative equities of the parties.

As often happens, your client's “voluntary” arrangement will be disregarded by a court disinclined toward encouraging such arrangements.<sup>3</sup> However, in issuing its order, the court will likely remind you that:

[Its] decision, which is based on consideration of the standard of living of the parties established during the marriage, the ability of respondent to provide the reasonable needs of movant and, also, any of the factors enumerated in DRL§236(B)(6) as amended by L.1986, Ch.884 (*Belfiglio v. Belfiglio*, 99 A.D.2d 462, 469 N.Y.S. 2d 978 [Second Department 1984], constitutes the order of the court, but has no bearing on awards ordered at trial (*VanNess v. VanNess*, 100 A.D.2d 848, 474 N.Y.S. 2d 90 [Second Department 1984]).

Do not expect the court to detail the empirical bases of its decision: the more nebulous the decision the better (and less appealable). And for the disgruntled party, the operations for relief are few, namely: appeal, move for a downward modification or live with the order until trial.

Although Chief Justice Wachtler led a vociferous charge against budget cuts to an already overworked judiciary, little has been done to discharge litigants from appealing *pendente lite* “dis”-orders. Routinely, after a 24-month wait to be heard, the Appellate Division rubber-stamps such appeals with “a speedy trial is the best remedy for an inequitable *pendente lite* result”<sup>4</sup> affirmance. Clearly not the “stuff” for your redemption. In fact, given the rarity of *pendente lite* order reversals, unless you are appealing a decision in which the spouse was practically shut-out,<sup>5</sup> convince your client to save her money on the appeal.

Alternatively, a successful reargument of a *pendente lite* decision is as likely to occur as Ivan Boesky being named the Commissioner of the S.E.C. The rule is simple: once a court shows a willingness to “change” its mind, that court will double its motion calendar; certainly an unwise path to free time. Similarly, unless your client experiences substantially changed circumstances which ring true rather than orchestrated, your client's prayer for a downward modification will not likely be answered.

### A Cry of Fraud - Help is on the Way

As observed by Judge Amodeo in his *Capalbo v. Capalbo* decision, N.Y.L.J., September 30, 1991, pg. 27 col. 3 (Fam. Ct. Dutchess County, 1991), the courts may have a weapon to combat “misguided” *pendente lite* orders. As incisively opined by Judge Amodeo:

“[P]ursuant to CPLR§5015, the Court has the power to relieve a party from an order upon the ground of misrepresentation . . . To order child support arrears on the basis of facts which were inaccurate when alleged and which were never subject to the scrutiny of cross examination would be grossly inequitable and would unjustly enrich [the moving party].”

Unfortunately, the *Capalbo* case may not justify a back-slapping celebration, given its narrow holding. In *Capalbo*, the moving party contended that she had sole custody of the parties' two (2) children, when in fact custody had been shared almost equally. In reliance on

that misrepresentation, the court issued an order obligating the husband to pay child support to his wife, a decision which would likely have been affirmed on appeal. Under the circumstances, Judge Amodeo could hardly have permitted an order to be entered for child support arrears, when to do so would reward a party who perpetrated a fraud on the court. Thus, he relied on CPLR§5015 to relieve the husband stricken by a *pendente lite* order born of that misrepresentation.

Not surprisingly, however, inequitable *pendente lite* orders are not always based upon misrepresentation, as distinguished from mere exaggeration. Since the point at which exaggeration becomes a CPLR5015 misrepresentation is quite elusive, the judiciary must find a way to rescue the party who simply finds herself at the wrong end of such an order. Otherwise, the victorious spouse will string their matrimonial into the 21st century rather than give up the benefits derived from a favorable *pendente lite* order. And due to the congestion that is strangling our court system, little can be done to advance a matrimonial much more quickly than the party impeding the progress will permit. Even if one is successful in moving the case along, the reward is frequently placement on a triple digit trial calendar. So what's an unhappy client to do?

### Suggested Alternatives

The solution lies not in new legislation, but in the practical application of existing law. The equitable distribution status<sup>6</sup> requires that the court consider all of the factors enumerated therein in carving out an appropriate division of the parties assets. The final factor to be considered under paragraph (d) subparagraph (13) of this statute is "any other factor which the court shall expressly find to be just and proper." Paradoxically, the courts can remedy an inadequate *pendente lite* order by retroactively enforcing the trial determination to the date of the original application,<sup>7</sup> yet allegedly have no power to reverse an erroneous and excessive *pendente lite* order by adjusting the parties' equitable distribution entitlements. If attorneys were able to argue to their clients that an inequitable *pendente lite* result could be remedied at trial, *pendente lite* decisions would only rarely be appealed and probably never be reargued. Since trial courts acknowledge that their *pendente lite* orders are many times based on inadequate data,<sup>8</sup> why not permit them to correct their errors at trial? By empowering the trial court to credit the party disaffected by an onerous *pendente lite* order at the trial stage, the system will take at least a baby step toward alleviating some of the burden imposed upon its understaffed trial and appellate courts.

In a related vein, if a litigant were penalized for submitting erroneous or misleading data to the court at the *pendente lite* stage, even the most vindictive matrimonial clients might become circumspect about tying up the court with wasteful motion practice. For starters, the attorney's fees generated as a result of defending

against either a perjurious or manifestly misleading *pendente lite* application should be borne by the offending party.<sup>9</sup> In addition, the party who is too quick at the trigger and fails to reasonably negotiate a temporary support dispute should likewise be penalized. Clearly, chilling the all too frequent abuse of the *pendente lite* application is certainly a goal worth achieving.

Just as the court rules require that attorneys attempt to resolve disclosure disputes in good faith as a prerequisite to moving to compel disclosure, an analogous obligation should be imposed on matrimonial practitioners to impede the "first strike" mentality of the overzealous.<sup>10</sup> Thus, this implicit extension of the sanction rule<sup>11</sup> would cause us all to be more thoughtful and reflective in our motion practice, clearing at least a portion of the court's distracted focus. And, ideally, the *pendente lite* application could then serve legitimate and bona fide purposes rather than merely stir the visceral and wasteful juices of the inherently stressful process of divorce.

### Endnotes

1. A pre-trial motion which generally seeks, among other things, temporary financial relief with an alleged design to maintain the status quo until trial.
2. See *Kayser v. Kayser*, 71 A.D.2d 1015, 420 N.Y.S.2d 412 (2nd Dept., 1979); *LaMothe v. LaMothe*, NYLJ, March 22, 1989, pg. 26 col. 1 (2nd Dept. 1989).
3. But see *Hite v. Hite*, 89 A.D.2d 577, 452 N.Y.S.2d 235 (2nd Dept. 1982); and *Heller v. Heller*, 38 A.D.2d 526, 326 N.Y.S.2d 939 (1st Dept. 1971); *Shapiro v. Shapiro*, 8 A.D.2d 341, 342-343, 188 N.Y.S.2d 455 (1st Dept. 1959).
4. *Hildenbriddle v. Hildenbriddle*, 110 A.D.2d 819, 488 N.Y.S.2d 74 (2nd Dept. 1984).
5. See *Pollilo v. Pollilo*, NYLJ, December 7, 1990, pg. 26, col. 1 (2nd Dept. 1990).
6. Domestic Relations Law §236, Part B, Subdivision 5.
7. Domestic Relations Law §236, Part B, Subdivision 6 & 7.
8. See *LaMothe, supra*; *Yecies v. Yecies* 108 A.D.2d 813, 485 N.Y.S.2d 128 (2nd Dept., 1985).
9. See *Brancoveanu v. Brancoveanu*, NYLJ, Nov. 26, 1991, pg. 28, col. 4 (2nd Dept. 1991).
10. Excepting, of course, in truly unanticipated and exigent circumstances, where justice delayed would be justice denied.
11. 22 NYCRR §130.1-1, et seq.

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### Whose Children Are They Anyway?

by Peter J. Galasso

Lisa teaches disabled children at a local elementary school. She is a divorced mother of three, the oldest having just celebrated his fifth birthday. Jessica, who is two years old, suffers from a congenital disorder that necessitates therapy three afternoons a week. Exhausted at the end of the day, Lisa can barely lift her arms after feeding, bathing and putting her children to sleep. She was granted sole legal custody of three children less than two months ago, yet she now finds herself back in court.

This time it is her ex-husband's parents who have brought the proceeding. The paternal grandparents insist that they be accorded visitation privileges, separate and apart from those of their son.

They do not contend that Lisa is unfit. To the contrary, Lisa has done an extraordinary job nurturing her children, especially after Mike left her for another woman, just five weeks after her twins returned home from a medically complicated delivery.

During Lisa's testimony, she reveals how draining her job has become, as she juggles caring for her needy students during the day and her own children at night. She complains that too often her students get the best part of what she has to offer, leaving her own children shortchanged during the week. Only on the weekends can Lisa spend quality time with them.

Notwithstanding, Lisa does not begrudge Mike's weekend time with their children. The weekends should be shared. However, when Mike is unavailable for a weekend visit, Lisa would welcome the extra time with her children; time she does not want to share with his parents.

Mike has lived with his parents for the past two years, and has paid Lisa only minimal support since losing his job. To date, and along with his parents, Mike has taken full advantage of his scheduled weekends with his children. When he is unavailable, Mike wants his parents to exercise his visitation rights.

Lisa argues that this arrangement favors his parents over her. Yet, over her objections, and despite the fact that grandparents enjoy no commonlaw or constitutional right to visit with their grandchildren, the Family Court grants the paternal grandparents visitation rights under his Judgement of Divorce.<sup>2</sup> Confounded and disappointed, Lisa gathers her belongings and exits the courtroom, remarking rhetorically, "Whose children are they, anyway?"

Historically, parents have enjoyed a well-recognized liberty interest in rearing and educating their children in accord with their own views.<sup>3</sup> In *Prince vs. Massachusetts*,<sup>4</sup> the U.S. Supreme Court held that:

The custody, care and nurture of the child (should) reside first in the parents, whose primary function and freedom include preparation for obligations the state cannot supply or hinder. Intrusion into the relationship between parent and child requires a showing of an overriding necessity.

Notwithstanding such constitutional protections, pursuant to Domestic Relations Law §72, grandparents may petition either Supreme or Family Court for visitation with their grandchildren, even over the objection of fit, natural parents, enjoying an intact relationship.

#### Grandparents' Role

Because grandparents have represented an important influence on the

lives of their grandchildren, as "reservoirs of information about family history and values,"<sup>5</sup> the courts have been sensitive to the special role they play.

As the Second Department recognized in *Emmanuel S. v. Joseph E.*<sup>6</sup> [DRL §72] rests on a humanitarian concern that "visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild . . . which cannot derive from any relationship." While DRL §72 provides in relevant part:

[W]here circumstances show that conditions exist under which equity would see fit to intervene, (upon application, the court) may make such directions as the best interest of the child may require for visitation rights from such grandparent or grandparents, in respect to such child (L. 1975 ch. 4321 §1, as amended).

Thus, the Legislature has created a two-pronged test in determining an application made pursuant to DRL §72. First, the petitioning grandparents must establish standing. The standing inquiry involves an examination of the extent and nature of the grandparent-grandchild relationships prior to petition. As summarized by the Court of Appeals in *Emmanuel S.*:

Although an intact family is not beyond the reach of the statute, that fact and the nature and basis of the parents' objection to visitation are among the several circumstances which should be considered by courts deciding the standing question. Also an essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship. It is not sufficient that the grandparents allege love and affection for their grandchild. They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention.

Once standing has been found, the court proceeds to the second prong, which is to determine if visitation is in the best interest of the grandchild. Because standing and a child's best interests are necessarily tied to the nature of the parent's objections and the existing relationship between grandparent and grandchild, it is difficult to imagine a situation where standing is found but where visitation is deemed adverse to the grandchild's best interests.

Since grandparent visitation petitions generally arise as the result of a denial of a grandparent's attempt at visitation, by either neglectful or feuding spouses, family acrimony is oftentimes the impetus for the proceeding. As surmised by the Second Department in *Emmanuel S.*:

Had the Legislature intended to extend the right to seek judicial intervention to "any grandparent," it could have been easily specified . . . We conclude that a petition for an order authorizing visitation pursuant to DRL §72 must demonstrate the existence of some circumstance or condition, such as untoward disruption of an established grandparent-grandchild relationship because of e.g., a change in the status of the nuclear family, or interference with a derivative right, or some abdication of parental responsibility, before judicial examination of the best interest of the child with its attendant trauma, increased animosity, and financial drain is to be undertaken.

*Confused by the absence of clarity in 'Emmanuel S.' and unmoved by the constitutional prerequisite of an 'overriding necessity,' judges too often allow these grandparent petitions to proceed to a hearing, which even if unsuccessful do not give rise to an award of attorney fees to the objecting parents.*

## Privacy Issue

Reversing the Second Department's holding, the Court of Appeals in *Emmanuel S.* found that the Legislature did not intend to condition relief under DRL§72 based upon the marital status of the parents. Although the nature and basis of the parents' objection to such visitation remains a relevant part of the inquiry, the status of the parents' relationship (i.e. divorced, separated or intact) is not dispositive of the standing issue.

Limited by the facts on appeal, the Court of Appeals elected, however, to pass on the privacy issue raised by the respondents, stating:

Respondents contend also that their constitutional rights are violated if the court allows visitation over their wishes when there is no claim that they are separated or unfit. The question is not before us. We are not addressing an award of visitation, but only whether petitioner has standing to seek it

Id. at 39

Nearly a decade before, in *People ex. rel. Sibley v. Shepard*<sup>8</sup> the Court of Appeals upheld the constitutionality of DRL§72 as applied to "adoptive" grandparents. Although it has an opportunity to reaffirm that decision in *Emmanuel S.*, it failed to do so. The Court's reluctance to even address the privacy claim in *Emmanuel S.*, where the respondents were the children's natural parents, suggests that DRL§72, under certain circumstances, may still be susceptible to constitutional challenge.

Hence, the question left unanswered by the Court in *Emmanuel S.* is whether New York's standard for state intervention into family matters (i.e., where equity would see it fit to intervene) should be pre-empted by the U.S. Supreme Court's more restrictive standard (i.e. overriding necessity), before such interference may be permitted. In that regard, Judge Demaro, then of the Family Court,<sup>9</sup> lamented:

§72 of the Domestic Relations Law has forced this court to decide "best interest" issues, not as and between adversarial natural parents and not for any compelling abuse or neglect situation (Family Court Act §1012). While the court has followed the mandates of §72, it did so with great discomfort. The court would be remiss if it did not elude to its trepidation in usurping the prerogative of a natural parent with custody in deciding what is best for his/her child . . . It appears to this court that a parent with custody, whose right to parent has not been limited by an Article 10 proceeding, and whose custody has not been abrogated pursuant to *Bennett v. Jeffreys*, (40NY2D543), may not have his best interest decisions as to whom his children have contact with replaced by this court's concept of "best interest." Even with regard to grandparents and siblings, the court finds that the states do not possess some all encompassing general *parens patriae* role in parenting (citations omitted). Such role, though permitted is limited . . . as the state interest is not "compelling." This court verily believes that DRL §72 is repugnant to the privacy rights of citizens as assured by the U.S. Constitution, 14th Amendment (and 9th Amendment) *Roe v. Wade*, 410 U.S. 113.<sup>10</sup>

Aside from such constitutional obstacles, the viability of the implicit pleading predicate of an "untoward disruption of an established grandparent-grandchild relationship" was also left open by *Emmanuel S.*

Antagonism alone is not a recognized prerequisite for court intervention. However, the issue is whether a "disruption" in the grandparent-grandchild relationship contemplates that the availability of DRL§72 relief is limited to situations where visitation is being denied.

Ostensibly, DRL§72 should be interrupted to at least require that visitation first be denied before the state takes its turn at rearranging a custodial parent's schedule with her children.

However, because that door remains slightly ajar, DRL§72 petitions aimed at obtaining independent rights of grandparent visitation, in addition to the visitation privileges already voluntarily extended by the parents, have become the newest method for impeding a parent's constitutional right of privacy, as well as her time with her children.

Divorced parents already suffer from the inherent burdens placed upon them to divide time with their children between one another. And because children naturally spend time in school and with their friends, little time is left for the custodial parent.

When a grandparent demands a share of that time, despite already having adequate opportunity to pass on the "precious pearls of wisdom" they are so revered for imparting, parents such as Lisa find the empathic odds against them as they struggle to be heard.

Confused by the absence of clarity in *Emmanuel S.*, and unmoved by the constitutional prerequisite of an "overriding necessity," judges too often allow these grandparents petitions to proceed to a hearing, which even if unsuccessful do not arise to an award of attorney fees to the objecting parents.

Certainly, divorced parents have it tough enough without having to litigate with their diminished resources against grandparents simply hungry for more time with grandchildren. Before parents are told how to raise their children and with whom they must associate, the courts are cautioned to pause and ask "Whose children are they, anyway?"

(1) *LoPresti v. LoPresti*, 40 NY2d 522, 387 NYS2d 412 (1976).

(2) *Anonymous v. Anonymous*, Queens County, Judge LeBow (199).

(3) U.S. Constitution, 14th Amendment; New York Constitution Art. 1 §6; see also *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Pierce v. Society of Sisters* 268 U.S. 510, 535 (1925); *Meyer v. State of Nebraska* 262 U.S. 390, 399 (1923).

(4) *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

(5) Lawson, Carol. "Taking Family Feuds to Court And Into State Legislatures," *The New York Times* May 24, 1990, page C1, 6; see also Abraham J. Heller, "Court-Directed Grandparent Visitation in an Intact Functioning Family: Therapeutic or Intrusive?" Vol. 22 Family Law Review No. 4.

(6) 161 AD2d 83, 560 NYS2d 211 (2d Dept. 1990) rev'd on other grounds, 78 NY2d 178, 573 NYS2d 36 (1991).

(7) 78 NY2d 178, 573 NYS2d 36 (1991).

(8) 54 NY2d 320, 445 NYS2d 420 (1981) (wherein a child was adopted by his paternal grandparents after his single mother died, and the court permitted the maternal grandmother, over the objections of the new adoptive parents, to have visitation with her grandchild).

(9) Now a Supreme Court Justice in Nassau County.

(10) *In the Matter of Mary Smith v. John Jones* 155 Misc2d 254, 587 NYS2d 506 (Family Court, Nassau County, 1992) (visitation denied based upon court's finding that the grandparents might undermine the relationship between parent and child).

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