Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

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SAVE THE DATE

NCBA AND NAL INSTALLATION OF OFFICERS
Tuesday, June 1, 2021
5:00 PM via Zoom
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WE CARE GOLF AND TENNIS CLASSIC
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LAWYER ASSISTANCE PROGRAM (LAP)
Monthly Virtual Wellness Groups
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OF NOTE

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, June 3, 2021 at 12:45 PM
Thursday, August 5, 2021 at 12:45

Paving a Path to What's Next

Elizabeth Eckhardt, LCSW, PhD and Jackie Cara

As more and more people get the COVID-19 vaccine, there is a lot of conversation about things getting back to normal. Yes, it is true that more and more people are returning to their workplaces and kids are going back to school full time and in person, but are things normal? Will things ever go back to the way things were before COVID-19 upended our lives over a year ago? So many questions remain—Are the vaccines effective? Do we have to continue wearing masks and being socially distant? What about the new variants? Will we need to get a booster, and when—just to name a few.

Many fear that things will never go back to the way they were, and others quietly hope that they do not. Some feel that the slowing down of life and the ability to spend more time with family and less time running around has been a hidden blessing during this challenging time. One thing we do know is that we do not know what the future will look like.

Not knowing what to expect and feeling a lack of control over the events in one's life can wreak havoc on overall mental health. Those of us in the mental health field have seen a sharp rise in the numbers of people reaching out for services. We anticipate that this number will continue to rise as the long-term effects of the pandemic show themselves. Between March 2020 and July 2020, the Nassau County Bar Association experienced a sharp increase in the number of attorneys reaching out to the Lawyer Assistance Program (LAP) and the number of monthly callers remains significantly higher than in years past.

Several attorneys have expressed concern about the amount they have been drinking since the beginning

of the pandemic, while others have experienced feelings of depression and anxiety in ways they never have before. As a result of these calls, LAP has expanded its programming to provide additional mental health and substance use programs geared toward prevention and early identification of problems, including peer and professional support,

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Stella K. Abraham High School Wins 2021 Nassau County Mock Trial Tournament

by Jennifer C. Groh

The Stella K. Abraham High School mock trial team prevailed over 39 high schools to take the Nassau County Championship of the 2021 New York State High School Mock Trial Tournament. The Hebrew Academy of Nassau County placed second this year. Stella K. Abraham High School will represent Nassau County in the upcoming state finals to be held virtually from May 23 to 25.

NCBA coordinates the Nassau County Tournament with well over 500 students. Contributing to the success of the program that was held virtually this year were dozens of NCBA volunteers—attorneys who served as advisors to the teams and other attorneys and sitting and retired village magistrates and judges who presided over the 40 teams that competed in the seven rounds of the tournament.

(L-R) Aviva Schreiber, Atara Shleifer, Ariella Borah, Anna Laufer, Priva Halpert, Menucha Ross, Chani Rabinow, Rochel Loike, Avital Davidowitz, Talia Cohen, Lea Septimus, Talia Traube, Rachel Hirt, Tamar Rabinovitz, Shira Yehoshua, Jenny Lifshitz, and Sara Stein. Not pictured: Dassie Jaffe

The competition is chaired by Hon. Marilyn K. Genoa, Peter H. Levy, and Hon. Lawrence M. Schaffer. Jennifer Groh, Director of the Nassau Academy of Law, the educational arm of the Bar Association, coordinates the annual mock trial tournament.

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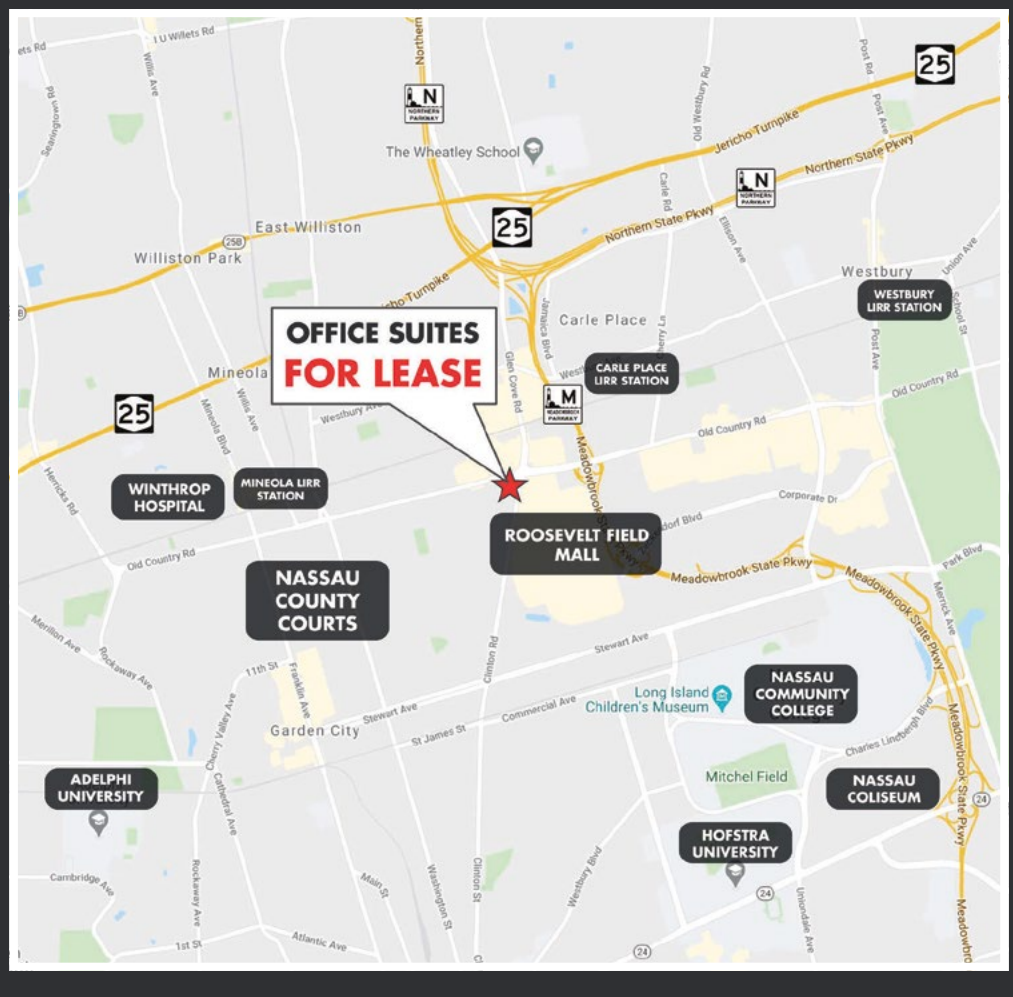

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FOCUS:
FAMILY LAW

Gestational Surrogacy: New Frontier in New York Family Law

Nancy E. Gianakos

On April 2, 2020, New York passed the Child Parent Security Act (CPSA,) which became effective February 15, 2021, legalizing gestational surrogacy. Much has been written about the benefits of the new law for families experiencing fertility issues and for the LGBTQ community in becoming legal parents.[1]

In the last decade alone, an estimated 8 million women in America suffered with infertility issues, spending billions to conceive annually; in 2007, the pursuit of conception fueled what then was estimated as a $6.5 billion for-profit infertility industry in this country.[2] Undoubtedly with the passage of same sex marriage laws and statutory enactments legalizing third party gestation, the profit potential will increase dramatically. This underscores the need for government oversight of an industry that remains in large part unregulated and fraught with exploitation of women and those desirous of a newborn.

New York's recent legislation is to be lauded for the protections afforded a gestational surrogate under the CPSA. Many of the concerns expressed in opposition to "womb renting" were very similar to those raised in objection to taxpayer dollars funding compensation of women who sold their eggs for harvesting for institutional research in 2009.[3] The commodifying of the women's body, exploitation of young and impoverished females, and the creation of "designer babies" have been hotly debated in the medical and legal communities.

Gestational Surrogate

According to the new law, a paid surrogate in New York must be 21 years of age or older, a US citizen or lawful permanent resident, and biologically unrelated to the child, i.e., a surrogate may not contribute her own egg for which she serves as the gestational surrogate.[4] A paid surrogate who is also a donor will void a contract of surrogacy, rendering the contract unenforceable.

Further, a surrogate must meet all the regulatory health mandates promulgated by New York State Department of Health (DOH) prior to entering into a surrogacy contract with the "intended parents."[5] By statutory definition, an "intended parent" in order to enter into an enforceable surrogacy contract, must be over the age of 18 at the time the agreement is signed, may be married or unmarried, and one of them must be a U.S. citizen or lawful permanent resident and a resident of New York state.

Surrogate's Bill of Rights

The CPSA provides for a Surrogate's Bill of Rights acknowledging the protections needed for low income women from the coercion of manipulative solicitations and long term effects of gestational practices upon their bodies.[6]

A surrogate in New York may not only be compensated for the use of her body by the intended parents, but must be provided life insurance with a minimum value of $750,000 prior to execution of the surrogacy contract and remain in effect for 12 months after the conclusion of the pregnancy; a health insurance policy; and upon request, a disability policy for whom she may name beneficiaries.

In addition, the surrogate has the right to complete autonomy in medical decisions for herself and the child in vitro, including decisions to terminate the pregnancy. A surrogate also has a right to counsel to be paid by the intended parents.[7] These rights may not be abridged by contract and attempts to do so may render the surrogacy contract void and unenforceable in whole or in part.

DOH Rules Regarding Gestational Surrogacy

The legislature when enacting the CPSA delegated to the DOH the implementation of regulations with a legislative directive to "regulate surrogacy programs and assisted reproduction service providers ("arps"), the practice of gestational surrogacy, and the donation of ova to ensure the health and safety of the egg donor *and the Child born under gestational surrogacy agreements* [emphasis added], to ensure that the surrogacy is ethical, and to ensure that the surrogacy agreements are fair to the parties that enter into them."

The next day, on February 16, 2021, the DOH published "Surrogacy Programs and Assisted Reproduction Service Providers." The rules are predicated on a voluntary registry of egg donors and surrogates; notably, there is no reference to a registry for sperm donors.

Access to Medical Records: An Unresolved Dilemma

The health and safety issues present one of the more perplexing issues of gestational surrogacy not only for the surrogate but for the surrogate child. The absence and availability of, as well as access to medical data including an egg or sperm donor's history such as the genetic lineage of the donor, the existence of siblings of the donor as well as prior donations of ova or sperm in creating other surrogate children who are genetic siblings of a surrogate child are protected as confidential information.

The extent of a donor's medical history remains under the auspices of the "assisted reproductive service provider" and such data collection appears geared to the immediacy of the health concerns for a surrogate in a gestational pregnancy—not the long-term care of the surrogate child.

Voluntary Disclosure of Medical History and Confidentiality

Pursuant to the DOH rules, a donor who voluntarily registers "shall be provided with written informational material regarding the ova donation registry which shall indicate, at a minimum…that consent can be withdrawn at any time…[that]the assisted reproduction service provider shall adhere to all state and federal laws regarding confidentiality of private health information, and the donor may pursue remedies against [them]… for any unwarranted disclosure of their confidential information."[8]

The arsp, after obtaining the donor-participant's signed consent, obtains a donor identifier code from the ova registry which is attached to the donor's confidential record maintained by the tissue bank for tracking purposes and generates a separate record, identified by the code only, indicating for the particular donor the number of ova and number of times ova have been donated, her medical and health history "which shall include at a minimum, all health screening criteria required under Part 52 of this Title." The arps must maintain the confidentiality of "ova donation registry record " in compliance with state and federal laws including Public Health Law § 4365(4)(c).

The confidentiality of medical and health records afforded the surrogate under the Ova Donation Guidelines are poised as a formidable obstacle to the future health care of a surrogate

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President's Column
In Closing

FROM THE PRESIDENT

Dorian R. Glover

In closing, our legacy is what history says about the work we have accomplished and the impressions we have left on those around us. We looked for ways to balance tradition with innovation, with the hopes of not compromising either. My predecessors laid the foundation, and each saw an opportunity to courageously lead our organization.

2020-2021 will be remembered for the Pandemic that claimed the lives of over 3 million people worldwide and counting, but also for the movement of racial justice sparked by the death of George Floyd and the assault of the U.S. Capitol by violent protesters.

Through it all, we stood resolute, whether it was to work with our Administrative Judge, the Hon. Norman St. George, to support the protective measures used to prevent the spread of COVID-19 virus as we moved through the slow and deliberate process of increasing in-court proceedings; or to work with our justice partners—community leaders, government officials, law enforcement, and the judiciary—to bring change, correct inequalities, and ensure equal justice and fairness from all constitutionally bound to uphold the law as we leaned on the NCBA mission of inspiring all citizens to have respect for the law and the governing principles of democracy.

That is the story of our history; we answered the call to make our community safer, to stand up for equality for all citizens, and to have respect for the law.

Family, the spirit of Domus rings true because it belongs to all of us. In this oasis of space, this spectrum of time, this cornerstone of our community, we have not only met the challenges that were before us, but more importantly we seized the opportunity and the responsibility to courageously lead Domus to even greater heights.

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FOCUS:
MATRIMONIAL LAW

Til "Tweets" Do Us Part: Social Media and Its Impact on Matrimonial Litigation

Angela A. Ruffini

Social media, a global phenomenon that has transformed the way we live, receive our news, and elect our politicians, has profoundly impacted divorce litigation.

What a precarious situation people find themselves in when all of their uninhibited thoughts and questionable conduct wind up on social media. They live under the false pretense that deleting their "posts" ensures their privacy. In reality, their uninhibited thoughts and questionable conduct have presented as new forms of evidence in matrimonial litigation that could muddy the waters for some litigants. Indeed, as we well know, when something is deleted, it is never truly deleted.

Social Media as Evidence

It is with good reason that courts have begun to capitulate to social media evidence. It has become one of the most intricate details encompassing people's daily lives. Users of social media often wake up and immediately check their social media accounts, post about their 12:00 p.m. brunch special or express their unsolicited political views amongst their "friends." Social media has become a pesky little nuisance that people cannot get enough of.

Embedded in social media platforms is also the platform's ability to track an individual's every move. Many social media websites contain GPS and similar technology to pinpoint one's exact (or almost exact) location. Therefore, social media evidence has become integral to legal proceedings and could truly make or break someone in the throes of matrimonial litigation. This evidence, as further detailed herein, has the ability to uncover a party's finances, location, drug or alcohol use, radicalism and other compromising evidence in ways legal processes—like subpoenas—cannot.

Courts will often cite three reasons for allowing social media evidence: (1) it does not violate privacy as there is no expectation of privacy; (2) it can be relevant; and (3) it does not violate any privilege."[1]

But what does this mean for matrimonial litigation? Put simply, what litigants post on social media can—and likely will—be used against them (to the extent that it can). Indeed, social media evidence can be more compelling in divorce litigation than evidence uncovered by a private investigator. In recent years, there have been studies attesting to this fact. A 2010 study conducted by the American Academy of Matrimonial Lawyers (AAML) "revealed that 81% of respondents had used social media evidence in their cases."[2]

Naturally, eleven years later, one can only expect that number to have risen. "Going through a divorce always results in heightened levels of personal scrutiny. If you publicly post any contradictions to previously made statements and promises, an estranged spouse will certainly be one of the first people to notice and make use of that evidence," according to Marlene Eskind Moses, president of the AAML.[3]

Courts have gone as far as compelling social media evidence by granting access to passwords and login information.[4]

This now begs the question of whether there is a reasonable expectation of privacy in what and how we post. What we think of as "private," especially if an individual's account is private, may no longer bear that status in legal proceedings, especially if it is material to custody or finances. In fact, as many social media platforms do not guarantee complete privacy, a litigant cannot, and indeed, should not have a legitimate reasonable expectation of privacy.[5]

This further gives rise to concerns about an individual's Fourth Amendment protections. Are these protections applicable in the context of social media? While there is little written on the Fourth Amendment and its application to divorce and family litigation, it may become an integral part of evidence and motion practice in the future.[6]

Social media evidence has also presented ethical issues. The concept of "false friending," where a spouse, third party, or even attorney "friends" an adverse party or possible witness on social media under false pretenses to accumulate evidence brings to light New York Rules of Professional Conduct Rule 4.1.[7] This rule provides: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."[8] Does this phishing expedition raise ethical concerns? Indeed, is a lawyer friending someone on social media under false pretenses the equivalent of "knowingly [making] a false statement?" Or, can (and should) this evidence be used to hold a spouse accountable for his or her actions despite the ethical concerns, especially if this evidence is material and relevant?

When we think of social media, we often think about the preeminent platforms including Facebook, Twitter, Instagram, Tik Tok, or Snapchat. But what about the less-thought-about platforms including GoFundMe, Change.com, or even dating websites like Match.com and eHarmony? Can the fact that someone has utilized GoFundMe to raise money for counsel fees serve as a basis to impute income to a spouse claiming poverty? Can someone's radicalized petition on Change.com affect the outcome of a custody case? Can someone's dating profile suggest that he or she is living with an intimate partner, thus affecting any maintenance award? While these may be questions still unanswered, documentary evidence of someone receiving counsel fees from online platforms or a radicalized online petition or even someone's dating profile can be utilized as evidence.

There are also questions about social media affecting someone's credibility and the ability to manipulate social media evidence. Can social media be used to impeach a witness? Can someone's grandiose portrayals be used against a party when he or she has represented the exact opposite throughout the matrimonial proceedings? Can someone's location on social media provide confirmation about someone's true whereabouts?

Recent literature suggests these answers are likely yes. Moreover, the concept of manipulating what we see and hear on social media is not new. With applications like Photoshop, we often question what is real and what is not. Can a scorned spouse choreograph evidence to meet his or her agenda? These very real and hot-button issues are making their way to the forefront of matrimonial litigation, sometimes helping and often hurting litigants.

Social Media's Impact on Custody and Finances

What is social media evidence intended to prove? Do litigants use it as evidence of destructive habits, excessive income, bad parenting? In reality, social media evidence can be used to help prove—or disprove—all of these things and much, much more.

Courts in custody matters have considered social media evidence when rendering a decision "in the child's best interests." Some courts have considered social media evidence of a mother's live-in paramour as justification for awarding a father primary residential custody.[9]

Other courts have considered social media evidence of using illicit substances when determining custody.[10] Still, other courts have scrutinized social media evidence as merely speculative with no probative value in custody determinations.[11]

As in most custody matters, the use and weight given to social media evidence will almost certainly be determined on a case by case basis. Other situations whereby parents' social media accounts shed light on their ability to parent include: a father joining a dating website claiming he was single and without children while simultaneously seeking primary custody of his children; a parent denied her marijuana use in court, but subsequently posted photographs of her smoking marijuana at a party; a father claimed he could not afford to pay any type of child support; however, his social media account depicted photographs of him sitting in a Ferrari, taking a cruise, and selling land that he owned.[12]

It is evident that social media has provided a vast array of evidence into an individual's life and indiscretions that can assist in evaluating a child's best interests.

When it comes to maintenance or alimony, litigants have utilized social media evidence to prove that a spouse's allegations of disability were far from reality. In one case, a husband submitted evidence to prove that a wife's hobby of belly dancing, as depicted on her social media account, was requisite proof that she was not disabled and thus not a candidate for lifetime maintenance.[13] The court considered this social media evidence when awarding her durational maintenance of only two years. In another instance, a litigant alleged that he was unemployed, and thus received temporary alimony payments from his wife. However, on social media the "unemployed" litigant represented himself as a business owner and wrote details about lavish trips to Las Vegas, South America, and Sea World all taken with his new girlfriend. Based on this evidence, the judge denied his request for alimony at trial.[14]

Although litigants may find it hard to grasp that their private social media content is not actually private, social media evidence has given divorce attorneys a wealth of knowledge about adverse parties that serves to assist them in their cases and bolster their clients' positions.

Conclusion

While technology and media platforms constantly change and adapt to the ever-evolving times, most individuals fail to consider the impact that social media can have on their lives. The ramifications social media can have on matrimonial litigation will only continue to emerge as social media transforms and becomes an increasingly integral part of everyone's daily life and communications. Can we learn something from this? Perhaps yes or

See SOCIAL MEDIA, Page 23

Angela A. Ruffini is a matrimonial litigation associate at Van Horn & Friedman, P.C. in Westbury and a member of the NCBA Matrimonial and Family Law Committee.

FOCUS:
MATRIMONIAL LAW

COVID-19: Impacting Matrimonial Business Valuations

Marie F. McCormack

COVID-19 has changed the world over the course of the last year. Not only has it caused tremendous loss of life and widespread illness, but it has also had a substantial impact on the global economy. However, its economic impact has not been uniform, but has had varying effects on businesses. Therefore, in matrimonial actions, it is important to consider the impact of COVID-19, if any, on the value of the business interest of the titled spouse.

To value a business interest, it is necessary to analyze whether the change in value of the business is active or passive.[1] Generally, if the post-commencement growth or decline in the business is a result of broad market factors, courts would use their discretion to value the business as of the date of trial.[2] If, on the other hand, the post-commencement increase or decrease was primarily due to the actions of the titled spouse, then the business would be valued as of the date of commencement.[3] A party seeking to demonstrate that COVID-19 has had an impact on the business interest of the titled spouse likely would argue for an evaluation date closer to the time of trial. This party would also seek to show the impact constituted a broad market force beyond the control of the titled spouse and that the impact was not short-term.

Trial courts have broad discretion in selecting a valuation date for a marital asset.[4] The valuation date selected, however, must be between the date of commencement and the date of trial.[5] The court in *Daniel v. Friedman* held that:

> Courts have discretion to value 'active' assets such as a professional practice on the commencement date [of the action], while 'passive' assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial but such formulations should be treated as helpful guideposts and not immutable rules.[6]

Market Forces vs. Spousal Efforts

A spouse's business is generally considered an active asset, but courts have discretion to value a business as of the date-of-trial, in certain instances, such as when the business increased or decreased dramatically due to broad market forces, as opposed to the to the efforts of the titled spouse.[7] The use of a date of trial valuation date prevents either a windfall or financial hardship to one of the parties.[8]

As to the impact of COVID-19, each case will be fact specific, but if the value of a business, such as a grocery store, increased substantially during the pandemic due to the fact that more people were preparing meals at home, it could be argued that this constitutes a broad market factor beyond the control of the titled spouse. In this situation, a date-of-trial valuation may be more equitable, as it would prevent the titled spouse from benefitting from the impact of market forces that were not due solely to the efforts of the titled spouse, but largely due to a change in the overall economy.

Of course, the analysis of a forensic expert would be necessary to determine the broad market impact of the pandemic on a particular type of industry in comparison to the growth of the specific business being valued. For example, if the revenues of a grocery store grew at a rate similar to the rate of this industry as a whole, then it would appear that the growth was due primarily to broad market forces. In contrast, if the revenues grew at a rate substantially higher than that of the industry, then it is likely that the growth was due primarily to the efforts of the titled spouse, and a date-of-commencement valuation would be more equitable. Selection of a valuation date is thus crucial to achieve an equitable result in assessing the impact of COVID-19 on business value. Prior case law provides some guidance on how courts might address its impact.

See VALUATIONS, Page 24

Marie F. McCormack is a Court Attorney Referee in the Supreme Court, Nassau County, and presides over matrimonial trials, and other matters.

2021 Installation of NCBA and NAL Officers and Directors

Tuesday, June 1, 2021
at 5:00 PM via Zoom

NCBA OFFICERS
Gregory S. Lisi, President
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There is no charge for this event. Must pre-register to receive Zoom link. Contact the NCBA Special Events Department at events@nassaubar.org or (516) 747-4071.

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FOCUS:
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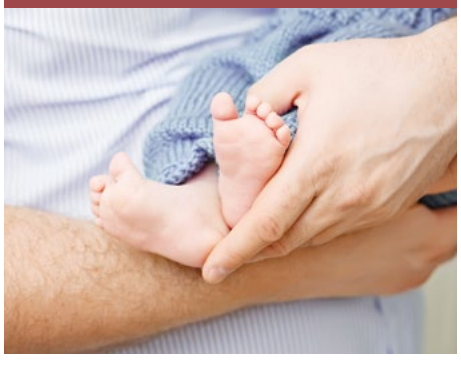
Forming a Family by Adoption in New York



Faith Getz Rousso

There has been a lot of buzz recently regarding the newly enacted New York Child Parent Security Act ("CPSA"), which was signed into law on April 3, 2020, and went into effect on February 15, 2021.[1] This comprehensive law addresses all children born through third-party reproduction, that does not involve the surrogate's own egg.

After years of revising and addressing the concerns of those opposed to surrogacy, the New York CPSA is comprehensive, complex, and intended to protect the rights of both the carrier and the intended parents. However, the reality is that a New York surrogacy may be cost prohibitive for many families, as the total costs can be upwards of $200,000, if not more.

A family may form their family by adoption for a fraction of the cost. An adoption can cost a family anywhere from nothing to approximately $25,000. There are three (3) ways of adopting a child in the state of New York.

Foster Care Adoption

Foster care adoption is adopting through a public agency. In Nassau and Suffolk Counties, the Department of Social Services ("DSS") is responsible for removing children from their families due to allegations of neglect, abuse, or abandonment.[2] If the agency cannot locate family members to place the child pending termination of parental rights ("TPR"), the child is placed in a non-kin, foster care placement.[3] The state must protect the natural parents' right to care for their child absent a demonstration of abandonment, surrender, persisting neglect, unfitness, or other like behavior, evincing utter indifference and irresponsibility to the child's well-being.[4]

However, once the parental rights are terminated, the foster parent may adopt the child. The process can take years while the ultimate goal remains reunification with the families until TPR. There is no cost to adopt through foster care and a family may be eligible for an adoption subsidy. The family's legal bill is paid by the Agency. In New York State, the adoption subsidy for representation is $2000 per adoption.

Private Adoptions

Private adoption is attractive to many families for a multitude of reasons, including that the prospective family is in control of the costs. One may adopt with a private agency or a private placement adoption. There are significant distinctions between independent and agency private adoptions. Most notable is how the expectant parent and the adoptive parent are "matched."

Private Agency Adoption

Only a licensed agency may facilitate an adoption in the state of the New York.[5] The authorized agency acts as an intermediary between the hopeful families and the expectant parents who are considering adoption for its child. It is a crime for an attorney in New York to place a child for adoption.[6]

The agency conducts their own outreach with clinics, hospitals, and advertising in efforts to connect its clients (who have been approved by their agency) with pregnant women considering an adoption plan. The agency charges a fee for this service which is approximately $10,000 - $20,000 for the matching service.

It is the agency's role to screen the expectant parents, request their background and medical information, and provide support for both the expectant parent and the adoptive parent throughout the process. The biological parent surrenders her child to the agency, and the agency may consent to the adoption of a minor to a family that the agency has approved. Many find the private agency attractive because it takes the "work" out of the hopeful adoptive family's hands.

Private Placement Adoption

Private independent adoption—in contrast to private agency adoption—is the process of a birth parent placing their child directly with an adoptive parent. The parties connect independently, often through social

See ADOPTION , Page 23

Faith Getz Rousso is principal at Law Office of Faith Getz Rousso, P.C., in Garden City, practicing in all facets of adoption law, including representing adoptive parents, biological parents in private and agency adoptions, stepparents, and foster parents. She is also Chair of the NCBA Adoption Committee.

FOCUS:
MATRIMONIAL LAW

Separate Property Considerations for Attorneys, and Working with a Forensic Accountant

Andrea Brodie and Joseph Ammirati, CPA/ABV/CFF

A prospective client contacts you for a divorce consultation. During the consultation, you learn that the prospective client came into the marriage with certain assets and the parties accumulated significant assets during the marriage. The prospective client further represents that certain of the assets accumulated during the marriage are his/her separate property. You anticipate that the spouse will dispute the ownership of the alleged separate property assets, how they were acquired or appreciated during the marriage, the source of funds to acquire, etc.

Assuming the prospective client does not have a prenuptial agreement, which may do little to help resolve these questions even if in existence, the undertaking to establish legitimate separate property rights commences. The first question is how to define the property: marital property or separate property, both of which are defined in the Domestic Relations Law.

Identifying Separate Property

Pursuant to Domestic Relations Law § 236 (B) (c), the term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.

Section 236 (B) (d) defines the term separate property as: (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part. Assets acquired post-date of commencement of a matrimonial action, such as post-commencement retirement contributions, will also be treated as the separate property of the titled spouse.

The definition of marital property is broadly construed, including the rebuttable presumption that commingling of assets or transmutation of assets become marital assets. The definition of separate property is narrowly construed. The statutory presumption is that all property, unless clearly separate, is deemed marital property, and the titled spouse has the burden to rebut that presumption.[1]

The designation of an asset as a marital asset does not automatically preclude a spouse from asserting a separate property claim against the marital asset, but as the attorney, it is critical to make this distinction early on to best protect the client's interest.

Some of the more common separate property claims in a matrimonial action are: (1) residential or investment properties, (2) retirement accounts, (3) cash and/or investment accounts, (4) business or investment holding interests, (5) deferred compensation awards (i.e., stock option or restricted stock awards), (6) disability pensions, and (7) separate property sold or exchanged to purchase new property.

As the attorney, it becomes incumbent upon you to start running through a checklist of sorts to determine how best to help the client establish an asset as separate property and/or assert a separate property claim against a marital asset. This checklist should be part of the discussion as early as the initial consultation. Some of the initial considerations should be as follows:

1. Does this asset fall within the narrowly defined definition of separate property as set forth in Section 236(B)(d), or is this potentially a separate property credit against a marital asset? Was the asset passively or actively managed during the marriage? Will there be an appreciation claim?
2. What valuation date(s) will you want to use? Date of trial, date of commencement, or some date in between? Particularly with current actions, how does the COVID-19 pandemic potentially impact the valuation, especially if the asset is a business interest?
3. Who has the burden of proof to establish the separate property claim? If there is an appreciation claim, the non-titled spouse must demonstrate the manner in which contributions resulted in the increase in value and the amount of the value attributable to his/her efforts.[2]
4. What records/documents might you need to support the separate property claim? These could include:
   a. Bank and brokerage statements
   b. Deeds and closing statements
   c. Wills and trusts
   d. Estate or gift tax returns
   e. Incorporation documents
   f. Pre-nuptial agreements
5. What do you do when the party with the burden of proof does not have all of the documents/records needed for tracing the separate property claim?

Once you and your client have determined the asset(s) in question with a separate property claim or component and as you start to develop your strategy for the case, the next decision is whether you will need to retain the services of a forensic accountant to help support the claim for separate property, particularly when the documentation trail is less than pristine. If you and the client determine a forensic accountant would be helpful to establish a separate property asset or claim, here are some considerations depending upon the type of asset.

Business Interest

If a business is being claimed as separate property, a forensic account will first want to know if the business was owned prior the marriage and/or was it received via gift or inheritance. The second question will be whether there are documents available to support ownership and the value of said asset and as of what date, i.e. date of marriage, date of gift, etc.

The first question is whether financial statements and/or tax returns are available. The IRS maintains historical tax returns for the past 6 years. Accountants typically maintain accounting and tax records for the past 7 years. Next question, if the business interest was obtained via a gift or inheritance, are gift tax returns or estate tax returns available? Personal tax returns may assist in identifying when certain business interests were

See *SEPARATE PROPERTY*, Page 21

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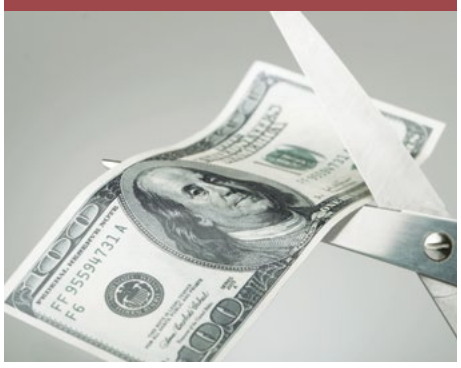
FOCUS:
MATRIMONIAL LAW

Wasteful Dissipation Claims Concerning Spousal Maintenance in a COVID Economy



Joseph A. DeMarco

Your client's husband shut down his commercial construction business last spring, shortly after the onset of the COVID-19 pandemic. During the past year he has focused much of his time on trading in his online investment account, which has seen wild swings, resulting in tens of thousands of dollars in "paper" gains and losses depending on the particular day. Your client, who does not work, has continued to spend in the same manner as she did prior to the pandemic and closure of her husband's business. As a result, the parties have amassed significant debt by the time the matrimonial action is commenced in April, 2021.

Does either party's conduct constitute a "wasteful dissipation" of assets? If so, how does a finding that a party engaged in wasteful dissipation impact a claim for spousal maintenance? Does the wife's own continued spending, in the face of a reduction in family income, constitute a wasteful dissipation? What if the construction business and/or the stock account were the husband's pre-marital separate property? Can a wasteful dissipation of *separate* property impact a maintenance determination? These are just some of the questions with which matrimonial attorneys must grapple when faced with facts similar to those set forth above.

Looking at Wasteful Dissipation Beyond the Equitable Distribution Factor

Wasteful dissipation claims are most often raised in the context of equitable distribution where a party seeks to claw-back assets that have been squandered or diverted during the marriage, or as a basis for obtaining a greater share of whatever remains in the marital estate. Indeed, among the statutory factors that the court must consider when determining equitable distribution is "the wasteful dissipation of assets by either spouse." In addition, though infrequently utilized by matrimonial practitioners and seldomly addressed in appellate decisions, wasteful dissipation claims are also relevant to determinations of spousal maintenance.

Thus, pursuant to the spousal maintenance factors set forth in the Domestic Relations Law, courts have the authority to deviate from the guideline maintenance calculations (temporary and post-divorce) based on a consideration of "the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration."

Under the right circumstances, application of this frequently overlooked factor can make a compelling case for a deviation, either up or down, from the statutory maintenance guidelines calculation.

What Conduct Rises to the Level of "Wasteful Dissipation?"

What constitutes a "wasteful dissipation" of assets on the one hand, versus ordinary lifestyle and discretionary spending, or simply an imprudent financial decision on the other? Courts have great discretion in determining what conduct constitutes "wasteful dissipation," and the overall circumstances and context in which the particular conduct occurs must be taken into account.

For example, excessive spending on activities such as flying and snowmobiling was not considered wasteful dissipation where the entire family enjoyed the activities,[1] but where a wife "developed a shopping problem" and made over $30,000 in purchases from television shopping channels, the Court found she wastefully dissipated marital assets.[2] A husband's post-commencement spending on a girlfriend and their child (who was conceived during the marriage and born during the litigation) and minor gambling did not rise to the level of a wasteful dissipation.[3] Nor did a refusal to refinance a mortgage on the marital home.[4]

On the other hand, where there was "overwhelming" evidence in the form of investment account statements and records from casinos indicating that a husband engaged in extensive gambling over a number of years, incurring significant debts and depleting substantial assets that would otherwise have been sufficient to support the parties at their prior lifestyle indefinitely, the Court found dissipation.[5] Dissipation claims have also been successful where there is evidence of mismanagement of assets or a business, including the closing of a profitable business.[6] Assessing whether a business owner's conduct is wasteful dissipation may be more challenging under the current climate of rapidly changing business and economic conditions.

The caselaw demonstrates that context is crucial when assessing a wasteful dissipation claim, and the impact of the COVID-19 pandemic should now also be considered. Business decisions that impact income or valuation must be viewed in context. What may have once been considered ordinary, discretionary spending in the pre-pandemic economy may now be considered wasteful dissipation for a family experiencing health issues, unemployment, or a downturn in business. Any historical lifestyle analysis that is going to be utilized to establish a dissipation claim must take these factors into account.

"Separate Property" Defense

The "wasteful dissipation" maintenance deviation factor expressly applies only to the wasteful dissipation of *marital* assets—not separate property assets.

Accordingly, under a plain reading of the statute, proof by the offending party that the dissipated assets were his or her separate property would provide a defense to the claim, and would prevent application of this deviation factor when determining maintenance. However, there *is* authority for considering wasteful dissipation of separate property when there is evidence of "egregious economic fault in mismanaging, dissipating and wasting separate assets" based on an application of the statutory catchall "just and proper factor."[7]

Also note that a court could impute income to a party for maintenance purposes where the dissipation of separate property assets results in a reduction in income.[8]

Impact of Wasteful Dissipation on Spousal Maintenance

Assuming a wasteful dissipation is established by the requisite burden of proof (i.e., a "preponderance of the evidence),"[9] the court must still determine how such finding should impact spousal support. Wasteful dissipation can be remedied in the equitable distribution context by compensating and making the aggrieved party whole through an unequal property distribution.

However, this compensatory remedy would not appear to be applicable to the maintenance determination. While there are few reported cases addressing the application of the wasteful dissipation factor for purposes of spousal maintenance, the remedy would

See WASTEFUL, Page 23

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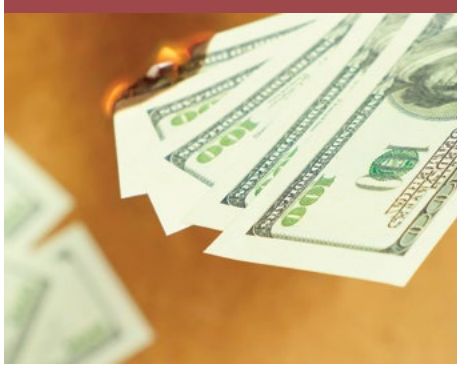
FOCUS:
MATRIMONIAL LAW

Stop Wasting Marital Savings on Interim Counsel Fee Applications



Peter J. Galasso

All too frequently, divorce actions veer off the tracks that would otherwise lead to an expeditious resolution. The reason is the conflict that often occurs over how the needy spouse's attorney will be paid during the pendency of the action.

The tension created by that single "process" issue is ordinarily grounded in the monied spouse's belief that it is counterintuitive to voluntarily supply ammunition to one's mortal enemy. This article seeks to point the matrimonial bar and the judiciary in the most pragmatically beneficial direction to solve this problem and thereby enable divorcing couples to reduce the cost of litigating while they focus on addressing their substantive issues.

Judicial Discretion Under DRL § 237

To combat the monied spouse's disinterest in getting the counsel fees of the non-monied spouse paid, Domestic Relations Law § 237(a) was amended in 2010 to purportedly ensure a level playing field in divorce litigation. Now the "less monied" is presumptively entitled to an award of interim counsel fees, though courts may address the situation as justice dictates:

> In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding.

Despite the needy-spouse presumption, the myriad issues complicating the resolution of interim Section 237(a) applications were recently and ably summarized by the former Presiding Justice of the Second Department, Alan Scheinkman, in *Kaufman v. Kaufman*:

> A less-monied spouse should not be expected to exhaust or spend down a prospective or actual distributive award in order to pay counsel fees as the result of unreasonable or excessive litigation conduct by the adverse party. On the other hand, the more affluent spouse should not be treated as an open-ended checkbook expected to pay for exorbitant legal fees incurred by the less affluent spouse through excessive litigation or the assertion of unreasonable positions.[1]

Justice Scheinkman went on to explain that an "assessment of litigiousness" may even require a hearing, which would necessarily elongate the action and errantly grow the parties' counsel fees.

Although some commentators have suggested that the standard of proof required to entitle a needy spouse to an award of interim counsel fees should be limited to establishing the movant's inability to pay her own counsel fees and should not contemplate or permit an inquiry into the merits of the needy spouse's position,[2] decisions like *Kaufman* continue to support the converse notion.

Advantages of Interim Awards

While that debate rages on, other commentators have pointed to decisions of noted jurists like Monroe County's Justice Richard A. Dollinger's in *Kinney v. Kinney*.[3] Justice Dollinger reserved the right to reallocate fees after trial to ensure equitable distribution:

> This award still leaves the husband with a 'horse in the race'—his exposure to additional fees during the trial and *the potential for reallocation of fees against his interest after trial*—that should nose him—and his soon-to-be ex-wife (who faces the same choices)—closer to the finish line.[4]

Spending limited marital savings on interim attorney fee applications is commonly driven by the parties' displaced aggression. Clients see it as a fight where compromise constitutes capitulation. That is why judges who successfully discourage or avoid pendente lite motion practice under Section 237 deserve ample praise.

Augmenting the financial waste, interim counsel fee applications also tend to elevate the parties' temperature, as their attorneys meticulously craft derogatory passages about the other spouse in their supporting papers to justify an award. That move inevitably invites an even more vituperative response. This dance always represents a turn for the worse. In disbelief over an adverse decision, an irate and dissatisfied spouse may then choose to appeal or perhaps move to renew and reargue, all over the payment of the interim counsel fees. Indeed, the litigation cacophony stirred up over the payment of interim counsel fees can be literally deafening and must, therefore, be pragmatically and permanently silenced.

Rather than engage in motion practice to test a jurist's bent on the interim counsel fee issue, the best solution is for the court to take more proactive steps to avoid deciding interim counsel fee applications altogether. Judges could follow the lead taken by Special Referee John Montagnino in *Freihofner v. Freihofner*, where he awarded the wife an advance against her prospective equitable distribution pending resolution of who was ultimately responsible for litigation costs:

> It would be inappropriate at this time for the Court to make any comment with regard to who should ultimately be required to shoulder this burden. And so, as an accommodation, *the Court has made the instant directive that defendant advance certain monies in equitable distribution* in order to allow plaintiff to continue to be represented in this proceeding.[5]

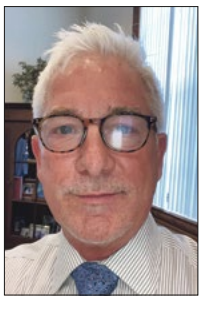
The only problem with the Freihofner decision is that the Special Referee's non-decision was rendered in response to motion practice, rather than in lieu of motion practice. That problem can be easily remedied by a collaboration between counsel and the court to add language to the parties' preliminary conference order establishing a fund to pay the parties' counsel fees and forbidding interim counsel fee applications.

Planning Ahead in the Preliminary Conference Order

In most contested divorces, the Preliminary Conference is a critical but too often a neglected opportunity to prudently chart the trajectory of a case. At the Preliminary Conference, in addition to ensuring that the parties collaborate in maintaining the pre-commencement status quo, the parties must be instructed by the Court to identify the marital accounts to be used to pay the parties' counsel fees.

Pursuant to the Court's inherent power to advance the parties a portion of their equitable distribution to pay their own counsel fees,[6] the Court must then order that those funds remain segregated and be used to pay the counsel fees of both parties, subject to reallocation after trial. In that way, no nasty attorney fee motions will need to be made and no interlocutory appeals will need to be taken. At the end of the case, and after all the facts are in, the Court can decide whether one party should bear a portion of the other party's counsel fees, if the parties cannot otherwise agree.

See MARITAL SAVINGS, Page 22



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FOCUS:
MENTAL HEALTH LAW

Impact of COVID-19 on the Mental Health Legal and Clinical Systems

Carolyn Reinach Wolf and Jamie A. Rosen

The COVID-19 pandemic posed unprecedented challenges for the field of psychiatry, disrupting the clinical services available to those individuals suffering from mental illness and their loved ones who often seek assistance on their behalf. Under normal circumstances, it is extremely difficult to watch a loved one suffer, refuse or discontinue treatment, disconnect from their support system, and relapse or deteriorate. The COVID-19 pandemic has only exacerbated these struggles, affecting access to inpatient treatment and outpatient mental health resources and, at times, impeding the ability to simply visit a loved one to provide support or necessary intervention.

Moreover, the rapid spread of this highly contagious disease, the resulting economic recession, and the death of close friends or family has resulted in a host of mental health consequences for even the healthiest of individuals: feelings of uncertainty, sleep disturbances, anxiety, distress, depression, and increased levels of alcohol or drug use. The restrictive measures such as quarantining, isolation, and social distancing have caused psychological distress for everyone.

Over the past year, psychiatrists and other mental health professionals have faced unique challenges including caring for patients who suffer from serious mental illnesses and test positive for COVID-19, as well as taking measures to prevent the spread of infection. In the outpatient world, the practice of psychiatry has transformed as many clinics, healthcare offices, and therapists closed their doors to in-person treatment. Telehealth and telepsychiatry, which previously accounted for a very small portion of mental health services, has become the new norm.

Inpatient Hospitalization

Hospitals offer a safe setting for mental health treatment including observation, diagnosis, therapy, and medication management.[1] However, the COVID-19 pandemic significantly impacted the provision of clinical services and required major legal, regulatory, and procedural changes.

In early 2020, especially by the time Governor Andrew Cuomo had declared a State of Emergency,[2] most hospitals were overwhelmed with patients in need of emergency care due to COVID-19. Some hospitals closed their psychiatric units to convert them into COVID units, significantly reducing the availability of psychiatric beds in New York. Staff and physicians from many units, including psychiatry, were redeployed to treat the massive influx of COVID-19 patients. Staffing shortages due to illness, caring for loved ones, or observing quarantine protocols, only exacerbated these issues.

Hospitals immediately implemented new safety protocols and procedures, including on their psychiatric units, if they remained open. Emergency departments began to require rapid testing to determine COVID-19 status before admission. Requirements of facial masks and other personal protective equipment, practicing social distancing, and changing visitation policies became the new normal in hospitals, including on psychiatric units. Group activities, group therapy, and congregate meals were limited or eliminated. Many of these protocols still exist to date.

The legal system, which is so closely intertwined with the provision of inpatient psychiatric services, also worked tirelessly to adjust court operations and implement safety protocols in the first few days and weeks of the State of Emergency. Mental hygiene legal matters in New York that affect the rights of patients on inpatient psychiatric units have been considered essential.[3]

The Mental Hygiene Parts were some of the first in the State to transition to virtual hearings even before Governor Cuomo issued an Executive Order mandating telecommuting or "work from home" procedures.[4] The courts and the hospitals made immediate and significant operational changes when judges, court staff, lawyers, doctors, and patients could no longer attend in-person court proceedings. Hearings for the retention of psychiatric patients, treatment over objection and Kendra's Law applications for Assisted Outpatient Treatment, among others, transitioned somewhat seamlessly to our new virtual world, with everyone participating from remote locations.

In some cases, where a psychiatric patient tests positive for COVID-19, the hospital might not have the staff or space to accommodate the patient and must transfer him/her to a medical unit or even to another psychiatric facility. This requires diligent record keeping and the execution of certain legal documents to effectuate such a transfer and limit any potential liability. Further, court orders obtained by a hospital for the administration of psychiatric medication over a patient's objection[5] do not follow that patient when he/she is transferred to another facility. This means that the accepting hospital will have to re-evaluate the patient's compliance with treatment and apply to the court again for continued treatment over the patient's objection. Unfortunately, this process disrupts the therapeutic alliance between the patient and the psychiatric treatment team and interrupts the patient's treatment.

Last, but certainly not least, COVID-19 impacted the treatment team's ability to plan for a safe discharge from the hospital. Social workers, staff, and physicians generally rely upon referrals to outpatient clinics and psychiatrists for follow up appointments in the community after discharge, but many closed or significantly reduced their services during the pandemic. This posed a very serious problem for individuals requiring follow up appointments for therapy and the administration of medication in the community.

Psychiatric Care in the Community

COVID-19 has required unprecedented changes in the provision of psychiatric care in the community. Without clear guidelines, mental health and healthcare professionals had to adapt their practices to provide quality care to the already vulnerable population of people with serious mental illness.

Unfortunately, as mentioned earlier, many facilities, medical or professional offices and clinics were forced to close at the height of the pandemic. Staffing shortages, insufficient funding to implement safety protocols, and a host of other reasons prevented many outpatient mental health providers from safely offering services. Some patients may have been unable to obtain medication or visit providers, leading to an increase in non-compliance and emergency room visits.[6]

See MENTAL HEALTH, Page 25

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FOCUS:
NCBA BYLAWS COMMITTEE

We Consult No Common Oracle But...the Bylaws

Daniel W. Russo

Becoming Secretary of the Nassau County Bar Association has been one of the highlights of my career. The new position comes with new relationships, new priorities and, of course, new responsibilities. One of the responsibilities I was advised to begin immediately was to familiarize myself with the Nassau County Bar Association Bylaws.

As Secretary, you are the *de facto* chairperson of the Bylaws Committee and, while the committee does not meet regularly like other committees, you are often called upon to consult on issues, such as NCBA elections, committee and task force formations, budget issues and public positions the NCBA may be asked to take on a variety of political and social issues.

Black's Dictionary defines bylaws as:

> Regulations, ordinances, rules or laws adopted by an association or corporation or the like for its internal governance. Bylaws define the rights and obligations of various officers, persons or groups within the corporate structure and provide rules for routine matters such as calling meetings and the like.[1]

Well-written bylaws should define the governing structure with the purpose of maintaining consistency in the operation of the organization. Bylaws should address matters like the size and function of the Executive Board and Board of Directors, the frequency of leadership elections, the rules for governing elections, the terms and duties of elected officers, and the frequency of meetings held within the association.[2] While bylaws need not address every potential issue that may arise within an organization, they must provide the internal framework for addressing anything that may come leadership's way.

History of the NCBA Bylaws

While the exact date and author of the NCBA bylaws is unknown, the wonderful publication entitled: *A Toast to Domus, the Legacy of the Nassau County Bar Association*, does shed light on the timeframe that the bylaws were written and narrows the likely authors to one or several of the 17 charter members. According to *A Toast to Domus*, it is likely that the bylaws were authored between January 18, 1899 (when the first meeting to organize the Nassau Bar County Association was held) and March 2, 1899 (when the formation of the NCBA was formalized and the bylaws were adopted).[3]

Over the last 122 years, the NCBA Bylaws have been amended many times to reflect the changing times of the legal profession and society. For example, on March 15, 1962, the NCBA Board of Directors voted to amend the bylaws to give the Judiciary Committee the power to recommend candidates for judgeships as opposed to simply rating candidates already nominated. This action was taken to comply with then Governor Rockefeller's wish to have local county bar associations recommend candidates for new judgeships.[4]

Today, Article VIII of the NCBA bylaws governs the procedures for the Judiciary Committee. Article VIII is a comprehensive framework regulating every aspect of the Judiciary Committee from who can serve on it, to the qualifications a member should consider when determining if a candidate is qualified to sit as a judge. It is one of many Articles in our bylaws that evolved over time to reflect the ever-changing profession of practicing law.

Today's NCBA Bylaws

As the NCBA has grown and evolved in its 122 years of existence, so has the bylaws that govern the Association. Currently, the bylaws are comprised of 11 separate Articles, each containing multiple sections and sub-sections. Each Article governs a specific category, detailing the rules and procedures for that topic. For example, *Article I – Membership*, consists of eight sections and multiple sub-sections throughout. This Article details with specificity the different classifications of membership, a member's rights and privileges, memberships fees and disciplinary procedures for removing a member. This Article was amended under President Elena Karabatos to include non-attorney membership categories.

The additional Articles of the Bylaws with similar specificity are as follows:

Article II – Board of Directors (Eight Sections)
Article III – Officer and Executive Director (Six Sections)
Article IV – Meetings of the Association (Five Sections)
Article V – Nominations and Elections (Six Sections)
Article VI – Committees (Four Sections)
Article VII – Grievance Committee (Two Sections)
Article VIII – Judiciary Committee (Nine Sections)
Article IX – Sections (Three Sections)
Article X – Amendments (Three Sections)
Article XI – Effective Date (One Section)

A great example of the bylaws being amended to reflect these unsettling times was an amendment approved by the Board of Directors at the April 2020 Board Meeting and adopted at the annual meeting in May 2020. The amendment authored by the Bylaws Committee allowed for meetings (monthly or Special) of the Executive Committee and the Board of Directors through electronic means. The amendment was passed in anticipation of what was thought by many to be an impending yet brief suspension of in-person meetings. Thankfully, the NCBA leadership had the foresight to do so as we remain, over one year later, conducting almost all NCBA business virtually.

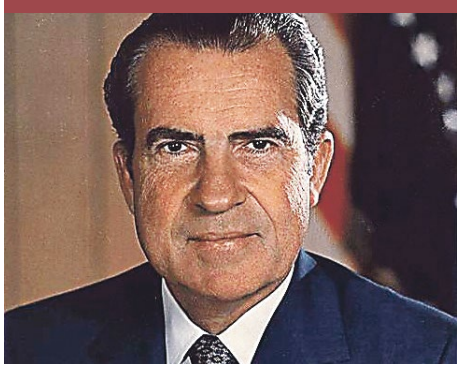
In conclusion, like many similar documents that provide the architectural framework for an association such as the Nassau County Bar Association, the bylaws that govern must be treated as a living, breathing document with the ability to change with and embrace the times in which we live. The NCBA Bylaws are consulted often and, when necessary, amended to better the Association's almost 5,000 members and the rest of those attorneys that practice law in Nassau County.

1. *See Black's Law Dictionary* (6th ed. 1990).
2. Making Sure Your Bylaws Are on Point (https://gbq.com/making-sure-your-bylaws-are -on-point-2) (2016).
3. *See A Toast to Domus, the Legacy of the Nassau County Bar Association*. Immediate Past President Rick Collins initiated this project when he was the Secretary, and the book was completed during his term as President. It is a wonderful history of our beloved NCBA and those who worked tirelessly to complete it deserve the entire NCBA's appreciation. Each person is properly acknowledged by Past-President Collins on page three of the publication.
4. *See A Toast to Domus*, citing several local newspaper articles reporting on the amendment.

Daniel W. Russo is a partner at Foley Griffin, LLP and the current NCBA Secretary.

FOCUS:
LAW AND AMERICAN CULTURE

Nixon Before the Bench: The Supreme Court and Richard Nixon



Rudy Carmenaty

On August 9, 1974, Richard Nixon resigned the presidency. Facing impeachment and removal from office, his departure was triggered by a decision from the United States Supreme Court. Ultimately, it was the Court who determined his fate and Nixon, in-turn, left his mark on American jurisprudence.

Nixon is an infinitely fascinating historical personality. He should be remembered for more than just being "Tricky Dick." At his 1994 memorial service, Senator Bob Dole remembered the late president as "*the largest figure of our time*," calling the post-war era the "*Age of Nixon*."[1] Perhaps Dole was right.

Political Outsider Enters the Fray

As a child, Nixon told his mother: "*I would like to become a lawyer-an honest lawyer, who can't be brought by crooks*."[2] In the eighth grade he wrote: "*I would like to study law and enter Politics, for an occupation so that I can be of some good for the people*."[3]

Nixon attended Duke Law School on scholarship. He made law review, graduating third in the class of 1937.[4] He was admitted to the California Bar, practicing in a small-town law office in Whittier before naval service during World War II. After the war, he embarked on a political career.

Nixon entered Congress as a fervent cold warrior. He would serve in the Senate and as Dwight Eisenhower's vice-president. As president, Nixon's most notable achievement was establishing a rapprochement with China. But his White House years were polarizing, dominated first by Vietnam and later consumed by Watergate.

He lost his first bid for the presidency to John Kennedy. Awkward and ill at ease, Nixon was insecure, resentful. Snubbed by the establishment whose approval he craved, his relations with the press were strained. His untelegenic performance in the 1960 presidential debate may have cost him the election.

After losing the 1962 California Governor's race, he was written-off politically. At his 'last press conference,' he griped "*you won't have Nixon to kick around anymore*."[5] Nixon moved to Manhattan for a fresh start, using his New York law practice as the springboard back to high office.

He became the Republican leader in waiting. Nixon supported Barry Goldwater in 1964 and congressional candidates in 1966. In 1968, Nixon won the prize defeating Hubert Humphrey and George Wallace. His mantra that year was 'law & order,' blaming the Warren Court for the dislocations then running rampant in America.

Nixon v. Warren Court

Nixon, ironically, was sworn in by his bête noire Chief Justice Earl Warren. Long-standing intermural-Republican rivals in California, Warren didn't support Nixon in his 1950 Senate race. At the 1952 GOP Convention, Nixon worked to secure for Eisenhower the California delegation undermining Warren's candidacy.

Warren at that point got behind Ike. Nixon was named Eisenhower's running-mate and Warren was promised the "first vacancy" on the Supreme Court.[6] When Chief Justice Fred Vinson died, Warren held Ike to his promise, and was nominated in 1953. Eisenhower considered Warren's appointment his biggest mistake.

Warren ushered in a legal revolution, beginning with *Brown v. Board of Education*.[7] Nixon supported the *Brown* decision, having witnessed segregation up-close when he attended Duke. As vice-president, he backed the 1957 Civil Rights Act. Later as president, he desegregated Southern schools.

During the next decade, the Warren Court issued landmark decisions in criminal procedure (*Escobedo v Illinois, Miranda v Arizona*)[8] Appealing to the 'Silent Majority,' Nixon saw his path to power. As crime rose and civil unrest mounted, many Americans blamed the turmoil on the permissiveness of the courts.

Nixon's Justices

Nixon pledged to appoint 'strict constructionists.' He would make a total of six appointments to the Supreme Court, two of which were rejected by the Senate. Having run against judicial activism, Nixon sought to shift the Court in a conservative-leaning direction. He was not entirely successful.

Nixon entered office with a vacancy pending. Warren had retired in 1968 so Lyndon Johnson could appoint his successor. LBJ chose Associate Justice Abe Fortas. Although the Democrats controlled the Senate, Fortas' nomination was filibustered. A lame duck, LBJ left the vacancy to be filled by the next president.

Nixon selected Warren Burger, a judge on the DC Circuit Court of Appeals, as the fifteenth Chief Justice (1969 to 1986). A critic of Warren Court decisions, Burger favored a far more restrictive reading of the Constitution. The Burger Court was a mixed bag rendering conservative and liberal rulings.

Senator Everett Dirksen noted Burger looked, sounded, and acted like a chief justice, but appearances can be deceiving. Pompous and shallow, Burger proved ineffective. He had the infuriating habit of switching his vote in conference. This was so he could control the assigning of opinions, much to the consternation of his colleagues.

Thanks to Abe Fortas, another opening became available in 1969. It was revealed that Fortas ill-advisedly accepted renumerations from financier Louis Wolfson. The ensuing embarrassment forced Fortas to resign his seat under public pressure.

To replace Fortas, Nixon sequentially nominated two Southern federal appeals court judges, Clement Haynsworth of the Fourth Circuit and G. Harrold Carswell of the Fifth Circuit. Both men were denied confirmation. Harry Blackmun was appointed and confirmed in 1970.

Amusingly, Nebraska Senator Roman Hruska actually defended Carswell's bid by endorsing mediocrity: *Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?*[9]

Blackmun had served on the Eighth Circuit. Burger and Blackmun were best friends and were initially tagged the 'Minnesota Twins.' Serving from 1970 until 1994, Blackmun at the outset voted frequently with his Chief. The turning point in Blackmun's tenure came with *Roe v. Wade* (1973).[10]

After *Roe*, Blackmun started charting his own path. He began siding consistently with Bill Brennen as opposed to Warren Burger. By the time of his retirement, Blackmun led the court's liberal wing and was succeeded by Stephen Breyer, a Clinton appointee.

The retirements of Hugo Black and John Marshall Harlan created two additional vacancies in 1971. Black, the intellectual leader of the Warren era, had been placed on the court by Franklin Roosevelt in 1937. Harlan, who was nominated by Eisenhower,

See NIXON, Page 26

Rudy Carmenaty serves as a Bureau Chief in the Office of the Nassau County Attorney, is the Director of Legal Services for the Nassau County Department of Social Services, and the Language Access Coordinator for the Nassau County Executive. He is also Vice-Chair of the NCBA Publications Committee and Diversity and Inclusion Committee.

NAL PROGRA

Pre-registration is REQUIRED for all Academy programs. Go to
CLE material, forms, and zoom link will be sent to p
All programs will be offered via

May 5, 2021
Dean's Hour: Nixon Before the Bench: The Supreme Court and Richard Nixon
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:30-1:30PM
1 credit in professional practice

May 6, 2021
Business of Law Lecture Series presents: Law Firm Management: Opportunities Presented During COVID-19
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
5:30-7:00PM
1.5 credits in professional practice
***Zoom networking will precede the program from 5:00-5:30PM**

May 7, 2021
Dean's Hour: Pathways to Legalization for Undocumented Immigrants
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:30-1:30PM
1 credit in professional practice
Skills credits are available for newly admitted attorneys
****Program coordinated with Assigned Counsel Defenders Plan Inc of Nassau County**

May 14, 2021
Dean's Hour: Get the 411 on the 420: Legalized Marijuana in New York
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:00-1:00PM
1 credit in professional practice
Skills credit available for newly admitted attorneys

May 18, 2021
Dean's Hour: Understanding New Power of Attorney Law
Program sponsored by NCB Champion Office Suites and
12:30-1:30PM
1 credit in professional prac
Skills credits are available fo attorneys

May 19, 2021
Dean's Hour: Fireside Chat w Prudenti
Program sponsored by NCB Champion Office Suites and
12:30-1:30PM
1 credit in professional prac
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May 26, 2021
Dean's Hour: Serving Those Competency—Interviewing a with Veteran Clients
Program sponsored by NCB Champion Office Suites and
12:00-1:00PM
1 credit in professional prac
Skills credits are available fo attorneys
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M CALENDAR

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ore-registered attendees 24 hours before program.
ZOOM unless otherwise noted.

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May 27, 2021
Dean's Hour: Everything You Need to Know About Becoming a Judge: Part 1
With the Franklin H. Williams Judicial Commission
12:00-2:00PM
2 credits in professional practice
Part 1 will cover Securing the Nomination; Evaluation Process

May 27, 2021
Fragility of Legal Systems: Lawyers and Law in Nazi Germany
With the NCBA Diversity and Inclusion Committee and the Jewish Lawyers' Association of Nassau County
Program sponsored by the Jewish Lawyers' Association of Nassau County
5:30-7:00PM
1 credit in ethics

June 2, 2021
Dean's Hour: Lyndon Johnson and the Paradox of Legislative Power
Program sponsored by NCBA Corporate Partner Champion Office Suites and Nota by M&T Bank
12:30-1:30PM
1 credit in professional practice

RECENTLY ADDED CLE ON DEMAND

MAR. 24

What is New in New York Elder Care For 2021
Date of program: March 24, 2021
1 credit in professional practice

12 free credits of On-Demand are included with your membership in addition to unlimited live/Zoom CLE offered by the Academy and NCBA Committees for the current membership year.

NCBA Committee Meeting Calendar May 5, 2021 - June 2, 2021

Please Note: Committee Meetings are for NCBA Members. Dates and times are subject to change. Check www.nassaubar.org for updated information.

REAL PROPERTY
Alan J. Schwartz
Wednesday May 5
12:30 p.m.

ETHICS
Matthew K. Flanagan
Wednesday, May 5
4:30 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, May 6
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, May 6
12:30 p.m.

CIVIL RIGHTS
Bernadette K. Ford
Tuesday, May 11
12:30 p.m.

LABOR & EMPLOYMENT LAW
Matthew Weinick
Tuesday, May 11
12:30 p.m.

MATRIMONIAL LAW
Samuel Ferrara
Wednesday, May 12
5;30 p.m.

DIVERSITY & INCLUSION
Hon. Maxine Broderick
Thursday, May 13
6:00 p.m.

PLAINTIFF'S PERSONAL INJURY/ BANKRUPTCY
Ira S. Slavit/Neil Ackerman
Tuesday, May 18
12:30 p.m.

WOMEN IN THE LAW
Edith Reinhardt
Tuesday, May 18
6:00 p.m.

ALTERNATIVE DISPUTE RESOLUTION
Marilyn K. Genoa/Jess Bunshaft
Tuesday, May 18
6:00 p.m.

BUSINESS LAW, TAX AND ACCOUNTING
Jennifer L. Koo/Scott L. Kestenbaum
Wednesday, May 19
12:30 p.m.

ASSOCIATION MEMBERSHIP
Michael DiFalco
Wednesday, May 19
12:30 p.m.

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan
Wednesday, May 19
5:30 p.m.

APPELLATE PRACTICE
Jackie L. Gross
Thursday, May 20
12:30 p.m.

EDUCATION LAW
John Sheehan/Rebecca Sassouni
Thursday, May 20
12:30 p.m.

DISTRICT COURT
Roberta D. Scoll/S. Robert Kroll
Friday, May 21
12:30 p.m.

GENERAL, SOLO AND SMALL LAW PRACTICE MANAGEMENT
Scott J. Limmer
Tuesday, May 25
12:30 p.m.

HOSPITAL & HEALTH LAW
Leonard M. Rosenberg
Tuesday, May 25
12:30 p.m.

ELDER LAW SOCIAL SERVICES HEALTH ADVOCACY
Katie A. Barbieri/Patricial A. Craig
Wednesday, May 26
12:30 p.m.

INTELLECTUAL PROPERTY
Frederick Dorschak
Thursday, May 27
12:30 p.m.

REAL PROPERTY
Alan J. Schwartz
Wednesday, June 2
12:30 p.m.

COMMUNITY RELATIONS & PUBLIC EDUCATION
Joshua D. Brookstein
Thursday, June 2
12:30 p.m.

PUBLICATIONS
Christopher J. DelliCarpini/Andrea M. DiGregorio
Thursday, June 2
12:30 p.m.

SURROGATE'S COURT ESTATES & TRUSTS
Brian P. Corrigan
Thursday, June 2
5:30 p.m.

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In Brief

Bruce Barket of Barket Epstein Kearon Aldea & LoTurco, LLP, announced it is launching a new weekly radio show, "Crime & Justice Radio," on *LI News Radio*. The first episode of the hour-long show aired on April 12 at 6:00 PM.

Jeffrey D. Forchelli Managing Partner of Forchelli Deegan Terrana LLP, has been selected for inclusion in *Long Island Business News*' Power 25 Law list in recognition of his outstanding achievements and standing in the legal community. **Jane Chen** has been appointed Co-Chair of the Asian American Bar Association's Real Estate Committee for the 2021-2022 fiscal year.

Howard Fensterman, Managing Partner of Abrams Fensterman is proud to congratulate its attorneys named to the Top Women Super Lawyers and Rising Stars including **Moriah Adamo, Andrea M. Brodie, Sarah A. Chussler, Ellen L. Flowers, Jill M. Goffer, Elizabeth Kase, Amy B. Marion, Jamie A. Rosen, Danielle M. Visvader**, and **Carolyn Reinach Wolf.**

Emily F. Franchina of Franchina Law Group was honored to present estate planning information to the Eastern Farm Workers, a non-for-profit organization helping low-income working families, in English with Spanish translation. In addition, Ms. Franchina proudly announces her top rating by Super Lawyers. Also, at the firm, **Elisa S. Rosenthal** received the NYSBA General Practice award for 2020 in recognition her efforts to improve the daily practice for law for general practitioners in New York State.

Ronald Fatoullah of Ronald Fatoullah & Associates was honored to participate in a tribute entitled "A Day of Remembrance—Honoring Nursing Home Lives Lost" sponsored by National Organization Gray Panthers. The program highlights included shared testimonials, musical tributes, and reflections by spiritual leaders and elected officials. In addition, the firm celebrated Older Americans Month with an educational webinar regarding the changes to the New York Statutory Power of Attorney.

Marian C. Rice

Marc L. Hamroff, Managing Partner of Moritt Hock & Hamroff, announced today that he, **Robert S. Cohen**, and **Julia Gavrilov**, all members of MH&H's Secured Finance and Equipment Leasing practice area, will be presenting at the 2021 Equipment Leasing and Finance Association Legal Forum LIVE. Hamroff will be serving both as moderator and a presenter for a panel discussion entitled "What Are the Courts Doing During the Pandemic? A Look at Creditors Rights, Bankruptcy, and Workouts During These Challenging Times." Cohen's session is entitled "California and New York Federal Licensing and Disclosure," while Gavrilov will present on the topic "Does Your Contract Work Across State Lines?"

Janet Nina Esagoff, founder of Esagoff Law Group PC, is proud to announce it has expanded its offices and warmly welcomes **Max D. Ludwig**, who has joined the firm as an Associate practicing in the areas of commercial litigation and real estate.

Hon. Arthur M. Diamond (ret.) will be hearing cases at NYC Private Justice, a platform that enables divorcing couples and their counsel to bypass the overburdened New York State court system to schedule a trial on financial issues related to their divorce, and with complete discretion.

Hon. Jeffrey Brown will join NAM (National Arbitration and Mediation) as a Hearing Officer/Neutral. This spring, for the seventh year in a row, **Richard Byrne** was named as one of the Top Three Mediators in the United States by the National Law Journal Best of Survey.

Vishnick McGovern Milizio (VMM) managing partner **Joseph Milizio**, head of the firm's Business and Transactional Law, LGBTQ Representation, and Surrogacy, Adoption, and Assisted Reproduction practices, led on April 15 the first of VMM and Northwell Health's joint LGBTQ Health & Life Planning Webinar Series. Upcoming webinars are scheduled throughout June—Pride Month—followed in July by a joint Medical-Legal Trans Clinic, the first of its kind. VMM is proud to announce that Milizio has been named a 2021 Power Lawyer by Schneps Media, given in recognition of "achievements and contributions of outstanding individuals of the legal industry who have created a significant impact in their fields." Partner **Avrohom Gefen** of VMM's Employment Law, Commercial Litigation, and Alternative Dispute Resolution practices was interviewed on April 7 on the CBS New York 6 o'clock news, explaining what employers and employees need to know about the new recreational marijuana law.

Capell Barnett Matalon & Schoenfeld LLP Partner **Robert Barnett** recently lectured for Strafford on the topic of "Minimizing Capital Gains in Estate Planning". In addition, Robert Barnett's article "Discrimination Settlements—Income Tax Considerations" was featured on the cover of Thomson Reuters' Journal of Taxation. Partner Stuart Schoenfeld presented a webinar, "Tax Meets Elder Law". Partner **Yvonne Cort** spoke at a recent webinar for the Chinese American Society of CPAs, on the topic of IRS and NYS collection updates.

Karen Tenenbaum, LL.M. (Tax), CPA, tax attorney was recently honored as a Power Lawyer by Schneps Media. In addition, Tenenbaum Law, P.C. was listed as one of the top 100 law firms by Long Island Business News. On Instagram, Karen was honored by Count Me In Revival and Maureen Borzachillo in celebration of Women's History Month. Karen also moderated a panel for the Suffolk Academy of Law on "How to Run and Grow a Law Practice.

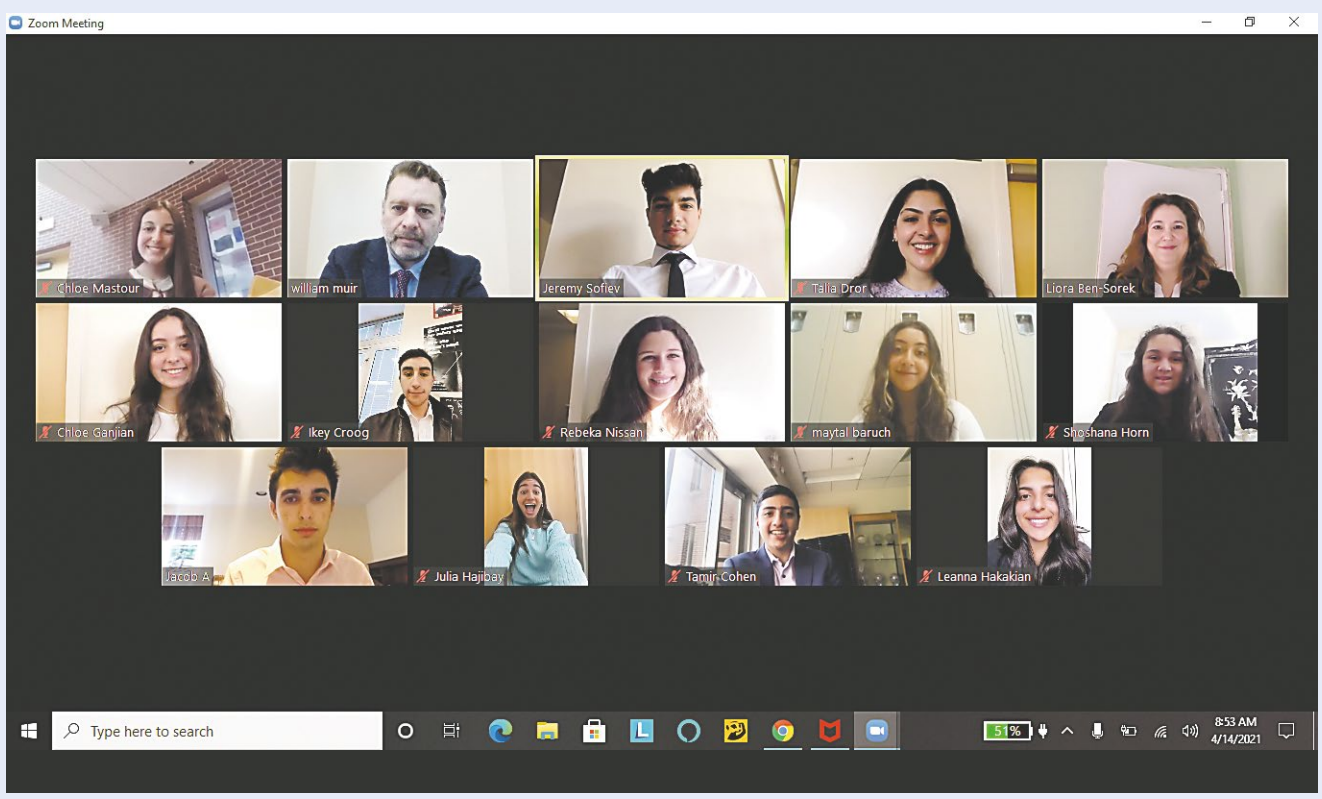
The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

Hebrew Academy of Nassau County Wins Second Place in 2021 Nassau County Mock Trial Tournament



Separate Property…

Continued From Page 8

held or acquired. Also, are there other documents such as corporate filings and/or operating or shareholder agreements?

Retirement Assets

If there is a separate property claim relating to retirement assets, the forensic account will want to review all retirement account statements from the date of marriage though the current date. A review of the statements will assist in identifying the value of the account(s) as of the date of marriage. It will also help follow the money to see if there are other retirement accounts or roll-over accounts that may not have been disclosed. The statements will also identify all contributions and/or withdrawals that occurred throughout the marriage.

For example, parties are married on March 31, 2015, and the Wife has a retirement asset worth $500,000 as of the date of marriage. During the marriage, she contributes $20,000 per year until an action for divorce is commenced on December 31, 2019 ($100,000 during the marriage). As of December 31, 2019, the Wife's retirement asset is now worth $800,000.

This presents several questions. Is only $500,000 preserved as the Wife's separate property? What about appreciation of the $500,000 as of the date of commencement? Did the contributions each year comingle the assets in the account? Should 1/5th of the account's value be considered marital ($100,000 contributed divided by $500,000 separate property value)?

The answer is not that simple, especially if the positions held (stocks, mutual funds or other assets held in the account) at the date of marriage in the Wife's retirement account are not the same positions held currently. If the positions in the account did not change, the analysis could be as simple as carving out those specific assets and ascribing the current value as separate property. If the positions have changed, then the second option is utilizing the Marital/Separate property ratio analysis.

Forensic Accountant Analysis

One way a forensic accountant can assist you is preparing an allocation of the changes in the retirement account based on a separate property/martial property ratio analysis. The account's value as of the date of marriage is the starting point. Utilizing account statements throughout the marriage, the forensic accountant can recalculate the separate property/marital property ratio after each contribution made during the marriage. That contribution would be deemed 100% marital as earned during the marriage. Thereafter, all other activity in the account, such as interest, dividends, and changes in market value are allocated based on that new calculated ratio, as detailed in Example 1 below.

As detailed in Example 1, the separate property value can be argued as $680,537 or 85.1% of the account's current value and only $119,463 or 14.9% as a marital asset. Is this fair? That is ultimately up to the trier of fact. Absent such analysis, if the simple 1/5th calculation was used as mentioned above, the value of the retirement account deemed marital could be argued as $160,000 (1/5th of $800,000 current value). If you are representing the Wife in this case, you prefer the forensic accountant's analysis and calculation.

EXAMPLE #1
DATE OF MARRIAGE MARCH 31, 2015

		Amount	Account Activity			Balance Value			
Year	Description	Inc./(Dec.)	Marital Value	Separate Value	Balance	Marital Value	Separate Value	% Marital	% Separate
3/1/2017-3/31/2015	Beginning Balance				$500,000.00	$ -	$500,000.00	0.0%	100.0%
	Contribution	$ -	$ -	$ -	$500,000.00	$ -	$500,000.00	0.0%	100.0%
	Dividends	$ 500.00	$ -	$ 500.00	$500,500.00	$ -	$500,500.00	0.0%	100.0%
	Gain/(Loss)	$ 10,000.00	$ -	$10,000.00	**$510,500.00**	$ -	$510,500.00	0.0%	100.0%
4/1/2015-12/3/2015	Contribution	**$ 20,000.00**	$ 20,000.00	$ -	$530,500.00	$ 20,000.00	$510,500.00	3.8%	96.2%
	Dividends	$ 4,000.00	$ 150.80	$ 3,849.20	$534,500.00	$ 20,150.80	$514,349.20	3.8%	96.2%
	Gain/(Loss)	$ 25,000.00	$ 942.51	$24,057.49	$559,500.00	$ 21,093.31	$538,406.69	3.8%	96.2%
1/1/2016-12/31/2016	Contribution	**$ 20,000.00**	$ 20,000.00	$ -	$579,500.00	$ 41,093.31	$538,406.69	7.1%	92.9%
	Dividends	$ 5,000.00	$ 354.56	$ 4,645.44	$584,500.00	$ 41,447.87	$543,052.13	7.1%	92.9%
	Gain/(Loss)	$ 30,000.00	$ 2,127.35	$27,872.65	$614,500.00	$ 43,575.22	$570,924.78	7.1%	92.9%
1/1/2017-12/31/2017	Contribution	**$ 20,000.00**	$ 20,000.00	$ -	$634,500.00	$ 63,575.22	$570,924.78	10.0%	90.0%
	Dividends	$ 6,000.00	$ 601.18	$ 5,398.82	$640,500.00	$ 64,176.40	$576,323.60	10.0%	90.0%
	Gain/(Loss)	$ 30,000.00	$ 3,005.92	$26,994.08	$670,500.00	$ 67,182.32	$603,317.68	10.0%	90.0%
1/1/2018-12/31/2018	Contribution	**$ 20,000.00**	$ 20,000.00	$ -	$690,500.00	$ 87,182.32	$603,317.68	12.6%	87.4%
	Dividends	$ 7,000.00	$ 883.82	$ 6,116.18	$697,500.00	$ 88,066.14	$609,433.86	12.6%	87.4%
	Gain/(Loss)	$ 40,000.00	$ 5,050.39	$34,949.61	$737,500.00	$ 93,116.53	$644,383.47	12.6%	87.4%
1/1/2019-12/31/2019	Contribution	**$ 20,000.00**	$ 20,000.00	$ -	$757,500.00	$113,116.53	$644,383.47	14.9%	85.1%
	Dividends	$ 8,000.00	$ 1,194.63	$ 6,805.37	$765,500.00	$114,311.16	$651,188.84	14.9%	85.1%
	Gain/(Loss)	$ 34,500.00	$ 5,151.84	$29,348.16	**$800,000.00**	**$119,463.00**	**$680,537.00**	**14.9%**	**85.1%**

Cash/Investment Accounts

If a separate property claim relates to cash and/or investment accounts as of the date of commencement, the forensic accountant will first need to understand "the story" relating to the cash and/or investment accounts. "The story" should include which current assets/accounts are being claimed, how those accounts were funded and can it be traced back to a separate property source such as inheritance, personal injury award, or assets held prior to the date of marriage.

Thereafter, the forensic accountant will need to obtain all documents and statements to trace all funds back to the original separate property source. The forensic analysis will need to demonstrate that no marital funds were deposited into any of the accounts where separate property is being claimed. Issues arise for the forensic accountant depending on the length of the marriage and if all supporting documents can be provided to complete the tracing.

In a perfect trace world, all statements are provided for all years, and everything is packaged nicely. However, this is rarely the case, especially in long-term marriages and where assets have been moved numerous times. In situations where there may be gap periods in the analysis and supporting account statements cannot be provided, alternative analyses may be considered by the forensic accountant to support the argument that the source of funds could not have come from any other source but separate property.

Of course, a slew of other issues can arise, which is why it is crucial for the attorneys and forensic accountants to know as much of "the story" as possible to help diffuse potential problems and troubleshoot from the beginning. Some common issues that could complicate the analysis might be refinancing proceeds, active management, or using an account to receive "marital" funds for short-term convenience purposes.

We all want the client that has separate property assets that are not only easily identifiable but easy to trace and document. For the clients where the analysis seems to be more akin to opening up Pandora's Box, discussing the issues with a forensic accountant will help navigate the issues and potentially give you a basis to assert a separate property claim you might not otherwise be able to establish.

1. *DeJesus v. DeJesus*, 90 N.Y.2d (1997).
2. *Embry v. Embry*, 49 A.D.3d 802 (2d Dept. 2008).

Gestational…

Continued From Page 3

child. Certainly, it is not unforeseeable for a surrogate child born in gestational surrogacy to be diagnosed with a disease for which the genetic history of the donor(s) is critical to the child's survival. Leukemia, for example, is just such a disease which afflicts millions of children, some of whom may only survive with a bone marrow transplant.

The search for a match often begins with the child's biological relatives. Clearly, a surrogate child without access to a donor's health and medical history is at a grave disadvantage without any history of either donor's biological background. Under such circumstances, would compulsory disclosure of the ova donation registry be warranted? What if the participant had withdrawn consent? Will a court step in and flex its power as parens patriae[9] and save the child?

This new law brings long awaited benefits to those who may not naturally conceive; it also portends unintended consequences. To the extent a surrogacy contract may address such consequences given the statutory protections and prohibitions of the CPSA, time will tell.

1. Fam. Ct. Act § 581.
2. Thinkagain, The Center for Bioethics and Culture Network 2010–2019.
3. New York became the first U.S. State to fund egg harvesting with tax dollars.
4. There are medical cases in which the mitochondria of one female is substituted in the ova of another female to create a viable specimen for IVF; what are the rights of the mitochondria donor if any, in a surrogacy arrangement given the CPSA?
5. Fam. Ct. Act § 581-402
6. CPSA Article 6.
7. Fam. Ct. Act § 581-602
8. 10 NYCRR 69-11.15
9. The court is the "supreme parent" in matters relating to children in New York.

We Welcome the Following New Members

Attorneys

Dina Epstein

Aditi B. Pascual

Students

Jennifer Theresa Champey

Danielle Jacobs

Rawson Jahan

Gissel Marquez

Paving…

Continued From Page 1

virtual Town Hall meetings, wellness programs, and Continuing Legal Education and outreach programs on coping and survival skills. LAP has also increased the frequency of recovery meetings from monthly to weekly. These weekly virtual recovery meetings have been consistently well attended and have provided a safe and supportive place for attorneys in all stages of recovery. LAP has also increased its supportive services to law schools.

One of the tragic outcomes as a result of the pandemic is that many attorneys have found themselves unemployed or underemployed. In response, LAP has restarted its Un/Underemployed Support Group. This group is currently being held virtually at 6:00 P.M. on the second Tuesday of each month. This group provides support and guidance to attorneys struggling to find or maintain work as a lawyer. The Un/Underemployed Group provides an opportunity for attorneys to discuss their difficulties and support one another. LAP intends to gain feedback from group members to determine what additional assistance can be provided, e.g., LAP may invite attorneys to present to the group on topics like networking, resume writing, job searches, and transitions.

LAP is also happy to announce that Melissa Del Giudice, founder of Yoga for Health Long Island, will be facilitating LAP's Mindfulness Mondays series to begin April 12, 2021 at 6:00 P.M., and will run the second Monday of each month thereafter. Melissa participated in LAP's six-week Wellness Series last year and participants wanted more! Melissa will share her extensive knowledge of yoga, meditation, and mindfulness to teach participants how to increase feelings of well-being and resilience in their day-to-day lives.

Additionally, in honor of National Mental Health Month, LAP will hold a four-week Wellness Wednesday program. This program will be held each Wednesday at 6:00 P.M. during the month of May and will focus on wellness, mental health, stress reduction, increasing motivation and resilience, wellness, nutrition, and women's health.

The Lawyer Assistance Program has several programs available to lawyers, judges, law students, and their immediate family members. LAP Director Elizabeth Eckhardt provides individual, professional supportive counseling to help attorneys through difficult times. Dr. Eckhardt provides needs assessments to assist in determining what services are needed and can provide referrals to outside treatment for mental health and substance use services. In some cases, Dr. Eckhardt provides supportive counseling for just one session whereas others may see Dr. Eckhardt for up to 6 supportive counseling sessions. Lawyers often find it very difficult to reach out for help. Many attorneys see themselves as problem solvers and find it difficult to be the one with a problem. Sometimes speaking to another attorney who understands the unique challenges that attorneys face can be the very assistance they are looking for. The Lawyer Assistance Committee is the backbone of LAP, and committee members are dedicated to providing peer support to attorneys who struggle with substance use or mental health issues.

LAP is available to members and non-members of the NCBA. Many people do not know that LAP also provides assistance to family members of attorneys who may be struggling with a wellness issue, substance use disorder, or a mental health issue.

To date, LAP has helped thousands of attorneys. "The Lawyer Assistance Program has supported me throughout law school and my legal career. I took medical leave from law school to seek treatment for my alcoholism and drug addiction. When I got home and was faced with what came next, LAP was there for me. Through LAP, I met lawyers in recovery who helped guide me every step of the way—applying to restart law school, dealing with the stresses of law school and a legal career through my recovery, choosing when and how to disclose my story, submitting my character and fitness materials as part of my application for admission to the bar, and helping other law students and lawyers in recovery who I met both inside and outside of LAP. I've regularly attended LAP meetings since getting sober almost five years ago, and I would not be where I am today—clerking for a judge in the Southern District of New York, a job that previously was well beyond my wildest dreams—without the help of the LAP and its members."

Sometimes speaking to another attorney who understands the unique challenges that attorneys face, can be the very assistance they are looking for. The Lawyer Assistance Committee is the backbone of LAP, and committee members are dedicated to providing peer support to attorneys who struggle with substance use or mental health issues.

The rates of substance use, mental health issues, and even suicide are higher among attorneys than most other professions. LAP is committed to reaching out and educating members of the legal profession about why lawyers often struggle more than other professionals, and what services are available. LAP conducts presentations and workshops in large and small law firms, to solo practitioners, law schools, and legal departments. Programs can be tailored to Managing Partners and Human Resource departments to discuss topics such as how to address impairment, information about LAP's Attorney Monitoring Program, what to look for in an attorney struggling with substance use or mental health issues, and when and how to intervene. Other programs are directed to partners, associates, and staff and include information about mental health and substance use among lawyers, coping skills, resiliency, well-being, and information about LAP services.

To register for any of the previously mentioned LAP programs/services or for additional information, please contact Elizabeth Eckhardt at eeckhardt@nassaubar.org or (526) 512-2618.

Marital Savings…

Continued From Page 10

This pragmatic approach avoids depleting a good portion of the parties' savings on counterproductive motion practice, helps level the playing field for the needy spouse, and ensures that the totality of the parties' financial circumstances and the parties' conduct during the litigation can be assessed when the attorney fee issue is ultimately addressed. For all concerned, this is a win-win-win solution. The Court avoids wasting its valuable judicial resources deciding pendente lite motion practice over funding the parties' divorce, counsel for both parties get paid, and the parties' dramatically reduce their overall counsel fees.

The highly impractical and inherently unpredictable alternative to this approach has festered far too long in the matrimonial halls of justice. Consider the case of *Straub v. Straub*,[7] where now-retired Suffolk County Supreme Court Justice Carol Mackenzie, in response to motion practice, awarded the wife's attorney a whopping $5,000 in interim counsel fees. On appeal, that award was increased by over 1000% to $60,000. Unfortunately, the lower court's abuse of discretion probably cost the parties about $50,000 in additional counsel fees fighting over the lower court's shockingly stingy interim counsel fee award.

To avoid such chaos, the mantra of the court at every Preliminary Conference where the issue of interim counsel fees exists should be, "Show me the money." If it's there, it should be used to pay counsel fees.

As *Straub* illustrates, the variance in attitudes among the members of the bench over funding the needy spouse's representation can also act to prevent a truly level playing field from ever being achieved. By forcing divorcing couples to allocate marital savings to enable the parties to pay their attorneys, litigation costs will necessarily contract. Moreover, deferring the decision under DRL §237 until the end of the case also tends to the concerns raised by Manhattan Supreme Court Justice Matthew Cooper's now famous "skin in the game"[8] objection to the non-monied spouse's presumptive entitlement to an interim award of counsel fees. In the parties' best interests, the Court needs to take affirmative steps to defer all counsel fee applications to the conclusion of the case.[9]

Conclusion

Some may argue that this approach is all fair and good when the parties have savings to invade. But that observation simply begs the question. If no marital savings exist to allocate to counsel fees, then any motion practice seeking an award of counsel fees would be ill-conceived, an effort in futility, and even borderline frivolous. In essence, an attorney "make-work" project, an ugly tendency that also needs to be soundly rebuked. An ostensibly unpayable award under such circumstances only leads to a motion to hold the alleged monied spouse in contempt, a hearing, and a possible appeal, all over a miscalculated interim counsel fee award.

To avoid such chaos, the mantra of the court at every Preliminary Conference where the issue of interim counsel fees exists should be, "Show me the money." If it's there, it should be used to pay counsel fees; if not, then counsel may have to wait until the end of the case to get paid, like a personal injury attorney. As a referendum going forward, divorcing litigants must stop wasting their marital savings on interim counsel fee applications. Working together, the Judiciary and the Bar can help them achieve that goal.

1. 189 A.D.3d 31 (2d Dept. 2020)(citation omitted).
2. *DRL§ 237 Amendments, 10 Years Later: Interim Counsel Fee Awards*, NYLJ (Dec. 14, 2020). The author seems to press for a judicial declaration that the 2010 amendment to Section 237 was intended to limit interim counsel fee applications to funding the needy spouse's legal representation as opposed to determining whether that legal representation is being wisely employed.
3. 58 Misc.3d 1209(A) (Sup.Ct., Monroe Co. 2018).
4. *Id*. at *3..
5. 39 A.D.3d 465 (2d Dept. 2007)(emphasis added).
6. *See Havell v. Islam*, 288 A.D. 160 (1st Dept. 2001).
7. 155 A.D.3d 919 (2d Dept. 2017).
8. *Sykes v. Sykes*, 43 Misc.3d 1220(A) (Sup.Ct., New York Co. 2014).
9. The one exception to this rule against interim counsel applications is where one spouse has a substantial separate property estate but where no marital savings exist. Under such circumstances, it would behoove the "monied" spouse to agree to contribute toward the non-monied spouse's interim counsel fees paid to the monied spouse's attorney.

Adoption…

Continued From Page 7

media, advertising or word of mouth. The adoptive parent's attorney's role is to file the petition with the Court for certification as qualified adoptive parents, along with their client's financial, medical, criminal, and marital information.[7] A home study is filed directly by a licensed social worker to verify the information filed in the Petition for Certification as Qualified Adoptive Parent.

Once "certified" as a qualified adoptive family, the family must do their own outreach to connect with an expectant parent. At first, this may seem to be a daunting task for many prospective adoptive parents, but there are now many avenues for adoptive parents and expectant mothers to make connections, including via the number one source: social media (i.e., Facebook, Instagram, Google Ad Words). There are also many online platforms available online that can help birth parents and adoptive parents connect by allowing adoptive parents to advertise their profiles enabling pregnant women the opportunity to visit these adoption site platforms and viewing the profiles of families hoping to adopt a child in the privacy of their own home.

Many states have laws that regulate the use of advertising in adoption.[8] Some laws permit both birth parents and adoptive parents to publish their interest in placing a baby or their interest in adoption, while other laws limit the use of advertising to attorneys or agencies. In New York, the issue of advertising is not addressed in any statute. This has been construed by those in the adoption community as permissible to place ads. The days of an adoption ad stating "loving happy family" published in the back section of a newspaper has been replaced by hyperlinks to a website about a family on the Internet.

Once the connection is made, the attorney's role is to (1) request social and medical background information; (2) ascertain if the biological father's consent or notice is required;[9] (3) comply with laws regarding consents and expenses to the birth parents;[10] and then (4) file the adoption documents and finalize the adoption. If a child is born outside the state of New York, and placed with a family that resides in New York or if a child is born in the state of New York and is placed with a family outside New York, then Interstate Compact for Placement of Children ("ICPC") must be observed.[11]

Here in Nassau County, all private adoptions are filed in Nassau County Surrogate's Court. In Suffolk and Queens Counties, the adoptions are filed in Family Court. Whereas, Family and Surrogate's Court have concurrent jurisdiction over adoptions,[12] it is County specific as to where one would file the adoption. Note, in Nassau County all foster care adoptions are filed in Family Court.

1. Family Court Act §581-303.
2. Family Court Act § 1011.
3. Family Court Act §§1017, 1035(f).
4. *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).
5. Social Services Law §374.
6. Social Services Law §374.
7. Domestic Relations Law §115-d.
8. bit.ly/3cJtsGY
9. Domestic Relations Law §111a.
10. Social Services Law §374(6); Domestic Relations Law §115(8).
11. Social Services Law §374-a.
12. Family Court Act §641.

Wasteful…

Continued From Page 9

appear to be more punitive in nature than compensatory. For example, in a Supreme Court, Kings County case,[10] Justice Jeffrey S. Sunshine deviated from the temporary maintenance guidelines and reduced the husband's temporary maintenance award upon a finding that he engaged in wasteful dissipation by concealing his unemployment from his wife for more than seven years and misled her regarding the filing of the parties' joint tax returns which resulted in past due taxes and penalties.

Similarly, in *Allison B. v. Edward A.*,[11] where the husband earned $1,284,000 and the wife earned $177,000, the wife was not entitled to any temporary maintenance under the guidelines. However, based on proof that the husband spent hundreds of thousands of dollars of his income on strip clubs, his girlfriend (e.g. hotels, trips, dining out, direct payments), and other personal expenses without the wife's knowledge, the Court deviated from the guidelines and awarded the wife $7,500/month in temporary maintenance.

If nothing else, the caselaw addressing wasteful dissipation claims are consistent in reminding us that context is crucial. The likelihood of success when seeking a deviation from the maintenance guidelines based on a wasteful dissipation claim will depend on the magnitude of the dissipation relative to the marital estate, and the current financial circumstances of the particular parties and the economy as a whole. In the hypothetical example presented at the start of this article, the closing of the construction business was arguably a wise decision and necessary consequence of the economic pause that was implemented at the onset of the pandemic. Of course, the business-owner's failure to take appropriate steps to save the business by, for example, taking PPP loans or reducing payroll, could weigh in favor of a dissipation claim.

Stock trading losses, to the extent that they did not exceed the investment of marital funds, may fall into the category of a bad financial decision not necessarily amounting to a wasteful dissipation of assets. On the other hand, the wife's continued spending at pre-pandemic levels, while the family's income was reduced, could arguably be considered a wasteful dissipation in the context of a pandemic economy. Scale and context are crucial to these determinations.

1. *See Willis v. Willis*, 107 A.D.2d 867 (3d Dept. 1985).
2. *See Lowe v. Lowe*, 123 A.D.3d 1207 (3d Dept. 2014).
3. *See McCaffrey v. McCaffrey*, 107 A.D.3d 1106 (3d Dept. 2013).
4. *See Carl v. Carl*, 58 A.D.3d 1036 (3d Dept. 2009).
5. *See Burnett v. Burnett*, 101 A.D.3d 1417 (3d Dept. 2012).
6. *See Mizrahi-Srour v Srour*, 138 A.D.3d 801 (2d Dept. 2016); *Scala v. Scala*, 59 A.D.3d 1042 (4th Dept. 2009); *Brzuszkiewicz v. Brzuszkiewicz*, 28 A.D.3d 860 (3d Dept. 2006).
7. *See Owens v. Owens*, 107 A.D.3d 1171 (3d Dept. 2013).
8. *See E.R.S. v. B.C.S.*, 51 Misc.3d 1210 (Sup. Ct., Westchester Co. 2016).
9. *See Epstein v. Messner*, 73 A.D.3d 843 (2d Dept. 2010).
10. *See H.G. v. N.K.*, 40 Misc.3d 1242 (Sup. Ct., Kings Co. 2013).
11. 54 Misc.3d 1226 (Sup. Ct., New York Co. 2017).

Social Media…

Continued From Page 5

perhaps no, but between the algorithms and allegories, metaphors and made-up stories, it is evident that "big brother" is always watching. One would do well to proceed cautiously and be careful what one posts online, as social media has become a complete blueprint of an individual's life.

1. Marcia Canavan & Eva Kolstad, *Does the Use of Social Media Evidence in Family Law Litigation Matter?* 15 Whittier J. Child & Fam. Advoc. 49, 62 (2016).
2. John G. Browning, "Social Networking for Lawyers: Necessary Weapon or Ethical Minefield?" *FamilyLawyerMagazine.com*, (Dec. 17, 2019), https://bit.ly/3mdKCjf.
3. Patricia Reaney "Rise in divorce evidence from social websites." *Reuters*, (February 10, 2010), https://reut.rs/3udJP4H.
4. *Gatto v. United Air Lines, Inc.*, Civil Action No. 10-cv-1090-ES-SCM, 2013 U.S. Dist. LEXIS 41909, at *4 (D.N.J. Mar. 25, 2013).
5. *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 434 (Sup. Ct., Suffolk Co. 2010).
6. *See* n.1, *supra*.
7. *See* n.2, *supra*.
8. N.Y. Rules of Professional Conduct R. 4.1 (2020).
9. *Bramble v. Bramble*, No. 2011-CA-000461-ME, 2011 Ky. App. Unpub. LEXIS 873, at *1 (Ct. App. Dec. 2, 2011).
10. *Dexter v. Dexter*, 2007-Ohio-2568, ¶ 1 (Ct. App. 2007).
11. *Sisson v. Sisson*, 2012 Ark. App. 385, ¶ 2, 421 S.W.3d 312, 313 (Ct. App. 2012).
12. Theodore Sliwinski, Esq., "Social Media and the Family Court." *Divorcesource.com*, (March 14, 2021), https://bit.ly/39CO3uV.
13. *B.M. v. D.M.*, 927 N.Y.S.2d 814, 814 (Sup. Ct., Richmond Co. 2011).
14. *See* endnote 11.

Valuations…

Continued From Page 6

Recovery from Major Economic Event

Courts have examined various factors in selecting a valuation date. If a business has recovered from the impact of a major economic event, then courts have selected a date of commencement valuation. Recovery generally means the economic impact was short-term.

In *Daniel v. Friedman*, the Second Department held that a date of commencement valuation was a provident exercise of discretion, as the husband's business had recovered from the negative impact of market forces and the evidence demonstrated that the business would continue to recover.[9] The Second Department reached a similar result in *Finch-Kaiser v. Kaiser* and affirmed the trial court's valuation of the husband's real estate investment company as of the day of commencement, rather than at the time of trial.[10]

Therefore, even if a business has been affected by a broad market force, such as COVID-19, if that business has rebounded, then a date of commencement valuation is appropriate.

Cyclical Businesses

Another relevant factor in the selection of a valuation date is whether the business has a history of being cyclical. In *Rich-Wolfe v. Wolfe*, the Third Department affirmed the trial court's determination that the husband's construction businesses should be valued as of the date of commencement, rather than the date of trial.[11] The Third Department reasoned:

> [T]he profitability of the parties' businesses had declined after the date of commencement due to the deterioration of the broader economy, but the defendant did not dispute that the construction industry is a cyclical one that is strongly affected by economic conditions.[12]

If a business has been cyclical, the negative impact of the broader economy is less likely to be permanent and the business will rebound, as it has done in the past. Therefore, a date of commencement valuation date is more appropriate.

Forces Beyond Spousal Control Impacting Revenue

A further factor examined by the courts in the selection of a valuation date is whether forces beyond the parties' control caused the post-commencement business revenue to increase or decrease.

If the change was due to economic forces beyond a party's control, the courts generally use a date of trial valuation date.

The Second Department, in *Sagarin v. Sagarin*, held that a date of trial valuation of the husband's business was a provident exercise of discretion as, "adverse economic forces outside of the husband's control caused the decline in value of the corporation."[13] Similarly, in *Schacter v Schacter*, the First Department held that the trial court should have used the date of trial, rather than the date of commencement, as the date of valuation of the husband's partnership interest in a law firm.[14] The First Department reasoned that the trial court failed to give due consideration to the impact of the 2007-2008 financial crisis on the value of the husband's partnership, as well as to the impact of the wife's conduct in creating negative publicity in regard to the husband.[15]

Arguably, the 2007-2008 financial crisis is analogous to COVID-19 in that both of these circumstances created a broad impact on the overall economy beyond the control of an individual. An important distinction, though, is that the financial crisis generally had a negative impact on the overall economy, while the impact of COVID-19 varies greatly depending on the type of business. Thus, an analysis of the impact of COVID-19 demands a close look at the data for the particular business and industry involved.

Spousal Efforts

In selecting a valuation date, courts additionally have examined whether the efforts of the titled spouse contributed to the increase in value of a business. If the increase in the value of the business, post-commencement, did not result primarily from the efforts of the titled spouse, then courts have selected a date-of-trial valuation date.

In *Wegman v. Wegman*, the Second Department remitted the matter to the trial court to value the husband's business as of the date of trial.[16] The Second Department reasoned that the increase in the value of the husband's business was not due solely to the efforts of the husband, but to the successful marketing of a product, Collagenase, which took years to develop and was developed during the marriage.[17] The Second Department also considered the wife's substantial contribution to the economic partnership of the marriage during the years while the product was being developed and stated, "[the wife] should not be deprived of a share of the wealth eventually generated by that substance merely because her husband chose to abandon her in the same year that the S.J. Wegman Company began to market it."[18]

In *Wegman*, the post-commencement growth of the business was not due to the efforts of the husband, but rather to the parties' joint efforts made during the marriage. Thus, a date-of-trial valuation was more equitable.

Spousal Manipulation of Business Value

Courts also will examine whether a spouse intentionally tried to manipulate the value of the business post-commencement and will not permit a spouse to benefit from that manipulation.

It is significant that in *Wegman*, not only was the increase of the value of the business not due primarily to the efforts of the husband, but in addition, the husband intentionally tried to manipulate the marketing date of Collagenase, in order to deprive the wife of the post-commencement increase in value.[19] The Second Department therefore held that a date-of-trial valuation was proper so the wife would not be deprived of the benefit of this increase.[20]

Similarly, in *Schacter v. Schacter*, the court would not permit the wife to benefit from her misconduct.[21] The wife tried to manipulate the value of business of the titled spouse by intentionally generating negative publicity regarding the business and compounding the detrimental impact of the financial crisis.[22] Thus, the First Department held that a date-of-trial valuation was proper, so the value of the business would reflect the post-commencement decrease in revenues, caused, in part, by the wife's conduct.[23]

Forensic evidence is essential in assessing the impact of COVID-19 on a particular business. About one year has elapsed since we learned of COVID-19 and its effects are continuing, so forensic accountants have data available. This is critical, as forensic accountants may only make predictions based upon what is known or knowable at the time of the valuation.[24]

Conclusion

COVID-19 has affected the economy dramatically. Therefore, it is essential, in a matrimonial action, to present evidence regarding its effects upon the business being valued, so the court may select an appropriate valuation date.

1. *See Daniel v. Friedman*, 22 A.D.3d 707, 708 (2d Dept. 2005) (citing *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 707 (2000); *see also* N.Y. Dom. Rel. Law § 236(B)(4)(b) (McKinney 2020); *McSparron v. McSparron*, 87 N.Y.2d 275, 288 (1995).
2. *Id.*
3. *Id.*
4. *Mesholam v. Mesholam*, 11 N.Y.3d 24, 28 (2008) ("Once property is classified as marital or separate, the trial court has broad discretion to select an 'appropriate date for measuring the value of [the] property'")(quoting *McSparron*, 87 N.Y.2d at 287 (internal quotation marks omitted) (bracketed language added).
5. *Mesholam*, 11 N.Y.3d at 28 ("[T]he valuation date must be between 'the date of commencement of the action [and] the date of trial'")(quoting Dom. Rel. Law § 236(B)(4)(b) (McKinney 2020) (bracketed language added).
6. *Daniel*, 22 A.D.3d at 708 (2d Dept 2005) (quoting *Grunfeld*, 94 N.Y.2d at 707 (2000); *see also* Dom. Rel. Law § 236(B)(4)(b) (McKinney 2020); *McSparron*, 87 N.Y.2d at 288).
7. *Wegman v. Wegman*, 123 A.D.2d 220, 234 (2d Dept. 1986).
8. *Id.*
9. *Daniel*, 22 A.D.3d at 708.
10. *See generally Finch-Kaiser v. Kaiser*, 104 A.D.3d 906, 907 (2d Dept. 2013) (reasonably inferring from the court's holding that a date of commencement is reasonable in situations where a rebound can be anticipated. This is akin to the court's reasoning in *Rich-Wolfe v. Wolfe*, 83 A.D.3d 1359, 1359–60 (3d Dept. 2011)).
11. *Rich-Wolfe*, 83 A.D.3d at 1359–60.
12. *Id.*
13. *Sagarin v. Sagarin*, 251 A.D.2d 396, 396 (2d Dept.1998).
14. *Schacter v. Schacter*, 151 A.D.3d 422, 422–23 (1st Dept 2017).
15. *Id.*
16. *Wegman*, 123 A.D.2d at 238
17. *Id.* at 237.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Schacter*, 151 A.D.3d at 422–23.
22. *Id.*
23. *Id.*
24. *AICPA Statements and Standards for Valuation Services*, AICPA (June 2007), https://www.aicpa.org/interestareas/forensicandvaluation/resources/standards/downloadabledocuments/ssvs_full_version.pdf.

Committee Reports

ELDER LAW, SOCIAL SERVICES AND HEALTH ADVOCACY

Co-Chairs: Katie A. Barbieri, Patricia A. Craig

Michael J. Langer

This committee addresses legal issues related to health, mental hygiene, and social services for the public and special population groups, including the poor, the aged and the disabled.

On March 5, 2021, a committee meeting was held by videoconference. After farewell remarks to and from now-retired Nassau County Supreme Court Justice Arthur Diamond, topics discussed included an introduction to New York's Medicaid Buy-in Program for people with disabilities to earn additional income without the risk of losing coverage, virtual notarizations, changes to Medicaid laws, and available resources for Medicaid budgeting. It was also discussed about the use of mediation in Nassau County contested guardianships under a pilot program operating at no cost.

On March 24, 2021, the committee hosted guest speaker, Elizabeth Forspan who delivered a lecture on issues related to elder care and planning, and related practice tips. Topics of interest included long-term care insurance considerations, use of trusts and complete and incomplete gifts for preservation of assets, and expected changes to community Medicaid as the community look-back phases in.

Note from the Committee: There is a program still running that allows contested guardianship (Article 81 or 17A) matters to be court-referred to a pre-existing panel of qualified mediators. The NCBA contact for more information about this program is Stephanie Pagano. Either a party or the court evaluator can request mediation from the court, who can refer parties following its determination on capacity as the primary issue.

The Committee Reports column is compiled by Michael J. Langer, a partner in the Law Offices of Michael J. Langer, P.C. Langer is a former law clerk in the United States Court of Appeals for the Second Circuit, and a former Deputy County Attorney in the Office of the Nassau County Attorney. Langer's practice focuses on matrimonial and family law, estate and commercial litigation, and criminal defense.

Mental Health…

Continued From Page 11

The outpatient mental health programs and offices that remained open throughout the pandemic were forced to adjust their enrollment criteria, denying or delaying admission to those with potential COVID-19 symptoms. Medical offices and outpatient facilities implemented COVID-19 response protocols such as screening questionnaires, taking a patient's temperature before entry, requiring a facial mask, and following social distancing guidelines. Mental health and healthcare professionals had to significantly reduce their patient loads to avoid crowded waiting rooms and often resorted to appointment-only policies rather than permitting walk-ins, even in an urgent-care setting.

Court-Ordered Outpatient Treatment Services

In New York, Assisted Outpatient Treatment (AOT) programs in each county heavily rely on in-person, outreach-based practices.[7] AOT is a valuable tool for mentally ill individuals who refuse mental health services in the community and are frequently hospitalized. The program has proven to reduce hospitalization by providing support in the community and monitoring medication compliance.[8]

AOT providers in the "new normal" have had to adopt new service modalities in the community, relying upon virtual communications by video conference or telephone call. The AOT program provides for community-based case management services, medication management, alcohol and/or substance use testing and counseling, and individual and/or group therapy.[9] Case managers or social workers who are generally required to make in-person visits anywhere from four to six times per month have been unable to safely make these visits in the past year. Assertive Community Treatment (ACT) Teams that normally provide court-mandated individual and/or group therapy, were forced to reduce or eliminate in-person services and implement telehealth options.[10] ACT Teams are encouraged to prioritize essential services such as medication assessment and administration as well as acute crisis intervention.[11]

Unfortunately, some counties in New York have delayed acceptance or processing of community referrals for AOT.[12] COVID-19 has hindered the AOT investigation process to determine eligibility for the program such as the need to obtain medical records and conduct an in-person psychiatric evaluation of the individual. In some counties, the only way to gain acceptance into the AOT program is through an inpatient admission wherein the treatment team applies for AOT as part of the discharge plan from the hospital. Throughout the pandemic, however, renewal applications for existing AOT clients are still being processed when the Court Order expires.

Use of Telepsychiatry During COVID-19

The COVID-19 pandemic forced many physicians and mental health professionals to adjust the way they deliver care and embrace the use of telehealth services. Even our very own Lawyer Assistance Program adapted and almost immediately began offering confidential professional counseling sessions via doxy.me, a HIPAA compliant telehealth video platform.[13]

Before the pandemic, telehealth services were generally underutilized by providers and patients due to regulatory and reimbursement issues. Unprecedented temporary waivers of federal and state regulations have allowed for the widespread use of telehealth services to safely provide medical and mental health care during the pandemic. For example, waiving penalties for certain HIPAA violations enabled medical and mental health professionals to use virtual platforms such as FaceTime or Skype.[14] The loosening of state licensure regulations allowed for telehealth services to be offered across state lines.[15]

Additionally, many providers have been able to bill for telehealth services as if they were provided in person, significantly expanding access to essential mental health services.[16] Even patients without a smartphone, computer, or access to high-speed internet have been able to access services with telephone-based, audio-only, treatment.[17] These necessary waivers expanded a provider's ability to initiate or continue mental health treatment during this unprecedented time.

Conclusion

The COVID-19 pandemic triggered drastic changes to the provision of mental health services in both the inpatient and outpatient settings. The healthcare system quickly adjusted to new ways of delivering mental health and related healthcare services. Many of these temporary changes, such as the reliance on telehealth, may be here to stay long after the pandemic ends.[18] Currently, only time will tell.

1. *Psychiatric Hospitalization*, National Alliance on Mental Illness, https://bit.ly/2R92Xmf.
2. N.Y. Exec. Order 202 (Mar. 7, 2020), https://on.ny.gov/3t4nlCQ.
3. In New York, Article 9 of the Mental Hygiene Law sets forth the legal requirements for voluntary, involuntary, and emergency admission to a hospital, as well as the retention of patients pursuant to a court order.
4. N.Y. Exec. Order No. 202.6 (March 20, 2020), https://on.ny.gov/3up5BT2.
5. *See Rivers v. Katz*, 67 N.Y.2d 485 (1986).
6. Bojdani E, Rajagopalan A, Chen A, et al., *COVID-19 Pandemic: Impact on psychiatric care in the United States*, 289 Psychiatry Res. (July 2020), https://bit.ly/3upbzUc.
7. Known as "Kendra's Law" in New York, AOT is court-ordered treatment for the person's mental illness and supervision in the community with the goal of preventing "a relapse or deterioration." Mental Hyg. Law § 9.60 (a). To be eligible for AOT, the individual must be at least eighteen years old, suffering from a mental illness, unlikely to survive safely in the community without supervision, and have a history of non-compliance with treatment for mental illness. Mental Hyg. Law § 9.60 (c).
8. Kendra's Law: New York's Law for Assisted Outpatient Treatment (AOT), Mental Illness Policy Org, https://bit.ly/39FL6JN.
9. Mental Hyg. Law § 9.60 (a). There is no punitive remedy for a patient's failure to comply with AOT; however, the individual can be brought to a hospital for evaluation for involuntary hospitalization. Mental Hyg. Law § 9.60 (n).
10. *COVID-19 Program & Billing guidance for ACT Programs*, (April 13, 2020), https://on.ny.gov/2PW4jA6.
11. *Id.*
12. A family member, or other concerned individual, can make a referral to the AOT program in the county where the individual resides by filling out an application with the Office of Mental Health. *See Assisted Outpatient Treatment*, https://my.omh.ny.gov/analytics/saw.dll?dashboard.
13. *Lawyer Assistance Program*, Nassau County Bar Association, https://bit.ly/3cODIhq.
14. *Notification of Enforcement Discretion*, HHS, https://bit.ly/2RdUaPV. The Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) stated it "will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency."*Id*.
15. NY Exec. Order No. 202.5, https://on.ny.gov/31TUghv.
16. *See, e.g., Medicare Telemedicine Healthcare Provider Fact Sheet*, Centers for Medicare and Medicaid Services, (Mar. 17, 2020), https://go.cms.gov/3miskgW; *see also Telehealth: Delivering Care Safely During COVID-19*, HHS, https://bit.ly/2PYYVwc.
17. *Telemedicine Coverage Expands in NY Under Bill Signed by Cuomo*, Bloomberg Law, (June 17, 2020), https://bit.ly/3wzaP0D.
18. New York Governor Andrew Cuomo continues to push for regulatory and statutory changes to permanently adopt these waivers and allow for continued flexibility in the use of telehealth. *Governor Cuomo Announces Proposal to Expand Access to Telehealth for All as Part of 2021 State of the State*, (Jan. 10, 2021), https://on.ny.gov/3dBiOBz.

Mock Trial…

Continued From Page 1

2021 Mock Trial Tournament Participants

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Peter H. Levy, Esq.
Hon. Lawrence M. Schaffer

Tournament Coordinator
Jennifer C. Groh

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Richard H. Apat
Hon. Leonard B. Austin
Rosalia Baiamonte
N. Scott Banks
Hon. Steven R. Barnwell
Kathryn Beer
Hon. Melissa Bekisz
Hon. Gale D. Berg
Joseph Brees
Hon. Maxine S. Broderick
Jess A. Bunshaft
Neil R. Cahn
Melissa Danowski
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Christopher J. DelliCarpini
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*** Attorney-advisor, Stella K. Abraham*

Nixon…

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was the Warren Court's principled conservative dissenter.

Nixon chose former ABA President Lewis Powell and Deputy Attorney General William Rehnquist. Powell served from 1971 to 1987. He was a moderate-conservative who became the court's 'swing vote.' He is best remembered for the controlling opinion in *Regents of the University of California v Bakke* (1978).[11]

Rehnquist joined the court as an Associate Justice in 1972 and was named Chief by President Reagan in 1986. Graduating first in his class at Stanford Law (1952, Sandra Day O'Connor was third), Rehnquist was the only genuine conservative among the men Nixon selected.

Rehnquist possessed a circumscribed view of the Fourteenth Amendment, considering it misapplied to cases dealing with abortion, criminal procedure, and the death penalty. Believing such matters are for Congress to resolve, he became the stalwart Nixon hoped Burger would have been.

United States v. Nixon: A Constitutional Crisis

Nixon handily won reelection in 1972. The Watergate scandal would turn the tables on the president. Individuals with ties to the Committee to Re-Elect the President were arrested for a burglary at the Democratic headquarters in the Watergate office-complex.

From 1972 to 1974, a litany of clandestine, unsavory activities came to light following the June 17, 1972 break-in. The unraveling of the cover-up seized the nation's attention resulting in a Constitutional crisis culminating in Nixon's resignation.

The burglars' trial before District Judge John Sirica drew the attention of the Senate. Senate hearings revealed the administration's inner-workings. Most damaging was the revelation of an Oval Office voice-activated taping system. The battle for the White House tapes would lead to a landmark Supreme Court opinion.

Special Prosecutor Archibald Cox subpoenaed the tapes. Nixon, citing executive privilege, refused. The impasse came to a head when Nixon ordered Attorney General Elliot Richardson to fire Cox. Richardson resigned instead, and Solicitor General Robert Bork carried out the order.

The public's reaction to the 'Saturday Night Massacre' forced Nixon to replace Cox with Leon Jaworski. The battle over the tapes continued. A grand jury named Nixon an unindicted co-conspirator. Jaworski instructed they couldn't indict a sitting President. The Constitution provides for impeachment; any criminal charges would have to wait until Nixon left office.

In 1974, the House authorized the Judiciary Committee to initiate impeachment proceedings. The Judiciary Committee approved three articles of impeachment. Nixon asserted executive privilege: the right of the President to maintain confidential communications on national security grounds.

It was the Court's decision in *United States v. Nixon* that forced Nixon's hand.[12] The Court ruled 8-0 (Rehnquist recused himself), ordering the President to deliver the tapes to the district court. Though unanimous, the justices had to determine the limits of executive privilege.

The Court's decision held that a president's need for confidentiality cannot be absolute. The Court defined a limited executive privilege in areas of military or diplomatic affairs. But it did not extend to materials subpoenaed in a criminal prosecution, which the president cannot withhold.

End of a Presidency, Start of a Legacy

The White House released the June 23, 1972 tape, recorded six days after the Watergate break-in. The tape contained conversations which verified the President directed the CIA to impede the FBI's investigation.[13] The 'smoking gun' tape was proof of obstruction of justice shattering Nixon's remaining credibility.

On August 7, 1974, Congressional leaders informed Nixon that his support in Congress had evaporated.[14] Leaving little doubt about the certainty of his impeachment, the President was told he held the support of only thirty-five House members.[15]

In the Senate, Nixon was informed he could count on only fifteen votes for his acquittal, assuring the two-thirds needed for conviction.[16] Nixon announced his resignation on August 8, 1974. He formally submitted a letter of resignation, effective the following day, to Secretary of State Henry Kissinger.

A criminal charge was still possible. President Ford granted Nixon a pardon for all Watergate offenses. Ford justified his actions citing *Burdick v. United States*, a Supreme Court ruling holding the acceptance of a pardon supports the imputation of guilt by its very acceptance; in effect, it is an admission of guilt.[17] Ford's pardon foreclosed any legal liability Nixon might have faced.

Yet Nixon's legal legacy persisted. All four of his appointments would be on the Supreme Court well into the next decade. Rehnquist was the last to step down, doing so in 2005. He has been acknowledged as one of history's most influential Chief Justices, the conservative counter-weight to Earl Warren.

Since Nixon's resignation, two presidents, Bill Clinton and Donald Trump, have undergone impeachment proceedings. Both were acquitted in the Senate. In Trump's case, he was acquitted twice. But more than a century spanned the 1868 impeachment of Andrew Johnson and Watergate. Clearly, something has changed.

As for Richard Nixon, he remains a historical enigma. An intelligent man, well-steeped in the law; he realized too late how much he allowed his inner demons to undercut his judgement. At the very end, he came to see how he had ruined his presidency: "*always remember, others may hate you, but those who hate you don't win unless you hate them, and then you destroy yourself.*"[18]

Sound advice for lawyer and layman alike. Advice Nixon should have heeded himself.

1. Senator Bob Dole's Comment at Nixon's Funeral at www.cnn.com.
2. Irwin Gellman, *Richard M. Nixon: Bicoastal Practitioner in America's Lawyer Presidents* (rev. ed. 2009) at 13.
3. *Id.*
4. *Id.*
5. Tom Wicker, *One of Us* (1st ed. 1991) at 3.
6. Brian Smenthkowski, *Earl Warren* at www.britannica.com.
7. 347 US 483 (1954).
8. 378 US 478 (1964); 384 US 436 (1966).
9. William Honan, *Roman Hruska Dies at 94* (April 27, 1999) at www.nytimes.com.
10. 410 US 113.
11. 438 US 265.
12. 418 U.S. 683 (1974).
13. The Smoking Gun Tape at www.watergate.info.
14. Hella Pick, *Nixon resists call to resign* (Aug. 7, 2014) at www.guardian.com.
15. *Id.*
16. Martin Waldron, *Goldwater Expect 'Hard Core" of Senate Vote to Acquit Nixon* (Aug. 8, 1974) at www.nytimes.com.
17. 236 US 76 (1915).
18. Richard Nixon: White House Farewell at www.historyplace.com.

Pro Bono Attorney of the Month

Jeff Klein

By Susan Biller

Nassau Suffolk Law Services Volunteer Lawyers Project (VLP), along with the Nassau County Bar Association (NCBA), are privileged to recognize Jeff Klein as our most recent Attorney of the Month. Klein is a partner in the firm of Mulhern & Klein, located in Wantagh and Manhattan. He focuses his practice predominantly in matrimonial law. We honor him this month for his long-term pro bono legal assistance to disabled and low-income residents of Nassau County in divorce proceedings. In fact, since Klein joined the VLP panel well over ten years ago, he has made the commitment to assist at least one pro bono client at any given time. This has translated to over 100 hours of free legal service.

When approaching every matrimonial matter, Klein's first emphasis is exploring whether the client's objectives can fairly be achieved through a negotiated settlement. However, in those cases where a fair settlement cannot be achieved, he works diligently to ensure that the clients are prepared to achieve the best possible result in court. His dedication has enabled many who lack access to the legal system to obtain proper parenting arrangements, a fair settlement, and build a new life for themselves during the most challenging of times.

Klein is a graduate of Clark University (1977) and St John's Law School (1980). He is admitted to the New York State Bar, as well as the Eastern and Southern Districts of the U.S. Federal Court. He is also a member of the NCBA Matrimonial Law Committee and the New York Chapter of the American Academy of Matrimonial Lawyers.

Klein's affinity for assisting the underserved has deep roots. He started his legal career at Nassau Suffolk Law Services, then known as Nassau County Law Services. Klein humorously recalls: "When I first interviewed for a staff attorney position at Nassau County Law Services, I told the managing attorney, Carl Nathanson, I was interviewing because I fully expected to spend my entire legal career there, which at the time, I was. I was certain that either my promise or the fact that I was the only person willing to accept a public interest salary was the reason I was offered the position. After I left, and fearful that perhaps my promise had been recorded, I decided that I could remain a law services member, in spirit, by accepting volunteer cases from law services." Klein has fulfilled his vow, and many clients have benefited as a result. Ultimately, Klein started his own firm in 1987 with law school classmate, Pat Mulhern, and they remain both friends and partners to this day.

A particularly rewarding volunteer case of Klein's involved a parent who had undertaken a campaign of alienating the children against his client, and unilaterally moved to Arizona with them. When Klein eventually compelled that parent to produce the children before a Nassau County Family Court Judge, the children would not even greet their mother. After the Judge awarded custody of the children to his client, the children grabbed onto their father and started to shriek in horror and protest. Nevertheless, his client called him shortly after to assure him that it took the children just two days to reacclimate and that they were now happy to be back with their mother. Klein felt relieved and gratified to have been able to bring about such a lifechanging result.

Klein feels the rewards of being a volunteer attorney are both tangible and intangible. Not only do volunteers receive up to ten CLE credits per reporting cycle, but they also sleep better at night.

> "Having a law degree is a privilege, and I estimate that if every attorney took two pro bono cases per year, we could provide representation to nearly everyone who needs but cannot afford an attorney. Law services makes the process easy by thorough screening, and frequently allows you to choose from an array of cases. Sometimes it can be helpful to ask who the attorney is on the other side. If it is someone you know you can work with, you may be able to take and resolve the case relatively quickly. I always assist at least one pro bono client. These individuals are uniformly grateful, and I feel fortunate to be able to effectuate such a meaningful change in their lives."

Susan Biller, Pro Bono Coordinator of the Volunteer Lawyers Project, credits Klein with making her job more fulfilling. "Jeff is part of the core group of our volunteer effort. His commitment to our program is inspiring. He is always ready to assist another needy client, reaching out to me when he is close to concluding a matter. I know I can count on him to take on a complex case whenever necessary."

When not helping people extricate themselves from their marriages, Klein finds release in riding a Peloton at his daughter's apartment while being taught by his favorite instructor with a classic rock playlist in the background.

In recognition of his continuous dedication and the outstanding work Jeff Klein has done for the VLP, we are very proud to honor him as our most recent Pro Bono Attorney of the Month.

The Volunteer Lawyers Project is a joint effort of **Nassau Suffolk Law Services** and the **Nassau County Bar Association**, who, for many years, have joined resources toward the goal of providing free legal assistance to Nassau County residents who are dealing with economic hardship. **Nassau Suffolk Law Services** is a non- profit civil legal services agency, receiving federal, state, and local funding to provide free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of **matrimonial, bankruptcy, 17A Guardianship, and certain advance directive representation**, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Susan Biller at Sbiller@nsls.legal or (516) 292-8100, ext. 3136.

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