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CHAIR'S COLUMN

Best Practices—Worst Behavior

by Lizanne Ceconi

The month of June should conjure up fond memories of barbecues, graduation parties, Father's Day, end of school, and weddings. These days, the month of June means pressure for judges and attorneys alike, caused by intensive settlement conferences, blue ribbon panels, peremptory trial dates, early settlement panels and the best chance to get an uncontested divorce put on the record. It also means no adjournments is the rule.

We've all come to learn that June 30 marks the end of the court calendar by which judges, court administrators and clerks are all judged. The measure of success is not whether cases were disposed of in an appropriate and fair manner to the litigants, but whether the *old* cases were resolved. Buzzwords, such as *backlog* and *beyond goal*, are now used to characterize cases that have been pending in the system for over a year. Too many of these B cases on a particular judge's docket means that his or her honor will have to write dreaded reports about why he or she missed the goal.

It is becoming all too clear that moving cases has become more important than dispensing justice, and that having a case resolved before the last day of June now takes precedence over any other factor of the case. Why is everyone drinking the Kool Aid and feeling the crunch to resolve cases in the month of June?

While the goal of resolving matrimonial cases within a year of the filing of a divorce complaint is laudable, the distinction between a goal and a requirement has become muddied in practice. There are a number of reasons why cases are not resolved within a year. First, the litigants simply are not ready to settle. Like the adage about wine, no case should settle before its time. The litigants are going through one of the most emotional times of their lives. Often, one party is more prepared emotionally than the other party to go through with the divorce. When parties are not prepared to divorce, they argue over insignificant issues, because that is the only way for them to hold onto familiar circumstances. Second, some cases are not ready to settle because the experts have not completed their reports. Third, the information needed to settle the case is not available as quickly as we would like. Fourth, attorneys occasionally miss deadlines because of

their work schedule or life in general. Yet, while these various situations occur, there seems to be less tolerance. In fact, best practices appear to have caused some of the worst behavior I have seen since I began practicing law almost 25 years ago.

The officers of the Family Law Executive Committee (FLEC) have been traveling throughout the state of New Jersey to talk about our family law practices. We are hearing stories about a lack of civility that appears to be fueled by the strict deadlines that are being imposed. Attorneys are dismissing cases, for example, because they could not meet the filing deadline for a case information statement or answers to interrogatories. Litigants are then faced with potential problems if the equitable distribution termination date is changed or insurance policies lapse, but the fact remains that it is often easier to simply re-file. In some counties, attorneys and parties are being strongly encouraged to submit to binding arbitration and the courts will summarily grant the divorces before the issues are even resolved or adjudicated.

The truth is, with all the pressure to dispose of a pending case, the recalcitrant litigant benefits. It is not often seen as a valid reason to adjourn a matter simply because one party failed to provide discovery. More than often pending cases are being sent to mediation or a parent coordinator just so they will be removed from the docket.

An even worse situation develops when an adjournment request is made. When an attorney notifies the court that he or she has another case listed at the same time, the attorney often is required to provide the name of the case, docket number, date of filing and the judge. What has happened to civility and trust? Should an attorney notify the court that he or she would like time to circulate a property settlement agreement, it is interpreted that the attorney has settled the case. When that attorney later appears in court with an unresolved case, he or she is then accused of misrepresenting to the court the status of the case just to obtain an adjournment.

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There are days when I feel like I am back in Catholic grade school, trying my best to be obedient before the nuns. If the case is settled, an attorney receives a gold star. If not, he or she has disappointed the court.

All attorneys have war stories about how the implementation of best practices has created the worst possible results. My story is particularly painful. In the fall of 2004, I was diagnosed with breast cancer. After surgery, it was decided that I should begin chemotherapy, with the first treatment to begin two days later. Chemotherapy was to begin on a Friday, and I was scheduled to appear for a post-judgment early settlement panel the following Tuesday. Despite the initial consent of my adversary, the court denied the adjournment request, advising my office late that Friday afternoon while I was at the doctor's office. The following Monday, another letter was written to the court expressly stating my diagnosis, surgery and treatment. Since the first judge had left for vacation, another judge reviewed the letter and demanded that my partner appear in court the following morning with the client. My partner had never met the client, nor been involved in the case. The next morning, the judge on the record wanted to know why I should not be sanctioned for my failure to submit an early settlement panel statement. Imagine the litigant's horror to witness such insensitivity in a forum where one expects justice to be dispensed. When the case did not settle, the judge informed my partner that if I was not prepared to try the matter by Jan., I would have to find someone else to do it. How does one explain to a client that moving cases is more important than having one's health and/or personal choice of counsel?

When this particular incident was brought to the attention of a former Supreme Court justice, the response was that this story was simply "anecdotal." To me, it is and was personal. If I thought it was simply aberrational, I probably would have coped better with the insensitivity of the response. While it certainly was egregious, there are, unfortunately, many other similar stories that are circulating in courthouses throughout the state. This behavior is more than anecdotal—it is becoming commonplace. I have heard far too many tales about denials of adjournment requests for funerals, family illnesses, vacations, children's birthday parties and other events that are part of our lives.

There are those who believe that cases will settle if the pressure is on. Is this the desired environment for settlements? Are litigants really going to feel comfortable with our legal system if settlements result from arbitrary deadlines or the denial of adjournment requests? Are we perhaps inviting additional litigation by using these tactics?

The noted criticism about the results of best practices is not intended to place the blame on our judges. We understand their pressures are coming from a higher authority. We also understand that family part judges, on average, work harder and longer hours, under more stressful circumstances, than any other part in the court system. But why do we all succumb to this pressure? It is not as if these good judges are going to be transferred out of the family part as punishment for too much backlog. Instead, best practices and aging of cases adds pressure to a process that already is filled with emotional and financial pressure for the clients. It is forcing good judges to leave the family part when eligible.

So, what can we do about taking this unnecessary pressure off judges, litigants and lawyers? How can we restore some degree of civility to our litigation practices? First, we can attempt to set realistic deadlines and allow the attorneys to make an effort to agree on their own discovery deadlines within a reasonable framework. This means the court should not be changing the dates on a case management order after both attorneys have consented. Second, we have to create a better system where attorneys can get judicial face-time if there are discovery problems. Not enough time is given by the court to assess a case on its own merits in order to determine the reason for it not proceeding as planned.

These suggestions are not intended to simply protect lawyers from the unintended consequences of best practices. Accountability is certainly important and crucial. Judges often describe attorneys who simply do not follow through on cases, who fail to conduct discovery, who do not properly complete the case information statement or prepare early settlement panel submissions. As attorneys on early settlement panels, we have seen poor submissions or no submissions at all from certain lawyers. I support sanctioning those attorneys to send the message that compliance is required. The court should demand professionalism and preparedness.

I recognize that judges are faced with the tough task of enforcing compliance, and yet want to ensure that litigants are not jeopardized as a result of poor lawyering. This is particularly true in the family part when single-parent families with innocent children can be badly hurt through poor representation. But, we cannot treat all lawyers as suspect simply because an adjournment is needed.

Since the FLEC officers began their meet and greets throughout the state, we have heard that the problems mentioned above still exist. Several years ago, the New Jersey State Bar Association initiated a Family Part Bench-Bar Program to examine the impact of best practices. Based upon the stories, it seems there is a need to revitalize the committee. If enough people step forward with their concerns about best practices, it will be possible to effect the necessary changes to bring back civility and sanity in our practices. Hopefully, the "anecdotes" of those who speak out will be seen as real consequences of the, at times, draconian process and not simply as a war story.

Please feel free to contact me or any of the other officers about your concerns involving the implementation of best practices. We will do our best to bring these issues to the forefront.

Hopefully, we will all have a more restful June next year! ■

FROM THE EDITOR-IN-CHIEF EMERITUS

In Memoriam
Robert W. Page

by Lee M. Hymerling

With sadness, we note the passing on July 28, 2007, of the Hon. Robert W. Page, a great judge and pioneer of the family part. First appointed to the bench as a juvenile and domestic relations court judge in the 1970s, Judge Page served for 35 years. In every sense, he helped shape the family part, serving on the elite committee chaired by the late, great Justice Morris Pashman, consisting of judges who, before the merger of our court system in the early 1980s, served in both the superior court and the juvenile and domestic relations court.

In the years that followed, Judge Page served for many years as the presiding judge of the family part in Camden County. In this role, he sought to make Camden County's family part a model for other vicinages to emulate. He integrated a multi-disciplinary approach, recognizing the need for social workers and other specialists to be available to aid the bench and as a service to the public.

In the late 1980s, Chief Justice Robert Wilentz appointed Judge Page to serve as chair of what was then known as the Pathfinders' Committee, created to study and make recommendations concerning the nascent operations of the then only five-year-old family part. His service leading that committee stands as one of his most profound contributions to the development of family justice in our state. The Pathfinders report, issued in 1989, framed that committee's view of the status of the family part in words that, almost two decades later, are memorable:

> The New Jersey family court can perhaps be best envisioned as a ship which pushed off from the shore five years ago and sailed out into uncharted waters. The ship is of old design, untested in the new waters, and considered inferior to the other ships in the fleet. Its crew includes many good sailors; but a few do not wish to be on board and are lacking in necessary seamanship skills. At times, the different parts of the ship function in sharp contrast with members of the crew pulling in different directions. Limited resistance remains, not only to new ideas, but also to a unified, cohesive ship run in accord with the plans of the original supporters of the voyage. The lines of communication from the captain to the crew are sometimes blurred to the point where some directives and course settings are either unknown or ignored. On occasion, problems, both foreseen and unforeseen, are encountered with little direction given as to how they should be overcome. Most of these problems are resolved through the sensitivity and hard work of individual line officers and crew. Considerable progress has been made even though many are still unaware of the direction or destination. After five years the ship has reached "the point of no return" and clear decisions must be made if it is every to stop drifting.

Fearlessly and bluntly, as could be Judge Page's style, the Pathfinders Committee outlined what needed to be done:

> The Committee feels that in order to achieve the full potential of the family court, several concerns and needs must be met:
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> **First**. Substantial disparity exists from county to county. Not only is there a lack of uniform observance of court rules and directives, but also the policy and practices in each county differ significantly. Too often the disposition of serious cases involving children and families, *i.e.,* domestic violence, custody and visitation disputes, and juvenile delinquency dispositions, depends far more on the practices of the county of venue than any other factor.
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> **Second**. Under the present management structure those persons responsible for the administration of the family court in each vicinage—the presiding judge and case manager—do not have control over the key personnel and other elements necessary to do their jobs effectively. This lack of management control pervades the entire system from top to bottom; *e.g.,* statewide court rules and written directives are often ignored, and case managers are expected to function without the authority necessary to insure compliance with the standards.
>
> **Third**. For the family court to realize its full potential, it must have all necessary resources. These include additional qualified, sensitive and well-trained judges and staff, and the necessary auxiliary programs; *e.g.,* custody visitation mediation, matrimonial settlement panel programs, juvenile resource centers.

> The Pathfinders Committee has considered and studied the presentations of all interested parties, statutes, court rules, directives, and relevant other information, including our collective experience. The Committee has focused primarily on identifying problem areas *within* the judiciary and not on programs, services, and facilities maintained by nonjudicial agencies; *i.e.,* DYFS, juvenile corrections, etc. Comment on the areas outside of the judiciary will be limited to identifying needs and suggesting ways in which the judiciary can act, either internally or by way of appropriate recommendations, to meet these problems.

These words, written so long ago, reflect how Judge Page addressed many issues, both as a judge and as a judicial administrator. His willingness to grapple with the issues and problems of the family part led Chief Justice Wilentz to ask Judge Page to observe and report on how the family part operated throughout New Jersey's 15 vicinages. In that sense, Judge Page served as a one-person version of the judicial observation teams that now travel throughout our state.

There can be no doubt that, during his long service on the bench, Judge Page was passionate about his calling. As one who long presided over the juvenile court, Judge Page grappled with the paucity of judicial and penal alternatives available for young offenders. All too frequently, he learned that these dispositional choices were scarce, and left him with the Solomonic task of choosing between unattractive alternatives.

Judge Page was a scholar of the law, returning to academia long after he ascended to the bench. To his credit, he attended the University of Virginia Law School to obtain a master of laws in judicial process in 1990–91. He knew that legal learning should never end, whether one is a lawyer or a judge. He was always intellectually curious. This scholarship and legal perceptiveness led Judge Page to create a new developments course that became an annual staple of our state's Judicial College. Each year Judge Page would author, with the assistance of those with whom he taught, detailed course materials. His seminar team always included a practicing attorney whom Judge Page carefully selected.

To his great credit, each year he would permit his Judicial College course materials to be published as an annual mainstay in this publication. The editors and readers of the *New Jersey Family Lawyer* should be most grateful for this tradition, which continues today as Judge Page's successor in the Judicial College course, Judge Thomas Dilts, presiding family part judge in Somerset County, has permitted publication of his course material from last Nov.'s Judicial College.

Not only did Judge Page lecture to judges but, with Jim Yudes, he annually presented a New Developments in Family Law Program, which has become an annual well-attended portion of the Institute for Continuing Legal Education's curriculum.

The New Jersey State Bar Association Family Law Section granted Judge Page the singular honor of the Saul Tischler Family Law Section Award. Only he and Judge Eugene Serpentelli received their Tischler Awards while still on the bench. Later, the Supreme Court precluded sitting judges from receiving the honor.

In truth, however, Judge Page's greatest legacy was how he thoughtfully and empathetically judged the thousands of matters that came before his court. He gave each litigant his or her full day in court. When a litigant or attorney left his courtroom, he or she knew the matter had been thoughtfully considered.

I have so many personal memories of Judge Page. Over many years, I had the privilege of driving Judge Page to Tischler dinners and other bar affairs throughout the state. Judge Page felt comfortable coming to Family Law Section gatherings, and often reminded me that he was first a lawyer before he was a judge. On long drives, which often took us to what seemed the far reaches of North Jersey, Judge Page and I would discuss a myriad of topics, not just about the law and lawyers, but about how the judiciary and, most specifically the family part, was equipped to serve the public. His thoughts were as insightful as were what the Pathfinders wrote so long ago.

I also have vivid recollections of appearing before Judge Page in his courtrooms in the Camden County Hall of Justice. I recall one special trial in which I appeared before Judge Page in a difficult custody matter he knew had to be promptly adjudicated. I recall one late evening when Judge Page continued court until well into the night. He had a sense of when matters deserved special attention, and he spared no effort in doing justice.

I also remember so many meetings spanning Judge Page's long service on the Supreme Court Family Practice Committee, where he often championed causes, sometimes little understood by many in the room. It was here that one could see Judge Page's abilities as an advocate as he tried to convince judges, lawyers and lay members of what he considered both right and practical. He was never afraid to be a member of a small group of dissenters. If he believed strongly in what he advocated, he was not afraid to be a minority of one.

The New Jersey Judiciary has been blessed with many fine judges. It is no accident that we, who practice or sit in the New Jersey courts, view our judiciary as the finest in the nation. In every sense of the word, Judge Page was a judge among judges, and a star of the family part bench.

Judge Page made a difference, a difference that far transcends Camden County and the cases over which he presided. We, as editors of the *Family Lawyer*, posthumously thank Judge Page for his years of service, and thank his family for sharing him with all of us. ■

And You Thought Marriage Was Taxing…

Tax Implications of New Jersey's New Civil Unions

by Gary R. Botwinick

On Dec. 21, 2006, the New Jersey Civil Union Act was signed into law, and became effective on Feb. 19, 2007. The act was the Legislature's response to the Supreme Court's decision in *Lewis v. Harris*,[1] which held that "committed same-sex couples must be afforded, on equal terms, the same rights and benefits enjoyed by married opposite-sex couples." The intent of the act was to place same-sex couples on exactly the same footing as opposite-sex couples. And, in fact, the act does an excellent job in that regard with respect to New Jersey taxation. However, with respect to federal taxation, the act runs headfirst into the Federal Defense of Marriage Act (DOMA).[2]

DOMA provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[3] Consequently, those certain tax benefits (and burdens) afforded to married couples under the Internal Revenue Code, will not apply to civil unions.

In advising parties prior to entering into a New Jersey civil union, or representing an individual terminating a civil union, it is incumbent upon the attorney to understand the tax impact of both events. Family law attorneys are quite familiar with the tax aspects of a traditional divorce (*e.g.* alimony, child support, equitable distribution). Now they must become familiar with the effect transactions will have before, during *and after* the termination of a civil union. While space will not permit a thorough discussion of all of the tax implications of civil unions in comparison to marriages, this article is intended to focus on those issues that are most important to family law attorneys.

FEDERAL AND STATE INCOME TAX ISSUES: ENTERING INTO AND TERMINATING A CIVIL UNION

The refusal to recognize a civil union as a marriage under federal law creates significant problems with respect to income taxation.

Filing Status

Because DOMA specifically excludes same-sex partners (even if joined in a civil union) from the definition of "married" under the Internal Revenue Code, civil union couples are prohibited from claiming married filing status on a federal income tax return. Thus, they will be required to file using the single status.

Though the act specifically provides that, with respect to any New Jersey state tax laws, members of a civil union are treated in the same manner as married spouses,[4] New Jersey law generally provides that a taxpayer's filing status for New Jersey income tax purposes will follow the filing status of the taxpayer for federal income taxes.[5] So, are members of a civil union required to file New Jersey income tax returns claiming a single filing status, or are they permitted to deviate from the requirement of consistency?

The New Jersey Division of Taxation has recently indicated that civil union couples will be able to file using a joint filing status for New Jersey income tax purposes. Incidentally, this may be beneficial for federal tax purposes. Through a quirk of the federal income tax system, married couples with approximately equal income are subject to a "marriage penalty," which results in a higher tax than if the spouses were each entitled to file singly and the tax obligations were aggregated. DOMA, in effect, gives civil union couples a *bonus* for federal tax purposes.

Gain on Sale of Principal Residence

Section 121(b) of the Internal Revenue Code provides an exclusion for certain sales of a principal residence. Individuals owning and using a residence for two out of the five years preceding a sale, are able to exclude $250,000 of the gain on the sale from taxation. Married taxpayers filing a joint return can exclude up to $500,000 of gain from taxation, even if only one spouse meets the ownership test.

At first blush, this does not appear to be a problem for civil union couples, because they would each be able to exclude $250,000 on their single returns, thus getting the benefit of the full $500,000 exemption (2 x $250,000). But what if only one of the civil union spouses meets the ownership test? If they were permitted to file a joint return, this issue would be irrelevant. Additionally, the Internal Revenue Code provides that the ownership and use rules are relaxed if a

sale occurs as a result of "unforeseen circumstances."[6]

The IRS has issued regulations that provide certain "safe harbors," which are presumed to be "unforeseen circumstances," including "a divorce or legal separation under a decree of divorce or separate maintenance."[7] Would a dissolution of a civil union qualify under the safe harbor? Though DOMA does not define divorce or legal separation, it is likely that an interpretation of DOMA would lead to the conclusion that such a dissolution would not satisfy the safe harbor. This could result in the recognition of significant taxable gain to a spouse in a civil union that would not have been imposed in a marriage, as defined in DOMA.

Alimony

In a divorce, the tax implications of alimony payments are clear. The Internal Revenue Code provides that "gross income includes amounts received as alimony or separate maintenance payments," and "there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individuals tax years.[8] In other words, the payee-spouse must include the alimony in taxable income, and the payor-spouse gets a corresponding deduction. But would this be the result if the payments are made as a result of a termination of a civil union?

Because DOMA limits the definition of a "spouse" to someone of the opposite sex, and only payments from a spouse can be considered "alimony or separate maintenance payments" under the Internal Revenue Code, such payments would not meet the requirements of 26 U.S.C. 71, and would not qualify as "alimony." Thus, the payor-spouse would be denied a deduction. But what about the payee-spouse?

It is unclear how the payee-spouse would be treated. There is no provision in the Internal Revenue Code to exclude these payments from the general definition of "gross income," as there is with respect to alimony payments.[9] Because the payment is unlikely to be viewed as having been given with "detached and disinterested generosity,"[10] it will not qualify as a gift exempt from income taxation.[11] So if it is not specifically exempted from the definition of "income," and it is not a "gift," then the likely result is that the IRS would take the position that the payment is includable in the payee-spouse's income. Thus, there is no deduction to the payor and inclusion in the payee's income—*double taxation*.

Property Transfers Between Civil Union Couples

Transfers of property between spouses or former spouses, if incident to a divorce, are exempt from federal income tax consequences to both the transferor and transferee-spouse.[12] The transferee takes a carryover basis from the transferor—in other words, the transferee assumes the transferor's basis. Consequently, neither spouse recognizes any gain or loss on the division of assets in a divorce, regardless of who may be the transferor or transferee.

DOMA, however, prohibits the application of Section 1041 with respect to transfers between civil union couples. Generally, this should not result in taxable income to the recipient-spouse in a civil union that is not being dissolved, because the transaction will typically qualify as a gift, and, therefore, be exempt from income taxation and gain recognition (but see below for gift tax treatment). However, if the transfer is incident to a dissolution of a civil union, the result is likely quite different, since such a transfer would not be considered a gift (*i.e.*, no detached and disinterested generosity).

In the case of a dissolution (since 26 U.S.C. 1041 does not apply), the tax consequences are likely to be governed by the holding of *United States v. Davis,*[13] which was decided before the enactment of 26 U.S.C. 1041. In *Davis*, the Court found that a transfer of appreciated property to an ex-spouse resulted in the recognition of taxable gain to the transferor-spouse. The transferee-spouse would take a stepped-up basis, as the built-in gain already would have been taxed. Interestingly, the Court also held that the receipt of property by the transferee-spouse did not result in income, as the property was received in exchange for a surrender of marital rights.

Thus, in a civil union dissolution, the transferor-spouse may have gain recognition if appreciated property is transferred. But would the transferee-spouse have income, or would the surrender of civil union partner rights be sufficient to avoid such an imposition? It is unlikely that the logic in *Davis* is any different when a civil union partner is, under state law, surrendering certain civil union rights. It is possible that the IRS could take the position that DOMA prevents such a result, though it is unlikely that such a position would be successful. Similarly, the IRS could take a position that there should be a capital gain on the exchange of the surrendered civil union rights for the transferred property. The Court, in *Davis*, however, did not make that determination.[14] Consequently, the transferor-spouse will likely have a taxable event, but the transferee-spouse probably will not.

Retirement Plans

In a divorce, qualified retirement benefits and individual retirement accounts (IRAs) are customarily divided between the spouses. Through the use of a qualified domestic relations order (QDRO), the division of the accounts does not result in a taxable event to either the transferor-spouse or the transferee-spouse. DOMA, however, prohibits the use of a QDRO with respect to civil union partners, as a QDRO must relate to child support, alimony or marital property rights of a spouse, former spouse, child or other dependent of the participant in the plan.[15] Thus, an actual division of a qualified retirement plan may be a practical impossibility, and if not impossible, then, at a minimum, extremely expensive from a tax perspective (*e.g.*, imposition of income taxes on distributions and a potential 10 percent penalty).

Gift and Estate Tax Issues

Contrary to popular belief, the federal estate tax is not dead, and the federal gift tax is even livelier. The current federal estate tax exemption is $2,000,000 (and is scheduled to increase to $3,500,000 in 2009) and the lifetime gift tax exemption is $1,000,000 (and is not scheduled to increase). The gift tax annual exclusion amount is currently $12,000. Of course, the federal estate and gift tax regime still provides for an unlimited marital deduction for transfers between U.S. citizen spouses (as defined in DOMA). That means that transfers between U.S. citizen spouses, no matter how large, and regardless of whether they occur during or after death, will not be subject to either federal estate or gift taxes.

New Jersey, with the adoption of the act, now treats civil union couples the same as married couples for New Jersey estate taxes and inheritance taxes. This means that testamentary transfers between civil union partners will be exempt from the imposition of New Jersey estate and inheritance taxes. Likewise, transfers prior to dissolution of a civil union will not be subject to New Jersey taxes.

Unfortunately, as in the area of federal income taxes, DOMA rears its ugly head in the area of gratuitous transfers between civil union partners.

Support Paid by One Partner to the Other

As in most traditional marriages, members of a civil union will typically pool their resources, and use them for the support of the family. Married couples usually do not worry about gift tax consequences from such an arrangement because of the unlimited marital deduction. But how will these arrangements be treated for federal gift tax purposes?

Clearly, DOMA prevents such transfers from qualifying for the marital deduction. Thus, it would appear that these transfers will be subject to federal gift taxation to the extent that the transfer exceeds the $12,000 annual exclusion. But if the transfer is in satisfaction of a statutory obligation of support, the transfer would be neither income to the recipient nor a gift from the payor. This is akin to the support a parent provides to a child. For example, if a parent pays $30,000 per year in aggregate expenses to support a child, is the amount in excess of $12,000 considered a taxable gift? Generally, these expenses are not considered taxable gifts.[16] If the amount paid or transferred exceeds the reasonable requirements for support, the excess may be a gift.[17]

Civil union spouses are required to support each other in the same manner a husband and wife are required to support each other.[18] So it is arguable that payments to or for the benefit of a civil union partner are not considered gifts. But what if the payment is beyond the level of support required to be given? There are no reported cases on this issue yet, but it is an interesting question.

Joint Property

Spouses in a traditional marriage typically own their marital residence in joint names. The source of the downpayment and the future mortgage payments are generally ignored for gift tax purposes because of the unlimited marital gift tax deduction. Consider the following hypothetical examples:

1. The husband (who is a starving artist) and the wife (who is a successful surgeon) buy a $1,000,000 home in joint names. The wife provides the downpayment of $200,000 from her own premarital assets, and all of the mortgage payments and other expenses related to the residence are paid by her from her earnings. *There are no gift tax consequences either during or upon the termination of the marriage as a result of the unlimited marital deduction.*
2. Assume the same facts as in hypothetical 1, except that the parties are John (artist) and Mark (surgeon), and they are partners in a New Jersey civil union. Upon taking title to the home in joint names, because there is no marital deduction, the IRS is likely to take the position that a gift of half the equity has been made from Mark to John. Moreover, every time Mark makes a payment toward the mortgage, he is enhancing the value of John's interest in the property, thus it is a taxable gift.[19]

This same logic would apply to joint bank accounts. However, the gift would occur only as the money is withdrawn by or for the benefit of the non-contributing partner.[20]

Are there gift tax consequences upon the dissolution of the civil union? In a divorce in a marriage, the division of marital assets does not typically result in the imposition of gift taxes because of the exemption set forth in 26 U.S.C. 2523 (the "marital deduction" if the transfers occur while the spouses are still married to each other) and the provisions of 26 U.S.C. 2516 (pursuant to a written separation agreement, where there is a final divorce within three years thereafter). But in the case of a dissolution of a civil union, there is no marital deduction and, because of DOMA, the treatment under Section 2516 is not available.

All is not lost. Prior to 1981, the marital deduction for gifts between spouses was limited. Prior to 1954, Section 2516 of the Internal Revenue Code did not exist. Section 2516 was, in fact, enacted in response to the U.S. Supreme Court's decision in *Harris v. Comm.,*[21] which held that a transfer of property, pursuant to a decree of divorce, was a transfer for adequate and full consideration in money or money's worth and was not subject to the gift tax. After the *Harris* decision, there was significant confusion regarding whether or not any certain division was pursuant to a decree, and whether the fact that a division may not have been pursuant to a decree was enough to result in the imposition of a gift tax.

Most courts held that a gift had occurred unless the terms of the property settlement agreement had been incorporated into the Court's decree. In some cases, however, it was sufficient if the agreement itself provided that it would become effective upon entry of the decree. When Section 2516 was enacted in 1954, the issue was put to rest.

Since DOMA precludes the application of Sections 2516 and 2523 to civil union dissolutions, it is likely that the Supreme Court's holding in *Harris* would apply. Thus, if the transfer is pursuant to a decree of divorce (including where a property settlement agreement is incorporated into a divorce decree), then it is unlikely that the IRS would be successful in asserting that the transfer is a taxable gift. Of course, we will not know until such a case is ultimately litigated.

Federal Estate Taxation

As stated above, there is no federal marital deduction for testamentary transfers to a surviving civil union partner. For federal estate tax purposes, it would appear that such transfers are taxable. In many cases where the estates are rather large, this may be an important issue to consider before entering into a civil union, despite the fact that the federal estate tax is scheduled to be repealed in full in 2010[22] and currently has a high[23] exemption that is increasing.[24] Can a claim made by the surviving civil union spouse against the estate of the deceased spouse result in a substitute deduction in lieu of the marital deduction?

Upon the enactment of the act, the provisions of N.J.S.A. 3B:8-1 *et seq.,* specifically, the "elective share," applied equally to civil union and married couples. In other words, civil union spouses have the same elective share rights as married spouses. Pursuant to 26 U.S.C. 2053(a)(3),"claims" against a decedent's estate are deductible to the extent the claim is allowable under the applicable law of the jurisdiction under which the estate is being administered.

If a deceased civil union spouse leaves nothing to his or her surviving spouse, and the surviving spouse makes a claim for the elective share, is that a claim that the estate would be able to deduct for federal estate taxes under Section 2053(a)(3)? In order to be deductible, the claim must represent a personal obligation of the decedent, *existing at the time of his or her death,* whether or not then matured.[25] Is a claim for an elective share a claim that was existing at the time of the decedent's death?

In *Essex v. U.S.,*[26] the Court held that a claim for a widow's allowance, authorized as a claim against the estate under Nebraska law, was not deductible under Section 2053(a)(3). The IRS also may contest the surviving civil union spouse's claim on the grounds that the claim is not for an interest *in* the estate as opposed to a claim *against* the estate.[27]

Prior to entering into a civil union, would it make a difference if the parties entered into a prenuptial agreement providing that the parties will provide certain benefits to each other in the event of a death of one of the parties or a divorce? New Jersey law provides that civil union couples could enter into enforceable prenuptial agreements in the same manner as spouses in a so-called traditional marriage. Is that sufficient to make a deductible claim under Section 2053(a)(3)? The author has been unable to find any cases addressing this interesting question, but in counseling a party entering into a civil union, it may be worth considering.

CONCLUSION

The enactment of New Jersey's Civil Union Act creates an interesting playing field for various issues. Obviously, tax issues are among the most important considerations for family law attorneys counseling clients. This article could not possibly address all of the issues certain to arise. Many of the issues raised here will only be developed over the course of many years of litigation. It the meantime, it should be a very interesting ride. ■

ENDNOTES

1. 188 N.J. 415 (2006).
2. Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996).
3. 1 U.S.C. 7 (2007).
4. N.J.S.A. 37:1-32(n), 37:1-33.
5. *See* N.J.S.A. 54A:2-1.
6. 26 U.S.C. 121(c)(2).
7. Treas. Reg. 1.121-3(e)(2)(iii)(D).
8. 26 U.S.C. 71(a) and 215(a).
9. *See* 26 U.S.C. 61(a) (which defined "gross income" for tax purposes) and 26 U.S.C. 71 (excluding alimony from the definition of gross income).
10. The general test for determining when a transfer is a gift for tax purpose.
11. *See Commissioner v. Duberstein*, 363 U.S. 278 (1960).
12. 26 U.S.C. 1041.
13. 370 U.S. 65 (1962).
14. *See also* Rev. Rul. 67-221, 1967-2 C.B. 63 (Under the terms of a divorce decree, the husband transferred his interest in an apartment building to his former wife in consideration for and in discharge of her dower rights. The marital rights the former wife relinquished are equal in value to the value of the property she agreed to accept in exchange for those rights. *Held:* there is no gain or loss to the wife on the transfer and the basis of the property to the wife is its fair market value on the date of the transfer).
15. 26 U.S.C. 414(p).
16. *See Hooker v. Comm.,* 10 T.C. 388 (1948), *aff'd,* 174 F. 2d 863 (5th Cir., 1949).
17. *See* N.J.S.A. 37:1-31.
18. *See Rosenthal v. Comm.,* 205 F.2d 505 (2nd Cir. 1953).
19. *See* Treas. Reg. 25.2511-1(h)(5).
20. *See* Treas. Reg. 25.2511-1(h)(4).
21. 340 U.S. 106 (1950).
22. A likelihood that the author sees as extremely remote.
23. $2,000,000.
24. $3,500,000 in 2009.
25. *See* Treas. Reg. 20.2053-4.
26. 33 AFTR2d 74-1478 (D. Neb.).
27. *See Lindsey v. U.S.,* 167 F. Supp. 136 (D. Mary. 1958).

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Is There Ever an Even Playing Field?

by Bonnie C. Frost

How often have we heard and argued that the court needed to "level the playing field" in our matrimonial matters? Most of the time this argument surfaces when a client needs fees to continue to have access to legal representation, or conversely, reflects a lawyer's desire to be paid while a case is ongoing.

After the Supreme Court Special Committee on Matrimonial Litigation reported to the court in 1998, the bar was hopeful that the playing field would, in fact, be leveled. The recommendations encouraged courts to liquidate assets *pendente lite* to pay fees, and to provide a process that would permit attorneys to withdraw more easily from cases. However, after an initial rush of enthusiasm, and as new and inexperienced judges were rotated into the family part, it has become business as usual, with little reflection on or use of the rules to assist litigants and attorneys.

The special committee recommended the courts be permitted to order the parties to incur debt so clients could pay their attorneys, and so they could obtain attorneys of their choice. The committee's recommendations were meant to: level the playing field so the financially disadvantaged spouse could obtain and pay his or her attorneys.

The report stated:

> the argument is frequently made that a fundamental unfairness exists in many matrimonial matters because one litigant might have, as a result of greater income, better access to the resources necessary to fund the cost of litigation. Many complain that the playing field in matrimonial matters is inherently uneven because the disadvantaged spouse, usually, but not always, the wife, lacks the resources to pay her counsel and experts leaving that litigant fewer choices as to how to pursue the litigation. Others complain that, too frequently, even in affluent cases, although resources exist in the form of accumulated assets, and despite statutory authority, there exists a reluctance among Family Part judges to enter awards from assets sufficient to enable both parties to equally prosecute their cases.

The 1988 amendment to N.J.S.A. 2A:34-23 states that "the court may order one party to pay a retainer on behalf of the other for expert and legal services when the respective financial circumstances of the parties make the award reasonable and just."

As a result, the special committee recommended the courts be permitted to use marital assets to fund litigation to level the playing field.

In response to the committee's recommendation, the Supreme Court enacted Rule 5:3-5(c), which provided that the Court, in its discretion, *may* make an allowance, both *pendente lite* and on final disposition, to be paid by any party to the action." [emphasis added]. The Court also provided that a trial court, "on good cause shown, direct the parties to sell, mortgage or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund litigation."

Even though the Legislature and the Supreme Court have authorized trial courts to award fees, *pendente lite* and at final disposition, the extreme reluctance of courts to actually award fees is prevalent. It is probably only in the most affluent of cases where fees are awarded *pendente lite*. Anecdotal evidence, while not verification of actual performance, would find practitioners hard pressed to remember the last time fees were awarded *pendente lite*. When attorneys are awarded fees at the time of final disposition, they are usually surprised.

This reluctance to award fees, from a judge's perspective, may be understandable. Some judges who have utilized the statute and the rules to award fees *pendente lite* have had to defend against charges from disgruntled litigants at tenure hearings where they have contended judges have wrongfully taken their assets from them. Divorce cases raise passions, which many times do not cease upon divorce. Litigants often direct their anger at the wrong subjects—judges and lawyers.

Not that long ago, in the mid-1990s, New Jersey judges were picketed at their homes and at the courthouses because they enforced the laws and required litigants to comply with orders. That activity has abated as it pertains to family part judges, but at the recent American Bar Association conference in San Francisco, on Aug. 11, 2007, judges from all over the country spoke about litigants attacking them personally for decisions they made. Some received death threats necessitating around-the-clock police protection. Justice Roberto Rivera-Soto spoke about how he and other New Jersey Supreme Court justices, after deciding *Lewis v. Harris*, received threatening letters at their homes after a talk show host read their home addresses on the air.

A judge is placed on the bench to make independent decisions—easy ones, hard ones and problematic ones. There is a tension to remain independent, but at the same time be accountable. If your livelihood depends on being reappointed, *i.e.* a smooth reappointment hearing, the reluctance to take a strong position in enforcing orders, while not purposeful, is human and understandable. The unfortunate consequence of this reluctance is that litigants are affected, and the playing field remains uneven.

Rule 1:10-3 provides that when a litigant is in contempt of a court order, the family part "in its discretion, may make an allowance for counsel fees to be paid by any party…accorded relief under this rule." To obtain relief under this rule, a party's behavior must be deemed willful. How many times have litigants not complied with court orders, letters are written exhorting them to comply, and when the enforcement motion is finally made, all one gets is an order for that recalcitrant person to comply with an order they were already supposed to comply with or the obligation is reduced? After all, as courts say, some money is better than none. The defiant, non-paying spouse is rewarded. It seems that not until a second, and more often a third, motion is brought for compliance, are fees ever awarded.

Rule 1:10-3 is meant to persuade litigants to comply with orders. This is good in theory, but what it really means in practice is, more often than not, that the disadvantaged spouse who is supposed to receive support or payment of equitable distribution, has to incur significant legal fees to get what he or she thought he or she had already bargained for and was to receive.

The lack of the exercise of discretion to order fees in these cases engenders more motions and embitters litigants about the court system. Litigants do not believe that orders have any effect. Non-paying litigants think orders have no teeth. Surely this is not the intent of our judges, but is another example of how the playing field is uneven.

The State Department's new passport requirements, which will soon require a passport to travel to Mexico, the Carribean, Canada and South America, also deny passports to parents who owe more than $2,500 in child support. This is yet another effective collection tool to obtain compliance with court orders for the people least able to collect, children. In an Aug. 15, 2000 story by the Associated Press, it was reported that in order for a man living in China to get his passport renewed, he had to pay $311,000 in back child support! In 2007, so far, states have collected $22.5 million in arrears under this program. This is great news for custodial parents with spouses who leave the country, and therefore may become immune to enforcement of child support orders, or for parents who refuse to pay but want to travel. Looking deeper into this scenario, however, it is ironic that the custodial parent who was owed $311,000 had to absorb this man's obligations to his children, presumably for years.

How do we, as attorneys, answer these often-heard questions from our clients? How can the judge let someone get away with not paying support? How can the judge enter an order and then, when the person goes before the same judge, does he or she end up not having to pay? Why does he or she only have to pay a small amount on arrears, when for months or years the children and the custodial parent have been doing without? How do we answer the parent who, because of the non-payment of child support, has taken on extra work to provide for the children and then, because that parent has been earning more money, the deadbeat payor's child support obligation is reduced?

This uneven playing field acts as a disincentive to parents and undermines respect for the system. Our system, in its zeal to give everyone a day in court, many times, despite its best efforts, leaves behind the least able to fend for themselves, the children. The playing field remains uneven.

Usually the financially disadvantaged spouse also is the informationally disadvantaged spouse, yet another example of the uneven playing field. The person who wants to be difficult or extract vengeance from his or her spouse can hide behind a statement that, regarding documents, he or she is not in possession of the information, thus forcing the other spouse to spend money for discovery (while, in the meantime, that spouse has not received *pendente lite* attorneys fees). If the spouse has a high-level job, he or she may have non-qualified benefits that are not readily discoverable, thus, potentially, he or she is able to shield them and avoid distribution, and at the same time avoid having to spend a significant sum of money on discovery efforts.

Weingarten v. Weingarten,[1] primarily a case of attorney-client privilege, also is a case where the court recognized the necessity of requiring spouses to deal fairly with each other when negotiating agreements. This concept of fairness pervades family law nationwide.

In Colorado, courts have held that, regarding antenuptial agreements, "by virtue of their betrothal, parties to an antenuptial contract are in a fiduciary relationship to one another."[2] If parties, by virtue of their engagement, may have a fiduciary relationship to each other, surely then after a marriage that same relationship must exist. In *Lepis v. Lepis*,[3] our Supreme Court held that contract principles have little place in the law of domestic relations, citing *Smith v. Smith*.[4] In the recent case of *Addesa v. Addesa*,[5] the Appellate Division held that the husband had a "contractual and moral obligation to be open and honest" with his wife.

As noted in *Addesa*, not only in mediation settings, but also in litiga-

tion, our system is based on the assumption that people are forthright and candid. But full information disclosure can be subverted by one party wishing to withhold information from the other, and thereby shifting the burden to the person who has most likely been harmed financially and ends up bearing the high burden of proving to a court that the other side has not been truthful.

When such undisclosed information is discovered after the judgment has been entered, Rule 4:50-1(f) is to be utilized in exceptional cases and "its boundaries are as expansive as the need to achieve equity and justice."[6] Nonetheless, courts are loathe to reopen judgments. Whether this is merely an appropriate exercise of their discretion, or they are concerned that if a judgment is reopened it enlarges their calendar, and thereby impairs the monthly statistics, the result is the same. Nonetheless, appeals ensue from such denials, with the financially disadvantaged spouse incurring more legal fees to obtain what should have been granted in the first instance if the information had been forthcoming.

The even playing field is a commendable goal. However, in practice it becomes illusory. This is not through any purposeful intent of our system—the tools to level the field are certainly there—but as a result of the court's efforts to balance the competing interests of the parties. While these interests may be real, they may not be accurate if the other spouse is not candid with the court.

Courts and attorneys can change the balance. Attorneys can effectuate change by arguing the rules and statutes, and by explicitly pointing out to judges exactly how the field can be evened, not just by arguing general principles of unfairness. Courts can change the balance by relying on the rules and statutory authority to make the hard decisions, not just the easy ones, without regard to public or institutional pressure. ■

ENDNOTES

1. 234 N.J. Super. 318 (App. Div. 1989).
2. *In re Estate of Lopata*, 641 P.2d 952 (Colo.1982).
3. 83 N.J. 139, 148 (1980).
4. 72 N.J. 350, 360 (1977).
5. 392 N.J. Super. 58, 75 (App. Div. 2007).
6. *Court Invest. Co. v. Perillo*, 48 N.J. 334, 341 (1966).

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Child Abduction and Other Aspects of International Family Law

by Amy Sara Cores

The very idea of dealing with clients located in other countries, compliance with international treaties and foreign law, and of course the unavoidable language barrier, is daunting to most family law attorneys. These are cases best left to the experts, right? However, even in a seemingly typical family law case questions relating to international law arise. This article seeks to demystify international law issues related to family law practice.

SETTLEMENT AGREEMENT CONSIDERATIONS WHEN PARTIES HAVE CHILDREN AND UNAUTHORIZED REMOVAL TO A FOREIGN COUNTRY IS POSSIBLE

In most divorce or custody cases the threat of a parent kidnapping a child to another country is minimal. However, when one or both of the litigants has substantial contacts with a foreign country, it is imperative that a settlement agreement provide for the continuing jurisdiction of the New Jersey courts with regard to issues concerning the children. Additionally, the agreement must provide a mechanism for the return of the children, in the event that one of the parties wrongfully retains a child in a foreign jurisdiction, as well as sanctions for such a breach. This also is essential when there is reason to believe that one or both of the parents will be taking the child(ren) out of the United States on a regular basis.

Certainly a practitioner cannot account for all eventualities in every case. The proposed draft of the Uniform Child Abduction Prevention Act (UCAPA) identifies several factors that should be considered when determining whether there is a risk of abduction in a particular case. These factors are relevant, not only to identify persons likely to kidnap a child within the United States, but also to identify persons likely to kidnap a child outside of the United States. The factors are as follows:

a. Has previously abducted or attempted to abduct the child;
b. Has threatened to abduct the child;
c. Has recently engaged in activities that may indicate a planned abduction including: abandoning employment; selling a primary residence; terminating a lease; closing bank or other financial management accounts, liquidating assets, hiding or destroying financial documents, or conducting any unusual financial activities; applying for a passport (for the person or child); seeking to obtain the child's birth certificate or school records;
d. Has engaged in domestic violence, stalking, or child abuse or neglect;
e. Has refused to follow a child-custody determination;
f. Lacks strong familial, financial, emotional, or cultural ties to the state or the United States;
g. Has strong familial, financial, emotional, or cultural ties to another state or country;
h. Is likely to take the child to a country that: (is not a party to the Hague Convention, or is a party to the Hague Convention, but that State is non-compliant according to the State Department, or the treaty is in force between that Country and the United States...);
i. Is undergoing a change in immigration or citizenship status...;
j. Has had an application for United States citizenship denied;
k. Has forged or presented misleading or false evidence..,to obtain or attempt to obtain [official government documents];
l. Has used multiple names to attempt to mislead or defraud; or
m. Has engaged in any other conduct the court considers relevant to the risk of abduction.[1]

The practitioner must decide if this is a real threat in a given case, and prepare an agreement accordingly. The more of these factors that are present, the greater the likelihood of a parental kidnapping. However, the absence of any of these factors does not eliminate the possibility of a kidnapping.

If kidnapping is a concern, if one or both of the parents intend to travel internationally with the child on a regular basis, or if the parties agree that a parent will be permitted to move to a foreign jurisdiction with the child(ren) and that state[2] is a party to the Hague Convention on the Civil Aspects of International Parental Kidnapping, then the following language is suggested to be included in the parties' agreement:

> This AGREEMENT shall be construed in accordance with the Laws of New Jersey. The parties have been habitual residents of the State of New Jersey, County of (X) from (month/year) until present. All of the parties' children are habitual residents of the United States, as defined by The Hague Convention on the Civil Aspects of Inter-

> national Child Abduction, as of the date of the execution of this AGREEMENT. The children attended school, have physicians, friends, activities, and generally lived their lives in New Jersey (for more than five years prior to their removal to (State X), or, for the past five years). Moreover, the infant children are citizens/nationals of the United States and as such the United States has a continuing interest in future court proceedings respecting the welfare of the children. The Superior Court of New Jersey, has continuing exclusive jurisdiction pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), N.J.S.A. 2A:34 *et. seq*. The parties hereby agree that all issues relating to custody and support shall be governed by New Jersey law. The parties hereby agree that in the event that either party is compelled to file an application with the court for enforcement or modification of this AGREEMENT, that same shall be filed in the Superior Court of New Jersey.

If a move is not contemplated at the time of the agreement, or if there is a threat that the child(ren) may be removed to a non-Hague country, the following language is suggested:

> The State of New Jersey in The United States of America, is the habitual residence of the minor children. The terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law, apply if a parent abducts or wrongfully retains a child in a foreign country.

Even if the foreign country is not a party to the Hague Convention, this provision may assist in securing the return of children to New Jersey. However, abduction to or wrongful retention in, a non-Hague Convention country or a non-compliant Hague Convention country will be difficult, at best, regardless of the language of the property settlement agreement.

If the children do not have passports, the attorney may want to consider adding language to the agreement that the children will be enrolled in the Children's Passport Issuance Alert Program.[3] The parties' agreement also should provide that when one parent seeks to take the child out of the country he or she must have written permission from the other parent. Although the federal government does not regulate the borders such that officials will stop an individual with valid travel documents from exiting the country and airline officials do not routinely check for written permission when parents are traveling with children internationally, it is a deterrent. If a child is eligible to obtain a passport from a foreign country, a parent also can request through the embassy or consulate that the passport not be issued.

While practitioners cannot provide for all potential scenarios in every property settlement agreement, they can identify situations that are likely to occur post-judgment, and protect their clients, as well as their children.

TRANSLATION ISSUES

If the parties were married in a foreign country, one or both of the parties may want to seek a divorce in the other country as well. For example, the husband and wife were married in France, and the wife is French and intends to reside in France after the New Jersey divorce. If the wife intends to marry again in France, she also will need a French divorce.

The following language is suggested to be included in the parties' agreement:

> Annexed hereto as EXHIBIT X is a translation of this Agreement into [French]. Both documents shall be filed with the Superior Court of New Jersey and annexed to any final Judgment entered in New Jersey. Both the English and [French] language versions of the texts shall be equally authentic, however, in the event that a dispute arises over the interpretation of this document the English language shall govern. The Wife shall file and register the Final Judgment of Divorce and the Property Settlement Agreement in any future proceeding in the [French Family Courts]. The Wife shall provide the Husband with proof of same within thirty (30) days of receipt of the foreign judgment, but no later than three (3) months from the date of the entry of the Final Judgment of Divorce in New Jersey.

It is essential to note in the agreement that one of the parties intends to register the judgment of divorce in a foreign jurisdiction. As will be explained below, the United States is not a party to any international enforcement or registration of foreign judgment orders treaty. Unless an agreement makes this reference, the party seeking a judgment in a foreign jurisdiction has no obligation to register the agreement. Practitioners may wish to consider adding a clause to the agreement, which bars either party from taking a child out of the country until proof of registration has occurred.

A FEW CONSIDERATIONS CONCERNING THE HAGUE CONVENTION

A full discussion of the Hague Convention is not possible due to the limits of this article. Most practitioners will not handle a Hague Convention case, and will refer them to other counsel or bring in consulting counsel. However, should an attorney undertake a matter, there are several important resources available. The State Department[4] website has a plethora of information regarding countries that are signatories to the Hague Convention, as well as links to other sites of importance. If the child has been abducted from this jurisdiction, the forms necessary to complete an application for the return of the child can be found on this site as well.

Preparing an application for the return of a child to the United

States is a relatively easy process, which does not necessarily require the assistance of counsel. However, all documents will need to be translated into the official language of the country to which the child has been abducted. When seeking the return of a child abducted to the United States, the federal statute provides that, given the urgency of a Hague Convention petition, no authentication of foreign documents or information included with the petition is required.[5]

Article 24 of the Hague Convention provides that an application must be accompanied by a translation into the official language of the requested state. If that is not feasible, a petitioner may provide a translation into French or English. The contracting states may object to the use of French or English, but not both. If a petition is filed that requests return from the United States it must be translated into English, and, of course, France requires that a petition be translated to French. However, it is not necessary to have a certified translation, which can save the client a substantial amount of money on the application, as the translation of legal documents can be very expensive.[6]

A practitioner should not, however, cut and paste the application into Google translator. The online translation programs are not capable of translating complex legal documents, and a computer cannot replace a human in these instances. The reader will find the resulting translation either unintelligible or hilarious. Regardless, the client will not be served well.

As a hypothetical example, a practitioner decides to represent a parent from country X whose child has been abducted and brought to New Jersey. The primary issue is whether the case should be filed in federal or state court in order to secure the return of the child to his or her home state.

The Hague Convention implementing statute, found at 42 U.S.C. §11605 (1995), confers subject matter jurisdiction on both the state and federal courts. However, there are several factors that must be considered in making the decision as to where to file the case. First, while the state court judges are more familiar with family law issues, federal court judges are more familiar with the Hague Convention and the related jurisprudence. Second, a federal court judge is also more likely to have handled a Hague Convention case then a state court judge. Third, the Hague Convention provides that the petitioner is entitled to a hearing within six weeks of filing the initial petition. Federal courts act swiftly on these applications and move the proceedings without delay. Fourth, the Hague Convention specifically cautions against a best interests analysis in determining whether a child should be returned to his or her country of habitual residence. Federal court judges are less likely to engage in a best interest analysis than state court judges.

Furthermore, practitioners' apprehension of federal court is also an important consideration. In order to file in federal court, one must be licensed in the federal court and familiar with the federal rules of procedure and evidence. A practitioner may choose to file in state court simply based on his or her own comfort level. Most family law practitioners do not regularly engage in federal court litigation and may not want to file in federal court for that reason alone. Also, a practitioner will need to register with the PACER service and learn how to use the electronic filing system, which is mandatory in the federal courts.

These are but a few of the aspects of handling a case under the Hague Convention. Further resources are available online through the State Department and the National Center for Missing and Exploited Children.[7]

FOREIGN SERVICE OF DOCUMENTS

How does a practitioner serve a complaint on a defendant who lives in China? The first step is to consult with the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (service convention). Pursuant to the service convention, the United States has set up a central authority for assistance with matters pending in federal courts.[8] For actions pending in state courts, state law designates the person authorized to effect service. However, the same forms are used to request service.

Form USM-94, titled, "Request for Service Abroad of Judicial and Extrajudicial Documents," must be completed. The form includes a summary of document to be served. The completed request form and documents to be served, which includes translations into the native language of the receiving country, if not English, should be mailed directly to the foreign central authority, as provided by Article 3 of the service convention. Form USM-94 requires a designation of the method of service to be used by the foreign central authority. Formal and informal methods of delivery, as well as personal service, may be designated.

The central authority of the receiving country will complete the certificate contained with the form and return the certificate to the requesting party. The State Department estimates that it can take two months to accomplish service under these methods.

However, Article 10 of the service convention provides for methods of service by private parties directly between countries, but again practitioners must check the receiving countries ratification of the service convention, as they may have objected to this form of service. Article 10 permits service of judicial process by the following methods: a) by "postal channels directly to persons abroad"; b) by judicial officers, officials or other competent persons in the state of destination at the request of the same in the state of origin; or c) by

judicial officers, officials or other competent persons in the state of destination at the request of an interested person in the state of origin.

Article 8 permits the service of judicial process through the diplomatic or consular agents of the country of origin, but this too is subject to the consent of the state of destination. It is also likely that the documents will need to be translated into the language of the receiving state, even if both the plaintiff and defendant are U.S. citizens.

If the receiving state is not a party to the service convention, it is suggested that the plaintiff use personal service or registered international mail. Once personal service is effected or a signed receipt for mailed documents is obtained, then proof of receipt can be filed with the court. For further guidance, practitioners should consult with New Jersey Rules of Court Rule 4:4-4 and Rule 4:4-5. It may be necessary to make an application with the court to request acceptance of this alternate form of service. There is always a risk of an attack on a judgment obtained without proper service on a defendant.

AFTERTHOUGHTS ON *MACKINNON*

On June 11, 2007, the New Jersey Supreme Court rendered a decision in the *MacKinnon* case.[9] Presently the attorneys for Mr. MacKinnon are seeking *certiorari* from the Supreme Court of the United States to hear this important case.[10] The facts simply stated are that Ms. MacKinnon, a Japanese national but resident of New Jersey for over 15 years, sought to move to Japan with the parties' daughter incident to the divorce proceedings. Mr. MacKinnon opposed the move. The trial court applying *Baures v. Lewis,*[11] held that Ms. MacKinnon met the standard and granted her request to move to Japan with the child. The decision confirms the general practice that *Baures* should be applied to all removal cases, including international ones.

The *Baures* test should be applied to international removal cases. However, the courts of this state did not adequately consider the impact of an international removal, and failed to specify additional factors to be applied in international removal cases. Instead, the court relied on the catch-all factor in *Baures*. In light of the fact that the United States has no international enforcement agreement with any other country, Mr. MacKinnon has *de jure* lost any right to enforce the visitation he was granted.

There are several troubling aspects of the *MacKinnon* decision. First and foremost, there are no mechanisms through which Mr. MacKinnon can enforce his parenting time, should Ms. MacKinnon fail to bring their daughter to the United States. Counsel for Ms. MacKinnon conceded, during oral argument at the Supreme Court of New Jersey, that her client might not return the child to the United States once removed. There are no international enforcement treaties, and, as noted by the trial court in its decision, the Japanese courts are not likely to voluntarily choose to recognize and enforce the order. Even if Mr. MacKinnon obtains a court order enforcing the parenting time aspect of the judgment of divorce from the court in New Jersey, he cannot compel the custodial parent, now living in Japan, to comply.

As practitioners, we face difficulties enforcing visitation when both parents reside within New Jersey. Imagine the complexity of enforcing visitation in another country, especially one that does not generally recognize the rights of the non-custodial parent.

Second, the trial court ordered the parties to submit to the personal jurisdiction of this state. This is despite the fact that Ms. MacKinnon is residing permanently in Japan and is a Japanese citizen. Our court rules and the common law of the state and federal courts set forth the standard by which personal jurisdiction can be obtained.

Should practitioners remember back to their first semester of law school when infamous cases like *International Shoe Co. v. Washington*[12] and *Pennoyer v. Neff*[13] were discussed, they will recall the discussion of minimum contacts. Under the minimum contacts analysis a court must consider the following: 1) whether the defendant has sufficient contacts with the forum state; and, 2) whether in light of other facts the assertion of personal jurisdiction comports with fair play and substantial justice.[14]

N.J.S.A. 2A:4-30.68 provides for the exercise of personal jurisdiction over non-residents in custody matters, and of course the parties can consent to submit to the ongoing jurisdiction under the laws of New Jersey. Here, Ms. MacKinnon was ordered to consent to ongoing jurisdiction. However, this analysis pre-supposes that any proceedings or findings in the New Jersey Courts will be given comity by the Japanese Courts. Acknowledging that the Japanese Courts will not recognize a decision of our courts renders the decision of the Court in *MacKinnon* meaningless. An order is only as good as it is enforceable.

Additionally, the Hague Convention was considered relevant in the proceedings. The Court held that a removal to a non-Hague Convention country could be ordered after applying the *Baures* factors. Ms. MacKinnon was granted primary physical custody, as well as permission to reside in Japan with the child. Mr. MacKinnon was granted visitation three times per year. The Hague Convention is not applicable as Japan is not a party. There are no mechanisms through which the non-custodial parent can enforce his rights.

The trial court found that as a practical matter, Japan would not be bound to recognize the foreign judgment or give comity to the laws or orders of New Jersey. If a parent violates a parenting-time provision, the courts of this state would have the remedy of ordering "make-up"

parenting time. In this matter, even if the Hague Convention were a viable option, the proceedings would take a minimum two months, and make-up parenting time would be virtually impossible due to the school calendar in Japan and the distance between the parties.

The Court also retained subject matter jurisdiction, namely, jurisdiction over the parties' child. Since there is no treaty in effect between the United States and Japan, the Japanese courts have no obligation to recognize this aspect of the order. Under our laws, the retention of subject matter jurisdiction is proper. However, Ms. MacKinnon need only apply to the local courts in Japan to usurp the New Jersey Court ruling, or simply fail to comply with the order. Again the non-custodial parent is without legal remedy. Alternatively, a non-custodial parent could attempt to re-litigate the matter in a foreign jurisdiction that has no obligation to recognize the judgment of the New Jersey Courts.

Baures should apply to an international removal case; however, it should be a "*Baures* Plus" analysis. The following plus factors should be considered by practitioners and judges: 1) whether the law of the foreign country recognizes and enforces the visitation rights of the non-custodial parent, which would give the non-custodial parent a mechanism through which his or her rights can be enforced; 2) whether the foreign country is "Hague friendly," in that it is a party to the kidnapping treaty and complies with petitions for the return of children, or has returned children without being a party to the Hague Convention; 3) whether the foreign country is a party to the Hague Service Convention, so the parent removing the child can be efficiently served; and, 4) the cultural implications of the move on the child, including but not limited to, the amount of time previously spent in the country, whether the child speaks the language of the other country, the level of development of the other country (specifically the town or city to which the parent seeks to move). If these factors were considered in *MacKinnon,* the move might not have been permitted.

The unfortunate implication of the *MacKinnon* decision is that an international removal is no different than an interstate removal, or put another way—place does not matter. Nothing could be further from the case. While a removal to Canada or Great Britain raises one set of issues, a removal to Cambodia or North Korea raises an entirely different set of issues. With virtually all of the states within the United States having adopted the UCCJEA, a court order entered in New Jersey is enforceable through a relatively simple process. A court order entered in New Jersey may be worth nothing more than the paper it is printed on to a foreign country.

As more cases involve parents whose careers take them to international locations for work, or who have moved to the United States from a foreign country and seek to return after a divorce, we will begin to see the complexities involved with the enforcement of custodial rights in the international arena. Finally, a narrow reading of *MacKinnon* should be followed by family law judges and practitioners. The facts in *MacKinnon* led the trial court to determine that, under *Baures*, the mother's request was appropriate, and this may not be so in every case.

A FEW DOS AND DON'TS

Do not assume that everyone speaks English in the rest of the world. It is true that in most countries English is taught in school. However, not all people who learn English are comfortable speaking the language. Moreover, depending on the age of the person and country in which he or she lives, he or she may not speak English at all. This, of course, makes it all the more difficult to communicate complicated legal concepts, and is, perhaps the most challenging aspect of dealing with foreign clients.

Do remember that there is likely to be a time difference between the East Coast and the other country, which can be substantial at times. If a client is going to make a telephonic appearance in court, the hearing will need to be scheduled at a time certain, and it should be explained to the court and all concerned parties that timeliness is essential. For example, if a client is in Australia there is a 16-hour time difference between Australia and New Jersey.

Do not assume the law in the foreign jurisdiction is similar to the laws of New Jersey, or that the parties have a detailed agreement. In most countries a basic decree of divorce is entered and parental rights flow from a code or statute. In some countries not only do the parents have rights relative to the children, but the children have rights relative to the parents. In some countries children have no rights. In some countries, the gender or age of the child determines which parent is granted custody. This may happen by operation of law, rather than agreement of the parties. Therefore, do learn and become familiar with the law of the foreign jurisdiction.

Do learn and become familiar with the foreign jurisdiction in order to facilitate conversations with clients. The author had a client from Worms, Germany, which she thought was exciting (and funny) because of the Diet of Worms.[15] Of course, no one else who has been told about it finds it entertaining. The client, on the other hand, thought it was great that the author was familiar with the history of his small town.

Handling international custody, divorce, or kidnapping matters may be considered a sub-specialty within family law. However, issues arise that call for a basic knowledge of international law in everyday family law

practice. The first resource is not necessarily the New Jersey Statutes, the New Jersey Rules, or New Jersey case law. The first resource is likely to be the Internet to find an applicable treaty or other assistance. Compliance with international law may mean the difference between securing an enforceable final judgment for a client or a final judgment, which can be easily set aside. Recognizing that a local case has the potential of becoming an international case may afford practitioners the opportunity to provide clients and the parties' children extra protections when agreements are drafted. ■

ENDNOTES

1. The provision has been significantly truncated in the interest of the length of this article. *See also* Janet Johnston & Linda Girdner, *Family Abductors: Descriptive Profiles and Prevantation Inter-nations* (U.S. Dep't of Justice, OJJDP 2001 NCJ 182788) and http://travel.state.gov/family/.
2. State in this article refers to a country.
3. http://travel.state.gov/family/abduction/resources/resources_554.html.
4. http://travel.state.gov/family/family_1732.html.
5. 42 U.S.C. §11605 (1995).
6. The author cautions practitioners not to use translation services provided free on the Internet, unless the practitioner has a level of competency in the language. These translations are generally inaccurate and require a substantial amount of revision.
7. http://www.missingkids.com.
8. Office of International Judicial Assistance, Civil Division, Department of Justice, Todd Building, Room 8102, 550 11th Street N.W., Washington D.C. 20530, (2020) 307-0983. *See also* http://travel.state.gov/judicial_assistance.html.
9. *MacKinnon v. MacKinnon*, 191 N.J. 240 (2007).
10. The author is co-counsel with Michelle D'Onofrio and Krista Haley, of DiFrancesco, Bateman, Coley, Yaspin, Kunzman, Davis, and Lehrer, P.C., on the petition for *certiorari*.
11. *Baures v. Lewis*, 167 N.J. 91 (2001).
12. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
13. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1878).
14. *Schaffer v. Heitner*, 433 U.S. 186 (1977).
15. At the Diet of Worms the Holy Roman Emperor issued the Edict of Worms on May 25, 1521, declaring Martin Luther an outlaw and a heretic and banning his literature.

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Dangers of Utilizing the Business Accountant as a Valuation Expert in Divorce

by Charles F. Vuotto Jr. and Scott Maier

To a divorce litigant, it often appears to be more cost- efficient to have the business accountant prepare a valuation of his or her business for the purpose of equitable distribution. However, there are inherent dangers in utilizing the business accountant as the business owner's expert in a divorce proceeding.This article highlights these dangers, and outlines the areas of attack that should be covered in cross-examination. For ease of reference, the authors will refer to the business accountant as the company accountant and the forensic valuation expert as the expert. Many forensic valuation experts may indeed be accountants, and some company accountants also may be forensic valuation experts. However, as this article highlights, an inherent conflict arises when the business accountant and expert are one and the same. As set forth below, the divorce litigant may find that the cost of not utilizing a separate expert is actually greater.

In order to understand the dangers of using a company accountant as an expert in a divorce case, it is important to understand the difference between their respective roles. The services an expert performs during litigation are generally as follows:

- Forensic investigation;
- Valuation reports;
- Cash flow analysis;
- Marital lifestyle analysis;
- Immunity analysis of business or non-business assets;
- Net worth charts/calculations; and
- Any other analysis required by the litigation

Services a company accountant generally performs are as follows:

- Compliance work—audit, review and/or compile financial statements;
- Tax return preparation;
- Management consulting (implementation of hardware/software systems, internal control reviews, documenting financial systems under Sarbanes Oxley (SOX), other consulting);
- Bookkeeping services;
- Forecast/projections of future result of operations;
- Valuations for other purposes (e.g., estate planning, financing);
- Personal/business tax projections;
- Determination of collectability of advances/loans to/from company, related parties or third parties;
- Review of overhead costs/true economic profitability;
- Financial management consulting;
- Investment advice; and
- Other services

The conflicts between the role of a business accountant and litigation expert are acutely evident in the following services: forecast/projections of future result of operations; valuations for other purposes (*e.g.,* estate planning, financing); personal/business tax projections; determination of collectability of advances/loans to/from company, related parties or third parties; review of overhead costs/true economic profitability; and actual financial management/investment advice.

For example, if the company accountant made projections or forecasts of revenues of profits, or valued the company for estate planning or gifting purposes, and those valuations are different from each other or from the divorce-related valuation report, he or she will be subject to significant attack on cross-examination.

Most problematic, however, are adjustments to the reported income of the company that are done in almost every valuation report. These adjustments will almost always put the company accountant in a difficult position of having to either: 1) decline to make appropriate adjustments in his or her valuation report in order to be inconsistent with his or her work as the company accountant; or 2) make adjustments that conflict with adjustments he or she did not make when preparing the company's financial reports and tax returns. These pitfalls are explained in greater detail below.

Once the differences in the roles between the expert and the company accountant are clear, the pitfalls of being both the testifying expert and the company accountant become self-evident.

- **Loyalty to business owner—** The company accountant has a business relationship with one of the divorcing parties outside the scope of the divorce litigation. Therefore, he or she has more on the line if the litigation does not go well for the client,

namely his or her job. This creates a potential loss of objectivity and independence.

- **Familiarity with client**—The company accountant often has some relationship with the non-titled spouse. This offers a lot of fodder for cross-examination. For example, the company accountant may have had informal discussions with the non-titled spouse before the divorce about topics addressed in his or her report that are inconsistent with the discussions.
- **Ability to verify accounting records**—As mentioned above, an expert often must verify or test the company accountant's work. It is difficult to honestly test or verify the veracity of your own work (tax returns, financial statements, etc.), especially if there are any errors.
- **Ethics violations**—The appearance of impropriety extends to the expert witness. Even though there may not be any actual conflict of interest, an appearance of impropriety may prejudice the credibility of the expert.
- **Qualifications and knowledge as an expert**—Does the company accountant have the experience or credentials to testify as an expert? Most business valuation experts possess one or more of the following credentials:
  - *Certified Public Accountant (CPA)*—CPAs act as advisors to individuals, businesses, financial institutions, nonprofit organizations and government agencies on a wide range of financial matters. They are licensed by the state, and must follow a strict ethical code. For more information about CPAs in the state of New Jersey go to http://www.njscpa.org/.
  - *Accredited in Business Valuation (ABV)*—The ABV designation was created in 1997 by the American Institute of Certified Public Accountants (AICPA). The ABV designation is awarded to CPAs who have demonstrated educational and practical experience in valuing businesses. Currently, ABVs do not have a set standard for valuation, but a draft of the standards has been circulated for approval by the membership. The ABV credential handbook is available at http://bvfls.aicpa.org/.
  - *American Society of Appraisers-Accredited Senior Appraiser (ASA)*—The American Society of Appraisers awards an ASA designation in business valuation that is based on a curriculum that includes classroom instruction, examinations and a review of appraisal experience. ASA-accredited professionals value interests in closely held businesses as well as other intangible assets, such as patents, copyrights, employment agreements and goodwill. For more information about the ASA business valuation accreditation, including the standards an ASA must follow, go to http://www.bvappraisers.org/.
  - *Certified Business Appraiser (CBA)*—The Institute of Business Appraisers awards the CBA designation to valuation professionals who meet established criteria, including formal education requirements, minimum levels of active experience as a business appraiser and successful completion of a written examination on business valuation theory and practice. Much like the ASA, CBAs value interests in closely held businesses. CBA designation criteria and standards are available at www.goiba.org/certify.asp#1.
  - *Certified Divorce Financial Analyst (CDFA)*—The CDFA designation is awarded to financial professionals who meet education, examination, experience and ethics standards in financial issues related to divorce proceedings. Specifically, CDFA professionals assist their clients in understanding and preparing for post-divorce lifestyles. General information about the CDFA designation can be found at www.institutedfa.com.
  - *Chartered Financial Analyst (CFA)*—The CFA Institute has awarded the CFA charter since 1963 to professionals employed within the global investment community. Of the more than 75,000 CFA charterholders worldwide, 49 percent are employed as financial analysts and portfolio managers for mutual fund companies, banks and insurance companies, while almost 30 percent of charterholders are sell-analysts, investment bankers, broker/dealers and investment advisors. The remaining charterholders include academics, regulators, accountants, and consultants. For more information about the CFA charter, visit www.cfainstitute.org.
- **Adherence to professional guidelines**—These have been promulgated by the Uniform Standards of Professional Appraisal Practice (more information can be found at (www.appraisalfoundation.org), adopted on or about 1989 by the Financial Institutions Reform, Recovery and Enforcement Act of 1989, which provides rules to be applied in valuing a business.
- **Fiduciary conflicts**—A company accountant may have other fiduciary responsibilities to the client or the client's business beyond the scope of the litigation. For example, the expert may calculate the economic

profit of a business, which may differ significantly from the income reported on the tax return.

- **Understanding of the process**—Company accountants often do not understand the legal process including discovery, depositions and testimony. This lack of understanding may impede the proceeding.

The following is a non-exhaustive list of questions that highlight the key points to raise when cross-examining the company accountant utilized as an expert by the business owner:

FEES AND INDEPENDENCE

- How much of your annual revenues come from the defendant?
- Would it be fair to say that it is in your best interest to do a good job for the defendant?

FAMILIARITY WITH CLIENT

- Have you discussed your opinions with the defendant?
- Did you make any edits to your report at the request of the defendant?
- Is it true that you play golf regularly with the defendant?
- Has the defendant ever mentioned to you what he or she thinks the business is worth?

ABILITY TO VERIFY ACCOUNTING

- What analysis have you done on the accounting records, which you prepared, to determine the economic income of the business?
- Did you make any adjustments to the reported information?
- The plaintiff has estimated that there is $200,000 in unreported cash income from the business each year, which is evidenced in the lifestyle analysis, but not included in your analysis of the business. What is your exposure, since you prepared the business income tax return?

QUALIFICATIONS

- Have you ever prepared the requested analysis for the purpose of a matrimonial proceeding prior to this case?
- Do you have appropriate credentials to value a business (CPA, ABV, ASA, CBA, CDFA, CFA)?
- Have you followed the ABV guidelines in preparing your report?

CROSS PURPOSES (*E.G.*, MATRIMONIAL ACCOUNTING V. TAX RETURN PREPARATION):

- Is it true that the income tax return reports no income from business operations of the defendant's business?
- Given the information on the tax return (which you prepared), how can you conclude the business income for the defendant's business to approximate $500,000?
- Further, how can you conclude that the marital lifestyle is $500,000 per year on average, given that the only source of marital income is the defendant's business?

GENERAL ACCEPTANCE WITHIN THE SCIENTIFIC COMMUNITY

Will the company accountant's expert testimony be admissible? In the case of *Frye v. United States,*[1] the Court established what is commonly referred to as the "general acceptance standard," which requires that scientific testimony is only admissible if it is based on a scientific technique that is generally accepted in the relevant scientific community.[2]

New Jersey courts have interpreted the *Frye* test as requiring that the general acceptance of scientific evidence may be demonstrated in three specific ways: "(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance."[3]

With limited exceptions,[4] the more relaxed federal evidentiary principles established in *Daubert v. Merrell Dow Pharmaceuticals,* Inc.,[5] which allow for the admissibility of expert testimony even in situations where general acceptance cannot be proven, have not been adopted by the courts of New Jersey, who continue to apply the general acceptance *Frye* test when determining the admissibility of scientific evidence.[6] For more information about specific *Daubert* challenges, visit http://www.daubert tracker.com/.

Considering the foregoing, one must determine whether the company accountant's opinions will be admissible under the *Frye* test.

CONCLUSION

The conclusion is fairly apparent: Avoid, at all costs, utilization of the company's accountant as your forensic business valuation expert in a divorce case unless you can proceed jointly and in a cooperative fashion. ■

ENDNOTES

1. *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923).
2. *Id.* at 1014.
3. *State v. Harvey,* 151 N.J. 117, 170 (1997) (*quoting State v. Kelly,* 97 N.J. 178, 210 (1984)).
4. Two exceptions to the Court's application of the *Frye* rule include tort cases involving injuries caused by a drug or toxic substance *(see Kemp ex rel. v. Wright v. State,* 174 N.J. 412 (2002)), and death penalty hearings wherein the defense offers scientific evidence (*see State v. Davis,* 96 N.J. 611 (1984)).
5. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).
6. Richard J. Biunno, New Jersey Rules of Evidence, 2006 Ed., Comment to Rule 702[3], page 853 ("The *Frye* test remains the stan-

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Parental Alienation: The Quandary Lawyers and Judges Face

by Elizabeth M. Vinhal

Too often, parents use their children as the ammunition they fire at each other in custody battles. Whether a parent asserts a warped right to exclusivity of a child's love, time and affection, or uses this as a venal financial tactic makes no difference. The damage to the child is immeasurable, and the remedies at law are sadly impotent. A parent can administer the poison, so to speak, through subtle innuendos that imply the other parent no longer cares for the child, or more obvious statements like "Your father does not love you!" Regardless, the children are the casualties of any custody war.

As family law practitioners we have heard our clients complain that their spouse is turning their children against them. What advice do we give them to stop this behavior? More importantly, what statutory and case law do we rely upon? Allegations of parental alienation raise a host of questions for family lawyers, including how to explain to our clients the consequences of such behavior and the remedy for resolving the issue within the court system.

The term "alienation of affections" originally evolved in the spousal context when one spouse would allege that the other spouse's love and affection was stolen by a romantic interloper. However, today the term "alienation of affections" is utilized in custody battles when a parent is accused of brainwashing their child against the other parent to such an extreme that the child's affections are alienated from the other parent, otherwise known as parental alienation.

This alienation can occur in the most subtle form when one parent makes a statement to a child that could reasonably lead the child to believe the other parent does not care about him or her. The following are examples of statements made by a parent that are forms of subtle parental alienation: "I wonder why your dad was not at your baseball game? I thought he said it was important to him." "Why does your mom spend so much time with her new boyfriend instead of you?" and "Nobody loves you more than I do!" More overt forms of alienation consist of a parent bribing a child with toys and/or fancy vacations, in return for the child not spending time with the other parent, or statements as blatant as "Your father doesn't love you. If he did he wouldn't have done this to *us*!" The most severe cases of alienation include a parent prompting their child to falsely allege sexual and/or physical abuse.

Parental alienation is the constant and unrelenting process through which a parent denigrates and marginalizes the other parent in their child's eyes, which in turn, alienates that parent's relationship with the child. The alienating parent's manipulating behavior creates hostility from the child toward the other parent, thereby placing the hapless youngster in the middle of a loyalty battle. Ultimately, the child rejects the alienated parent, often parroting the abusive parent's allegations about him or her, which can, and often does, create an irreparable breakdown in the parent-child relationship.

Acknowledgment of a child's irrational rejection of another parent was first recognized by Judith Wallerstein and Joan Kelly in their study "The Effects of Parental Divorce: Experiences of the Child in Later Latency."[1] The study discussed a child's harsh rejection of one parent, which resulted in the child no longer wanting to visit with the other parent. Thereafter, in the mid-1980s, Dr. Richard Gardner, a child psychiatrist, coined the phrase "parental alienation syndrome" (PAS). He defined the syndrome as "...a disorder that arises primarily in the context of child-custody disputes....It's primary manifestation is the child's campaign of denigration against a parent, a campaign that has no justification against a good, loving parent."[2]

Dr. Gardner distinguished parental alienation from PAS. He believed parental alienation was a general term that encompassed any situation where a child is alienated from a parent (*i.e.* physical abuse, verbal abuse, sexual abuse, etc.). PAS, on the other hand, he defined as a "subtype of parental alienation," which was caused "by a parent systematically programming the children against the other parent, who has been a good, loving parent."[3]

Dr. Gardner identified three levels of parental alienation: mild, moderate and severe. He was a proponent of utilizing family therapy in mild or moderate cases, but was confident that only a change in custody from the alienating parent to the alienated parent would suffice in severe cases.[4]

In part, because of Dr. Gardner's

strong stance in transferring custody in severe parental alienation cases, his research has been the subject of significant scrutiny over the years. Many critics claim PAS is based on opinion with no empirical research to support it. Others claim that since PAS is not listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV, it does not exist. Critics have gone so far as to claim that since Dr. Gardner's works are self-published, he is essentially a fraud.

Putting aside the criticism of Dr. Gardner's research, or the name for the condition, the reality is parental alienation exists regardless of whether it is called PAS, programming, brainwashing, divorce poison, indoctrination, vilifying of a parent, and/or mind control. The label that lawyers or courts utilize to describe the act of abuse in which one parent dispenses hate about the other to villainize that parent in the child's eyes is irrelevant. What is important is how lawyers and courts address the issue in order to avoid perpetuating the alienation in the future.

Lawyers and judges are charged with the difficult task of identifying the emotional abuse of alienation and crafting a remedy that will deter this type of behavior. Interestingly, New Jersey courts have not defined the term "parental alienation," *per se*. As a result, treatment of parental alienation in the New Jersey courts is somewhat inconsistent because a bright line rule to address the issue has not been established. Rather, it is left to the judge's discretion, and therefore dealt with on a case-by-case basis. In fact, there are only a handful of cases, which consist of published and unpublished decisions, specifically dealing with parental alienation in New Jersey.

In making a custody determination courts look to N.J.S.A. 9:2-4(c), which holds, in pertinent, that a court should examine, among other things, "…the parent's ability to agree, communicate and cooperate in matters relating to the children…[and]…any history of unwillingness to allow parenting time…."[5] An additional requirement "superimposed upon an analysis of the statutory scheme" is the "best interest of the child standard."[6] "The 'best-interest-of-the-child' standard is more than a statement of the primary criterion for decision or the factors to be considered; it is an expression of the court's special responsibility to safeguard the interests of the child at the center of a custody dispute because the child cannot be presumed to be protected by the adversarial process."[7]

As early as 1949, in *Turney v. Nooney*, the Appellate Division held that in promoting a child's best interest "the court should strain every effort to attain for the child the affection of both parents, rather than one."[8] The court further emphasized "the greatest benefit a court can bestow upon children is not so much to be found in determining which parent shall enjoy their physical custody as it is in ensuring that the children shall not only retain the love of both parents, but shall be at all times and constantly deeply imbued with love and respect for both parents."[9]

Turney specifically charges custodial parents to encourage a relationship between the children and the other parent. Almost 40 years later, in *Beck v. Beck*, the Supreme Court reiterated this view when it held that in determining a joint custody arrangement the court must examine whether the children have relationships with both parents in which, among other things, "…the child recognize both parents as sources of security and love…."[10] The Supreme Court opined in *Beck* that "…a successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents may harbor."[11]

Seven years later, in *Nufrio v. Nufrio*, the Appellate Division held:

> …the prime criteria for establishing a joint legal custody relationship between divorced or separated parents centers on the ability of those parents to agree, communicate and cooperate in matters relating the health, safety and welfare of the child, notwithstanding animosity or acrimony they harbor towards each other. The ability of parents to put aside their personal differences and work together for the best interest of their child is the true measure of a healthy parent/child relationship. A judicial custody determination must foster, not hamper, such a healthy relationship. Therefore, a parent's amenability or inability to cooperate with the other parent, are factors to be considered in awarding joint legal custody.[12]

Our courts have made it abundantly clear that when a trial court determines custody the ability and the inclination of parents to foster their child's relationship with the other parent is paramount. "…[A] parent's right to the care and companionship of his or her child are so fundamental as to be guaranteed protection under the First, Ninth and Fourteenth Amendments of the United States Constitution."[13] Thus, in a case where emotional or physical harm can come to a child as a result of a parent's behavior "a parent's custody and visitation rights may be restricted or even terminated…."[14]

Some lawyers would argue that Dr. Gardner's recommendation to transfer custody in cases where a custodial parent severely alienates a child's affection is appropriate because the emotional abuse is detrimental to the child's emotional well being (*i.e.* destroying that child's relationship with the other parent). Thus, a change in custody is warranted as a means to preserve the best interests and welfare of the child by allowing the child and the alienated parent to repair their relationship before the alienating parent destroys it permanently. Such a transfer also removes the child from the source of the emotional poison-

ing and allows the child to heal.

The Appellate Court, in *Sheenan v. Sheehan,* followed the above line of thinking and held that as a "general rule"[15] if a parent "desires to retain the primary custody of her child, it is her duty to aid and encourage the father's sincere effort to enhance the mutual love, affection and respect between himself and his child and not merely to refrain from active resistance thereto."[16] The Supreme Court echoed this sentiment in *Sacharow v. Sacharow*, wherein Justice Virginia Long authored the opinion holding, in pertinent part, that when analyzing the best interest of a child "the court should take into account the good faith of the parties; the prior history of dealings between them; the relationship between each parent and the child; [and] any efforts by either party to alienate the child from the other parent...."[17]

Three years later, in an unpublished Appellate Division case, *Flesche v. Flesche*, the Appellate Court specifically addressed the issue of parental alienation when the defendant/mother appealed an order declaring her ex-husband the primary parent of their 13-year-old son. She claimed the trial court failed to order a plenary hearing or interview their son.[18] The mother accused the father of contributing to their son's negative feelings toward her by calling her a "whore" in front of their son and allowing their son to use vulgar and denigrating language about the mother in his presence. It was undisputed that prior to the parties' divorce the mother had a relationship with the son's hockey coach. Knowing about the affair, the father agreed in the parties' property settlement agreement "to cooperate in every way to help the children better adjust to the circumstances as they now exist and may in the future exist."[19] Subsequent to the divorce, the son refused to spend time with his mother. The trial court record reflected that the parties discontinued counseling sessions after the divorce, and that the mother, since then, did not seek therapeutic counseling or the court's intervention to assist in reestablishing her relationship with her son. As a result, the trial court awarded the father residential custody, despite the mother's strong claims of parental alienation.

On appeal, the appellate court held that although the mother's affair with the son's hockey coach embarrassed the son, "the actual degree of the father's own culpability, if any, in promoting that alienation is unclear from the paper record."[20] The appellate court was "dismayed" that despite the fact that the trial court encouraged the mother to make an application to the trial court for therapeutic reunification, she did not. As a result, the appellate court construed the trial court's order as an interim order, and allowed the mother 90 days to file a motion citing her good faith efforts to obtain therapeutic counseling and if timely opposition was filed instructed the family part to reconsider the necessity of a plenary hearing.

In closing, the appellate court opined:

> ...The parties and their son have a very challenging and emotional situation. It is incumbent upon both parents to exert their best efforts cooperatively to repair their son's fractured relationship with his mother. The mother, for her part, must take the initiative in pursuing suitable counseling, and in exhibiting appropriate sensitivity, judgment and patience in order to help her son learn to accept her again as a parent with open arms. Likewise, we admonish the father, despite his understandable hard feelings about his former spouse's affair, to honor his express commitment in the PSA, as well as his inherent duties as a co-parent, to show respect for his son's mother, to refrain from disparaging her, and to support the mutual efforts of mother and son to rebuild a constructive relationship. Without such mutual parental cooperation, the son surely will be deprived of the inestimable benefits of his mother's love and support, and the mother will be deprived of the reciprocal fulfillment and respect that every parent presumptively deserves from his or her children.[21]

A year later, in 2006, the appellate court again addressed the issue of parental alienation in the unpublished decision *E.I. v. L.I.*[22] In this case, the mother appealed, among other things, the temporary award of custody to the father, along with temporary suspension of her parenting time, as a result of her falsely alleging her daughter was sexually abused by her father. Only after the parties submitted to polygraphs by consent, which indicated the father was being truthful when he said he did not sexually abuse his daughter, and after hearing the testimony from several Division of Youth and Family Services caseworkers, psychologists, and a polygraph operator, did the trial court determine the mother was motivated to encourage the daughter to make false allegations of sexual abuse in an effort to prevent parenting time and remove the father from the house. As a result, the trial court transferred custody from the mother to the father, and suspended the mother's parenting time pending a psychological evaluation. "The court determined that the children needed to establish a relationship with their alienated father without any interference by the mother."[23]

Despite the trial court's order, the mother never underwent a psychological evaluation, and therefore did not see the children for approximately two years. However, on appeal the appellate court remanded the case to "consider a fair and equitable parenting time for the mother." The appellate court's rational was based on the fact that the children were more mature in light of the two-year passage of time, and have been able to bond with their father since the entry of the trial court's order. It is important to note that the appellate court did *not* criticize the trial court for transferring

custody; rather, the court reiterated that N.J.S.A. 9:2-4(c) requires the court, in making a custody determination, to look at the best interests of the child, and in doing so *Wilke v. Culp* holds "a parent's custody and visitation rights may be restricted, or even terminated, where the relation of one parent (or even both) with the child cause emotional or physical harm to the child, or where the parent is shown to be unfit, or perhaps where *special temporary circumstances require*...."[24]

The appellate court upheld the trial court's decision that "the suspension of [the mother's] visitation rights was determined to be in the best interests of the children in order to end the alienation of the children from the father,"[25] and thereby warrants the "special temporary circumstances" the *Wilke* court envisioned.

In another unpublished Appellate Division case, *V.U. v. L.U.,*[26] the appellate court rejected the court-appointed custody expert's recommendation to transfer custody of the two minor children, Carol and Mary, from the mother to the father as a result, in part, of the mother's parental alienation. The trial court interviewed the two girls and noted that although Carol did not want to have contact with her father, Mary once felt that way but has been able to reconnect with her father. The trial court held that despite the "instability that [mother] has imposed upon [Mary] and [Carol], these girls appear to be healthy and [are] doing well in school."[27] Essentially, the trial court rewarded the mother, who clearly was alienating the children from the father, with continued custody, because the court found that a transfer in custody was not in the children's best interests.

On appeal, the appellate court affirmed the trial court's decision with a lukewarm endorsement, and held:

> The judge was not bound to accept the opinion of the court-appointed expert, but rather was entitled to accept or reject all, or part, of the expert's opinion. Although another judge may have reached a different conclusion based upon the same facts, we determine that Judge Franklin did not mistakenly exercise his discretion in awarding custody of the parties' two daughters to defendant.[28]

Like New Jersey, other jurisdictions struggle with the handling of parental alienation. For example, in the North Dakota case *McAdams v. McAdams*, the court denied custody to the father because it found he had alienated the son from his mother.[29] In *Brown v. Brown*, the mother requested custody of the child because of predicted future alienation if the child stayed with the father. Although her request was denied, the court stated that "[e]vidence of parental alienation is a significant factor in determining custody."[30]

In Iowa, in *In re Marriage of Rosenfeld*, the court held that since the custodial father and his wife alienated the children from their non-custodial mother, the children needed to spend more time with their mother, and thereby, transferred custody to her.[31]

On the other hand, the Arkansas case *Blake v. Smith* held that evidence supporting the alienation of a child's affection from a parent should not alone be sufficient grounds to warrant a change in the child's custody.[32] Similarly, the Georgia case *Elders v. Elders* held that although a father told the children their mother "was immoral and that she did not love them," the father should not be deprived of the custody of the children because of it."[33]

In the New York case *Gage v. Gage*, the Supreme Court, Appellate Division, upheld the award of custody to the father after the father's expert testified that the mother's constant demeaning of the father in front of the child led the court to believe that if the mother was granted custody she would use the children as a weapon against the him. The mother's own expert testified that if she was awarded sole custody, she would continue to negatively speak of the father.[34]

In Vermont, the appellate court held that the trial court abused its discretion when it transferred custody of the children to the father based on the mother's estrangement from the children, despite the fact the mother had been the children's primary caretaker prior to the parties' divorce. The court found that since the father was the principle cause of the children's estrangement from the mother, the mother was "more likely to provide suitable custody and guidance to the children."[35]

There is a dearth of authority on parental alienation in New Jersey. Beyond dispute is the fact that courts have an affirmative duty to promote the affection of the children for both parents, as defined by statutory and case law. If one parent is interfering in the child's relationship with the other parent, doesn't the court have a duty to eliminate that parent's negative behavior, or at the very least, protect the child from it?

The author believes the only way to protect a child from this emotional abuse is to remove the child from it. Courts struggle with transferring custody of a child from the alienating parent because of a fear of contravening the child's best interests; however, the author feels, this philosophy only perpetuates the alienation and improperly rewards the abusive parent. Courts must establish some guidelines on how to deal with parental alienation cases. In mild and some moderate cases, family mediation and/or therapeutic counseling could help resolve the issue; however, in more severe alienation cases the likely remedy should be to transfer custody of the children to the non-alienating parent until the court is convinced that the emotional abuse is eliminated. The author believes parents cannot be allowed to systemically and methodically brain-

wash their child against the other parent; this deliberate act alone is contrary to the children's best interest. Until a solution is fashioned, the author fears many children of divorce will continue to suffer this particularly malignant emotional abuse at the hands of one or both of their parents. ■

ENDNOTES

1. Judith S. Wallerstein & Joan B. Kelly, "The Effects of Parental Divorce: Experiences of the Child in Later Latency," 46 *Am.J. Orthopsychiatry* 256 (1976).
2. Gardner, Richard A., *et al*., *The International Handbook of Parental Alienation Syndrome*, Illinois: Charles C. Thomas Publisher, LTD. 2006.
3. *Id.* at 6.
4. Richard A. Gardner, "Legal and Psychotherapeutic Approaches to the Three Types of Parental Alienation Syndromes Families: When Psychiatry and the Law Join Forces," 28 *Ct. Rev.* 14 (1991).
5. N.J.S.A. 9:2-4(c)(emphasis added).
6. *Kinsella v. Kinsella*, 150 N.J. 276, 317 (1997) (citation omitted).
7. *Id.* at 317-18.
8. *Turney v. Nooney,* 5 N.J. Super. 392, 397 (App. Div. 1949)(citation omitted).
9. *Id.* at 397(citation omitted).
10. *Beck v. Beck*, 86 N.J.480, 497-498 (1981).
11. *Id.* at 498 (citation omitted).
12. *Nufrio v. Nufrio*, 341 N.J. Super. 548, 550 (2001)(emphasis added).
13. *In re of J.S & C.*, 129 N.J. Super. 489 (Chan. Div. 1974).
14. *Wilke v. Culp*, 196 N.J. Super. 487, 496 (App. Div. 1984).
15. *Sheenan v. Sheenan*, 51 N.J. Super. 276, 293 (App. Div. 1958).
16. *Id.* at 291(citation omitted).
17. *Sacharow v. Sacharow*, 177 N.J. 62, 65 (2003)(emphasis added).
18. *Flesche v. Flesche*, WL1586025 (App. Div. 2006).
19. *Id.*
20. *Id.*
21. *Id.*
22. *E.I. v. L.I.*, WL 1764473 (App. Div. 2006).
23. *Id.*
24. *Id.* (citations omitted).
25. *Id.*
26. *V.U. v. L.U.*, WL 2707346 (App. Div. 2006).
27. *Id.*
28. *Id.*
29. *McAdams v. McAdams*, 530 N.W.2d 647 (N.D. 1995).
30. *Brown v. Brown*, 600 N.W.2d 869, 874 (N.D. 1999)(citation omitted).
31. *In re Marriage of Rosenfeld*, 524 N.W. 2d. 212 (Iowa Ct. App. 1994).
32. *Blake v. Smith*, 190 S.W.2d 455 (1945).
33. *Elders v. Elders*, 57 S.E. 2d 83 (1950).
34. *Gage v. Gage*, 167 A.D. 2d 332 (1990).
35. *Begins v. Begins*, 721 A.2d 469 (1998).

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dard in New Jersey in most types of cases in which scientific testimony is to be introduced."); *In Re Commitment of R.S.,* 339 N.J. Super. 507, 536 (App. Div. 2001), *affirmed* 173 N.J. 134 (noting that "New Jersey has long recognized that in order to be admitted into evidence, a novel scientific test must meet the standard articulated in *Frye v. United States*…," and further recognizing, "Although *Frye* has been replaced in the federal court system by the more lenient standards of Federal Rule of Evidence 702 as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* in New Jersey, with the exception of toxic tort litigation, *Frye* remains the standard.") (citations omitted).

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