CONSTITUTIONAL

Aid-In-Dying a New York State of Mind

By Cory Morris

Does one have the *right* to assisted suicide in New York? In 1997, the United States Supreme Court made it clear that there is no fundamental right to die and that New York's prohibition on assisted suicide does not violate the Equal Protection Clause of the Fourteenth Amendment.

Recently, some have tried to wrestle free of this prohibition. Just a few weeks ago, in *Myers v Schneiderman*, the New York City Supreme Court denied the right to assisted suicide by means of an "injunction prohibiting prosecution of the professionals who aid mentally competent, terminally ill patients with the means and/or methods to end their lives."[1] The decision is currently being appealed and it appears that other challenges to similar laws are arising in light of recent news.

States are legalizing and others are pushing for what is being referred to as Aid-In-Dying legislation. "Oregon became the first state to allow physician aid in dying in 1997 when voters chose by a wide margin to approve The Oregon Death with Dignity Act."[2] "In early October [of 2015], California's End of Life Option Act made the state the most recent to legalize physician aid in dying … a process that allows terminally ill patients to receive life-ending medication from physicians." California, Oregon, Vermont and Washington currently allow physician aid in dying. Similar to what was sought in *Myers v Schneiderman*, a court ruling in Montana protects physicians who aid dying patients from prosecution.


Cory Morris

Along with California, Canada is now added to the list of places that allow for assisted suicide. "People with grievous and irremediable medical conditions should have the right to ask a doctor to help them die, Canada's highest court says in a unanimous ruling."[3] The Canadian case was brought by a civil liberties group on behalf of two women with degenerative diseases who wanted the right to have a doctor help them die. The lawyer arguing the case called it discrimination because of their physical disabilities, essentially arguing, "that they were being discriminated against because their physical disabilities didn't allow them to kill themselves the way able-bodied people could." The decision was unanimous, albeit silent on the extent of which it could be employed. For instance, if one was suffering from extreme emotional disturbance or mental illness, it is unclear whether a medical professional could determine the candidate was the appropriate recipient of assisted suicide treatment.

The legislation introduced in New York would allow terminally ill, mentally capable adults the option to self-administer prescribed, life-ending medication. Similar legislation was introduced in New Jersey. Currently however, "[i]n New York, as in most states, it is a crime to aid another to commit or attempt suicide, but patients may refuse lifesaving medical treatment."[4] Able-bodied adults not suffering from mental illness have the freedom to make their own medical decisions but cannot engage a doctor to assist in suicide, or euthanasia. The New York Court of Appeals held that a right to refuse medical treatment is not the equivalent of a right to commit suicide[5] and that we are guided by the capacity of the individual to make medical decisions.

While some might consider it humane, New York treats assisted suicide as a serious crime — a felony. Some believe that legalizing euthanasia, or allowing assisted suicide, is the peak of a very slippery slope. In New York, "[a] person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide," a Class E felony or worse, "[a] person is guilty of manslaughter in the second degree when … [h]e intentionally ... aids another person to commit suicide,"[6] a Class C felony. "It is, [however,] within the sole discretion of each district attorneys executive power to orchestrate the prosecution of those who violate the criminal laws of this state."[7] In other words, New York District Attorneys can effectively decide to allow for what some phrase as Aid-in-

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COMMERCIAL LITIGATION

Attorneys' Eyes Only Designations Within a Protective Order

By Leo K. Barnes Jr.

A Protective Order is standard fare in commercial litigation. Those matters which assert the theft of trade secrets or a breach of a non-compete agreement will often permit an "Attorneys' Eyes Only" ("AEO") designation within the Protective Order if discovery documents are of such a highly sensitive nature that revelation of the same to an adversary litigant will likely cause a current competitive harm.

Although there is no definitive list of documents that are entitled AEO designation, Magistrate Cheryl L. Pollack in *Gerffert Co., Inc. v. Dean*[1] proposed the following language in a dispute between two competing businesses that could not agree on a definition:

> The designating party may designate any Confidential document, thing, material, testimony or other information derived therefrom as "Attorneys' Eyes Only" if the designating party can show good cause that the materials contain extremely sensitive trade secrets or commercial information, such as pricing, product development, profits, and future marketing strategies, that if disclosed to the opposing side could result in serious competitive or other harm, that cannot be avoided by less restrictive means.[2]


Leo Barnes

Once designated as AEO, counsel is not permitted to share the documents or information with the client. Of course, the designation, and the corresponding limitation upon sharing the information, raises a host of obstacles that make it more difficult for an attorney to counsel the client.

> The AEO designation must be used selectively because discovery and trial preparation are made significantly more difficult and expensive when an attorney cannot make a complete disclosure of relevant facts to a client and because it leaves the litigant in a difficult position to assess whether the arguments put forward on its behalf are meritorious. [] To justify the AEO designation, the designating party must do more than show that it is a competitor of the receiving party or that the documents in question disclose information about the designating party's relationships with other competitors.[3]

Despite the occasional necessity for utilizing AEO designations within a Protective Order, the process is also ripe for abuse, and corresponding sanctions for counsel.[4] The New York City Bar Association Committee recognized this issue when deliberating over the content of its model Stipulation and Order for the Production and Exchange of Confidential Information ("Model Protective Order"),[5] which was drafted for use in Commercial Division matters.[6] More specifically, in the notes preceding the Model Protective Order, the New York City Bar Association Committee recognized the potential issues with respect to AEO provisions:

> As for "Attorneys' Eyes Only," the Committee decided not to include the option for such protection primarily out of a concern that it would be invoked far more than necessary. Inevitable disputes over the propriety of a party's invoking "Attorneys' Eyes Only" protection would undercut the overall goal of the Committee to reduce the time required to negotiate confidentiality agreements.[7]

Recently, in *Global Material Technologies Inc. v. Dazheng Metal Fibre Co. Ltd.*,[8] an Illinois Federal Court examined the same issues the New York City Bar Association was concerned with: the over application of AEO designations. In *Global Material*, plaintiff alleged that defendants misappropriated plaintiff's trade secrets and used confidential customer information to compete with plaintiff. During discovery, plaintiff moved to remove certain AEO designations concerning documents produced by one defendant and a non-party.

The *Global Material* court granted the motion to remove AEO status on the documents produced by the defendant finding that defendant made only "broad allegations of unspecified harm that consistently have been found insufficient to justify the 'extreme measure' of preventing a party's attorneys from sharing the documents with their clients." The court further elaborated that defendant failed to describe with any particularity how the generalized

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CONSUMER BANKRUPTCY

The Omitted Creditor in a Closed Bankruptcy Case

Recent decision analyzes current split between circuits

By Craig D. Robins

Here's a perplexing situation that all of us bankruptcy attorneys find ourselves in from time to time. Weeks, months or years after a bankruptcy case is closed, a client calls up to say that a debt was inadvertently omitted from the filing. What do you do?

This has been a conundrum for years. Attorneys seem to have great difficulty tackling this and deciding what the appropriate course of action is. Do you re-open the case to amend the schedules to add the omitted creditor? Or do you send a letter to the creditor saying the debt was discharged even though it was never scheduled? There is good reason for the confusion. Both are correct answers, but depending on the jurisdiction.

The difficulty for us here in New York is that the Second Circuit, unlike most other circuits, has yet to rule on this issue. As there is a split between the circuits, some courts have ruled that a debtor must amend the schedules whereas others have held the opposite, that the debt is discharged if it is a no-asset case, even if it was never scheduled in the first place. There is even a split amongst the Second Circuit courts.

Craig Robins

This column, in June 2009, was devoted to this issue and highlighted *a* decision issued by the late Judge Dennis E. Milton in Brooklyn, *In re Coppola*, (U.S.B.C. E.D.N.Y., Case No. 96-21661-dem, April 20, 2009).

In that case, Judge Milton discussed the two approaches. Under the "mechanical approach," courts have denied motions to reopen no-asset cases, finding that the debt owed to an omitted creditor is discharged "as a matter of law." Under this approach, there is no reason to reopen a bankruptcy case, provided that it is a no-asset case and the debt is not otherwise excepted from discharge.

Under the "equitable approach," courts consider whether the debtor's omission was the result of fraud, recklessness or intentional design, or if it would prejudice the creditor's rights. Good faith is an important element. Courts adopting this approach have held that motions to reopen no-asset cases to list omitted creditors should be liberally granted to afford omitted creditors an opportunity to file a non-dischargeability complaint.

Unfortunately, although that decision contained a good discussion of these two approaches, it still left undetermined what the appropriate protocol is in this district.

However, we finally have some guidance in the form of a fresh, new written decision from Judge Alan S. Trust, sitting in the Central Islip Bankruptcy Court, who has analyzed the issue and given us direction on handling it, at least until the issue reaches a higher court.

Judge Trust followed the mechanical approach and adopted a test that should be applied in these circumstances: a Chapter 7 no-asset case should not be re-opened to allow an undisclosed debt to be scheduled unless: (i) the debtor or creditor can state a plausible basis for seeking a determination that the debt at issue does or does not fall within the category of non-dischargeable debts listed in Sections 523(a)(2), (4) or (6); or (ii) the creditor can state a plausible basis for the court to determine that assets may become available to distribute to creditors; or (iii) prejudice to either party, which can be remedied by reopening the case, has been demonstrated. *In re: Mohammed*, (Bankr. E.D.N.Y., Case No. 13-73191-ast, September 4, 2015).

In *Mohammed*, Judge Trust denied the debtor's application to re-open the case to add the creditor. He determined that the central issues were whether an unscheduled debt is automatically discharged in a no-asset Chapter 7 case, and if so, whether a closed case should be re-opened to schedule it.

In that case, the debtor defaulted in a

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VEHICLE AND TRAFFIC

Drive Safe Diversionary Program

By David M. Mansfield

The Suffolk County District Court Traffic and Parking Violations Agency offers the opportunity for your client to participate in a diversionary program for certain first offenses and for those charged with a serious speeding offense or a series of speeding offenses. This article will focus on the Drive Safe Program.

David Mansfield

The agency has a similar program for child restraint violations §1229-c (1)(2) and for commercial drivers with improper cellphone use violations §1225-c2(a) while operating a commercial vehicle as defined in Transportation Law §2(4a). But there are eligibility requirements and not all clients will qualify.

The primary use of the diversionary program, which is administered by the EAC Network, is mostly made available for a first offense high speeding violation under Vehicle & Traffic Law §1180 for clients under the age of 25. The case must be conferenced with a supervising prosecutor to obtain the referral to the program. The cost of the program is $75. It is conducted on a designated Thursday night once a month in Room 183 from 6 to 9:00 p.m. at the agency.

The Drive Safe Program is not to be confused with the New York State Accident Prevention Point Reduction Program administered under 15 NYCRR Part §138, which is for point reduction and insurance liability premium savings, if applicable.

Most clients now take the Department of Motor Vehicles approved course online. The link for authorized online providers is https://transact.dmv.ny.gov/pirp/#ipirp. But taking it online does limit interpersonal contact.

The Drive Safe Program requires that your client be on time at the designated location or the offer of a reduced speeding charge will be revoked and your client will have to stand trial or plead guilty as charged. I attended a session on July 30, 2015. A few parents attended this session with their son or daughter.

The program, which is monitored by the EAC staff, does constantly monitor the client's attitude. It features motivational speakers. They have included a veteran Suffolk County Highway

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SCBA Holiday Party

Photos by Barry Smolowitz

ENVIRONMENTAL

Court of Appeals Rules That SEQRA Standing Is Not Defeated

Many people suffer direct harm

By Frederick Eisenbud

The standing of a party to seek judicial review of a particular claim or controversy is a threshold matter, which must be considered at the outset of the litigation. *See Dairylea Coop. Inc. v. Walkley*.[1] In *Sierra Cub v. Village of Painted Post*, an article 78 proceeding was commenced to challenge village resolutions that authorized the sale and export of excess water from the municipal water supply. The resolutions permitted the construction of a transloading facility to load the water onto trains that would then transport the water to the buyer in Pennsylvania. Respondents, in support of their motion to dismiss, established that the trains that would transport the water would utilize an existing rail line that traversed the entire village.

In his affidavit in opposition to respondents' motion, Marvin contended that his house was "one-half block from the railroad line" and that, following commencement of the water shipments, he began to hear "train noises frequently, sometimes every night." Marvin averred that he "heard either the train whistle or the diesel engines themselves or both." The noise was allegedly so loud that it "woke [him] up and kept [him] awake repeatedly." Marvin, however, raised no complaints concerning noise from the transloading facility itself.

Frederick Eisenbud

The lower court found that only Marvin had standing to challenge the resolutions on SEQRA grounds, granted summary judgment to Marvin, and dismissed as to all other petitioners.

The Appellate Division, Fourth Department, reversed and granted judgment to respondents dismissing the Article 78 petition in its entirety.[2] "Inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that Marvin will not suffer noise impacts different in kind or degree from the public at large," it wrote, adding " [S]tanding cannot be based on the claim that a project would indirectly affect ... noise levels ... throughout a wide area," citing *Save Our Main St. Bldgs*.[3]

The Court of Appeals reversed, on Nov. 19. 2015, finding that Marvin had standing.[4] Its discussion of precedents is helpful. In 1991, the Court of Appeals decided *Society of Plastics Industries v. County of Suffolk*.[5] A trade organization sought to challenge a Suffolk County ban on plastic bags on the ground that the county failed to comply with SEQRA. The Court of Appeals dismissed the challenge, stating, in part, that "[i]n land use matters … the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large." Because there was no showing of direct environmental (as opposed to economic) harm to the members of the trade organization, the Court of Appeals found they lacked standing to challenge the county law on SEQRA grounds. The court provided an example of the problem: "[t]he doctrine grew out of a recognition that, while directly impacting particular sites, governmental action affecting land use in another sense may aggrieve a much broader community. The location of a gas station may, for example, directly affect its immediate neighbors but indirectly affect traffic patterns, noise levels, air quality and aesthetics throughout a wide area."[6]

The Court in *Village of Painted Post* distinguished this example because in the case before it, "more than one resident is directly impacted by the noise created from increased train traffic. That more than one person may be harmed does not defeat standing," the court said, citing *Save the Pine Bush*.

In *Matter of Save the Pine Bush Inc. v. Common Council of City of Albany*,[7] the Court of Appeals explored whether members of an environmental group concerned with protecting the Pine Barrens in Albany County had a sufficient interest different from the public

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REAL ESTATE

Suing the Mortgage Loan Servicer

By Charles Wallshein

On January 10, 2014 powerful new regulations were promulgated by the Consumer Finance Protection Bureau ("CFPB") under the Real Estate Settlement Procedures Act ("RESPA") and the Truth in Lending Act ("TILA") pursuant to 12 C.F.R. 1024 &1026.

These regulations create, for the first time, a private right of action when mortgage loan servicers fail to properly review mortgage modification applications, properly and promptly respond to requests for information, correct irregularities with application of payments, assessments of fees and charges, or to comply with new strict timelines for handling applications for loan modifications, deeds in lieu of foreclosures and short sales. The RESPA and TILA amendments provide for strict liability, statutory damages and actual damages.

These causes of action may be raised independent of a foreclosure action in state court or federal district court, or may be raised as counterclaims against the loan servicer in the foreclosure action. Actions pursuant to the CFPB regulations can also be brought as adversary proceedings in bankruptcy court.

For conduct that occurred after January 10, 2014 the new regulations codified the strong servicing standards originally agreed to by the major mortgage servicers in the 2012 National Mortgage Settlement. For the first time mortgage loan borrowers have leverage to force their loan servicers to meet the high standards of conduct established by the regulations.

At this time less than 100 cases have been litigated nationwide, with none having been filed in the Eastern District. As with any set of newly promulgated regulations there are very few court decisions at the trial court or appellate level to provide a guide to the practicing bar.

Over the last 12 months I have prepared between 20 and 30 cases where I believe the loan servicers have engaged in egregious violations. The violations I look for are usually uncovered in the loan modification process and in the "Request For Information" (RFI) process set forth in the regulations. The RFI is the statutory equivalent of the older "Qualified Written Request." The actual violation accrues when the servicer is notified of its error with a "Notice of Error" (NOE) and then fails to correct the error. The loan servicers must respond to RFIs within 30 days. In most cases the servicer then has 15 days to respond to a NOE. Failure to respond to a RFI or to an NOE is a violation.

Typical errors by the servicers consist of inaccurate calculation of amounts due, failure to properly review the borrower for the proper modification program, failure to apprise the borrower of the loss mitigation options available and failing to identify the investor and the type of loan. Other common errors committed that are within the statute concern forced placed insurance, inaccurate payoff and reinstatement figures, inaccurate payment histories and inaccurate broker price opinions.

What is now actionable under state common law for "bad faith" pursuant to CPLR §3408 has been codified under the new CFPB regulations. I find it disturbing when my client submits a viable modification application and is denied for no apparent or justifiable reason. What I find absolutely disgusting is when a loan servicer states that its investor just does not modify loans. I believe that the defense bar will be able to apply the new regulations to force loan servicers to modify loans. I expect that both federal and state courts will apply this new law as the standard for reviewing modification applications. I also expect that the terms of the standard HAMP modification will become the minimum modification standard for servicers to offer. I believe the New York State Legislature, Congress and the CFPB have made it very clear that public policy strongly favors modification over foreclosure.

The statutory damages provided by statute are relatively minimal and vary from maximums of $500 to $2000 per violation. However, the regulations also provide for actual damages, which include attorneys' fees. Other actual damages could theoretically include those damages under tort theory such as infliction of emotional distress. As I mentioned earlier, very little of this has been litigated to judgment. Cases that have "settled" often include actual damages that far exceed the statutory damages.

My experience thus far has been that loan servicers that receive mortgage modification applications that are accompanied by RFIs and NOEs pay very close attention. The RFI and the NOE are red flags to loan servicers. Once a proper RFI and NOE are served the servicers know that they are dealing with a professional and that they are

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MATRIMONIAL

No Rights to Your Children? Correct, in the Second Circuit

By Vesselin Mitev

We're told as elementary school students that federal law is the supreme law of the land. Nearly any argument can be fortified by adding the words "constitutional protection" (an amorphous, nearly undefinable concept), but what federal (supreme) protection is there for one's rights to their children?

A troubling case now on appeal in the Second Circuit suggests that the answer, currently, is that there is none for the legion of parents in New York, including the "non-custodial" parent.

In *Uwadiegwu v. County of Suffolk*,[1] the plaintiff father was the respondent in two Article 10 neglect petitions, alleging that he and the child's mother had neglected the children by engaging in drug use and domestic violence in front of the children. The Family Court ordered the removal of the children to foster care, eventually directed their return to the mother, but also ordered that the Department of Social Services (DSS) was to provide visitation to the plaintiff father, and ensure that said visitation take place.

Instead, according to the plaintiff, DSS officials surreptitiously relocated the children, by using taxpayer vouchers, to secretly transport them to the far away locale of Jackson, Mississippi, without the father (or the court's) knowledge, consent, or permission.

The plaintiff filed suit in federal court, alleging deprivations of his First, Fourth and Fourteenth Amendment rights, including the fundamental liberty interest to associate with, care for, and otherwise manage his children. The county defendants moved to dismiss, and the District Court granted the motion in its entirety, holding that there was no case law in the Second Circuit that would deem that plaintiff, whom the court termed the "non-custodial parent" (although the issue of custody had never been litigated in Family Court) had a "fundamental liberty interest in visitation."

The District Court relied heavily on a 1998 Second Circuit case, *Young v. County of Fulton*,[2] which dealt with a summary judgment grant (different standard of review than a motion to dismiss) in a voluntary surrender of two children to state custody. The court also rejected the plaintiff's contention that the Family Court orders, both of which directed DSS to provide the plaintiff with visitation pursuant to Family Court Act § 1081 and Social Services Law § 384(b)(7)(a), were not sufficient to invoke a violation of either the procedural or substantive safe guards of the Due Process Clause.


Vesselin Mitev

Family Court Act § 1081 provides that: "A non-custodial parent … shall have the visitation rights with a child remanded or placed in the care of a social services official pursuant to this article as conferred by the order of the family court or by any order or judgment of the supreme court."

Social Services Law § 384(b)(7)(a) defines a permanently neglected child as: "a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of either at least one year or fifteen out of the most recent twenty-two months following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child."

Read together, the two statutes clearly impose an affirmative duty upon the authorized care agency to "encourage and strengthen" the parental relationship by, *inter alia*, ensuring that court-ordered visitation took place.

In a footnote, the District Court held that the case law (or absence thereof) "makes no distinction between a temporary loss of custody and a permanent termination of parental rights;" and further held that the plaintiff's remedy, if any, was to travel more than a thousand miles to Mississippi to see his children: "There is nothing preventing Plaintiff from traveling to Mississippi and exercising those rights."

If *Uwadiegwu* stands, then any New York state order of visitation and stipulation of settlement incorporated by reference in a divorce judgment, and by implication any writ of habeas corpus application to produce a child from a recalcitrant parent, for example, is attackable or defensible on Constitutional grounds as invalid, or voidable.

While the application may be ultimately granted or rejected, the "*Uwadiegwu*" defense is precisely that type of poison-tipped arrow that may not kill immediately but ultimately leave a fatal wound, as any judgment of divorce adjudging one parent the custodial parent and one parent the non-custodial parent could conceivably be read as an order, issued under color of state law, that closes the gate to the courthouse to the non-custodial parent seeking to enforce his or her visitation rights, which are now no longer fundamental.

To be sure, New York makes a sharp distinction between a non-custodial parent and one who has had their parental rights terminated: to the first class belong, necessarily, 50 percent of all divorced parents with children, who still enjoy sometimes nearly 50-50 visitation, and otherwise have unfettered access to their children's lives; to the second class belong a much smaller number of persons who have had the aforesaid access severed by court order and who are legal strangers to their children.

The analysis by the District Court that a non-custodial parent has no fundamental liberty interest in visitation with his or her child or children is a potential concern for anyone representing the non-custodial parent in a custody dispute, especially where relocation may be an issue. Opt-out language (such as in constructive emancipation cases, where the parties agree that a child's conduct under the seminal *Roe v. Doe* case is an emancipation event that would absolve the non-custodial parent from paying child support) may be considered.

A 1983 Supreme Court case may serve as the jump-off point. In the 1983 case *Santosky v. Kramer* (102. S.Ct. 1388), the United States Supreme Court held that "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."

Until the Second Circuit weighs in, it's the best you can do.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals. He represented the Plaintiff in Uwadiegwu.

[1] 91 F.Supp.3d 391 (EDNY 2015)
[2] 160 F.3d 899 (1998)

New Maintenance Rules Legislation

The newly enacted maintenance rules legislation amends both the Domestic Relations Law and the Family Court Act, and establishes new formulas for maintenance and spousal support. The law puts in place new guidelines for both temporary and post-divorce maintenance and spousal support. It also eliminates "Enhanced Earning Capacity" from equitable distribution.

If you missed the December Academy program featuring some of the individuals involved in writing the legislation which also discussed everything you need to know about this monumental legislation, never fear – you can get the program online, on-demand at http://scba.inreachce.com/ or order the program on CD or DVD through the Academy by calling 631-234-5588.

Faculty

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Moderator: Hon. Andrew Crecca, *Suffolk County Supreme Court, Supervising Judge of the Matrimonial Parts*
Program Coordinators: Hon. Andrew Crecca, Hon. John Leo, Donna England, Esq.

Income Double Counting (Continued from page 1)

declared, "Courts must be meticulous in guarding against duplication of maintenance awards that are premised on earnings derived from professional licenses." *McSparron v. McSparron*, 87 N.Y.2d 275, 286 (1995). Once a court converts a specific stream of income into an asset, that income may no longer be calculated into maintenance. The [service business or license] is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. *Grunfeld v. Grunfeld,* 94 N.Y.2d 696, 705 (2000).

In permitting excess earnings from a real estate rental to be used in formulating maintenance and distributive awards in 2006, the same court observed that, "Double counting may occur when marital property includes intangible assets such as professional licenses or goodwill, or the value of a service business. It is only where "[t]he asset is totally indistinguishable and has no existence separate from the [income stream] from which it is derived" that double counting results. *Keane v. Keane*, 8 N.Y.3d 115, 121-22 (2006).

Following Keane and continuing to date, the Second Department has issued opinions that seemingly conflict with this rule. See, e.g. *Groesbeck v. Groesbeck*, 51 A.D.3d 722 (2d Dep't 2008) (double counting not prohibited with home improvement business), *Sutaria v. Sutaria*, 123 A.D.3d 909 (2d Dep't 2014) (Wife was entitled to distributive share of husband's businesses and maintenance, since businesses constituted tangible income-producing assets), and many others.

So what's the rub? The phrase beginning with "double counting may occur…" has seemingly been interpreted as the Court of Appeals permitting double counting. Rather, it appears clear to this author that the High Court did not overrule *Grunfeld* and *McSparron*, but only explained that the issue of impermissible double counting is implicated with passive income-producing assets.

Analyzing the evolution of the rule, one trial court stated, "[T]he recent Court of Appeals decision in [Keane] does not apply to income derived from businesses … Although the court held that rental income derived from property deemed a marital asset could be used in determining maintenance, even after that same income was capitalized and distributed, it limited this double dipping to passive assets, e.g., real estate. *NK v. MK*, 17 Misc. 3d 1123(A), 1148 (Kings Co. Sup. Ct. 2007). To confuse matters further, the same courts have issued nearly simultaneous opposite holdings. See, e.g. *Rodriguez v. Rodriguez*, (impermissible "double counting" in valuing medical practice using excess earnings, while also awarding maintenance on the income); *Mula v. Mula*, 131 A.D.3d 1296 (3d Dep't 2015) (Once specific stream of income is converted into an asset, that income may not be calculated in the maintenance award).

How do you protect your case? When representing both titled and non-titled spouses, a clean result is best (for titled spouses, to avoid an award that is impossible to pay; for non-titled spouses, to avoid the uncertainties associated with an appeal that, quite literally, could go "either way," and the potential "loss" of an artificially rich award). So long as the court makes an appropriate adjustment to avoid the actual double counting, i.e., calculating maintenance only on the income up to "reasonable compensation," then making a distributive award, the result will likely be proper within the sound discretion of the trial court. *Greisman v. Greisman*, 98 A.D.3d 1079 (2d Dep't 2012). What remains to be seen is the interplay between the amended DRL statutes, which will eliminate enhanced earnings as an asset and make formulaic permanent maintenance with a statutory cap on income.

Note: Christopher J. Chimeri is matrimonial partner focusing also on appellate matters with the law firm Quatela, Hargraves & Chimeri in Hauppauge. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is co-chair of the Suffolk County Bar Association's Member Services and Benefits Committee. In 2014 and 2015, he was peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."

Inside the Courts (Continued from page 4)

Although the team could have possibly negotiated away any obligation to maintain a safe premises, thus relegating responsibility and subsequent liability upon the security company, the parties' contract and conduct clearly demonstrated that the security company "follow[ed] guidelines and procedures promulgated by the Bills" and the team further maintained the right to utilize its own employees for the purpose of securing the premises.

Moreover, the undisputed evidence established that the team determined the number of security personnel and where the security company's employees were stationed within the parking lot. Thus, it was evident that the Buffalo Bills maintained responsibility over the safekeeping of the premises, and, therefore, may be liable for the reckless and/or negligent actions of the employees of the company it hired to provide security. Regarding the burning log that blocked the progress of defendant's motor vehicle, a security employee testified "removing [it] from the roadway 'wasn't high on our priority list' because the security personnel was focused 'on underage drinking and just drunk, obnoxious fans'" as requested by the Buffalo Bills. Accordingly, the claims were reinstated.

Fans heading to professional sporting events should take note that injuries and potential resulting liability are not limited to the playing field.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the Touro College Jacob D. Fuchsberg Law Center and New York Institute of Technology, and the author of numerous legal publications, including his most recent book, "The Bench Guide to Landlord & Tenant Disputes in New York" (Second Edition)©.

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President's Message (Continued from page 1)

firm ladder, and building our careers. In the end that is not what is important.

What Steve Eisman really gave us was to be an example of someone who was a good lawyer, who fully and zealously represented his clients, while being respectful of his opponents to the point that they became friends, all while maintaining and his nurturing wife and children. You did not have to know Steve long to know that his wife and children were the most important aspects of his life.

New Years tends to be a time when we reflect upon our life and take stock in what is happening in our lives. It is now a time to think about how we wish to be remembered if we were taken suddenly at a young age like Steve, to consider about how balanced our life is between our families and the jealous mistress we call the law.

On a different note, during the past week the New York State Commission on Judicial Conduct dismissed allegations regarding two of our esteemed justices, the Honorable Emily Pines and Honorable Thomas F. Whelan. For months our justices appeared on the front page of *Newsday* facing allegations that they could not address to the newspaper. As a result the paper was able to draw conclusions that would best sell papers, to the detriment of the reputation of our two justices.

Our Association and the Board of Directors struggled to find a way to support the two justices that we knew were accomplished, knowledgeable, hardworking and consummate professionals who also possess great integrity. We failed to let the community know that we know these justices are the best in Suffolk County. Not only did we fail these two justices, but our members as well, by not making the public aware of all of the good things that we do as a legal community to help the public.

The Bench Bar Committee has formed a sub-committee to study the issue and make recommendations to the Board of Directors regarding how we can make the public aware of the many things lawyers do to enhance and improve our society, which ultimately brings justice to all.

Wishing you a healthy, happy and prosperous New Year!

Bench Briefs (Continued from page 4)

In *Ralph Oyague v. County of Suffolk,* Index No.: 14033/2013, decided on May 1, 2015, the court granted respondent's cross-motion to dismiss the petitioner's Article 78 petition on the grounds of res judicata and statute of limitations. In rendering its decision, the court noted that res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if there is a judgment on the merits rendered by a court of competent jurisdiction, and if the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was.

With regard to the statute of limitations issue, the court pointed out that pursuant to CPLR §217(1), a petitioner who seeks Article 78 review of a determination must commence the proceeding within four months after the determination to be reviewed becomes final and binding upon the petitioner. In granting the cross-motion, the court found that in the prior Article 78 proceeding, the petitioner sought the same relief sought in this proceeding, and that in the prior proceeding, the court dismissed the petition based upon statute of limitations grounds. Accordingly, the current petition had to be likewise dismissed on the grounds that the proceeding was barred by the statute of limitations and in accordance with the doctrine of res judicata.

Honorable William B. Rebolini

Motion to set aside jury verdict denied; jury verdict not against weight of evidence.

In *David Gagnon v. Catherine Nicoletti, and Suffolk County Water Authority,* Index No.: 11328/2012, decided on July 22, 2015, the court denied the motion by plaintiffs, for an order setting aside the jury verdict on the issue of damages as inadequate and contrary to the weight of the evidence.

The court noted that the plaintiffs commenced this action to recover damages for personal injuries sustained by David Gagnon as the result of a motor vehicle accident. Following a damage trial, he was awarded $100,000 for conscious pain and suffering and $75,000 for lost earnings up to the date of trial. He was awarded $75,000 for future lost earnings for a 3-year period and $10,000 for future medical expenses and $0 for future pain and suffering. In rendering its decision, the court reasoned that a jury verdict is contrary to the weight of evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached in any fair interpretation of the evidence. The court continued and stated that it is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses. Here, the court concluded that the jury verdict was not against the weight of evidence.

Motion to compel granted to limited extent; Facebook postings attributed to defendant allegedly containing admissions of his intent to commit an assault and therefore, such statements were relevant to plaintiff's case in chief as well as to the affirmative defenses asserted by defendant; private one-on-one messages made through Facebook account not subject to disclosure since they were not readily available for public viewing.

In *Tobias Monaco v. Michael Ammirati,* Index No.: 10405/2013, decided on June 9, 2015, the court granted the motion to compel to the extent that the defendant was directed to print out and to retain all photographs and videos, whether posted by others or by defendant himself, as well as status postings and comments posted on defendant's Facebook and other special media accounts, including all deleted materials. Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on January 14, 2013, while plaintiff was on duty as a security officer at the Patchogue-Medford High School and the defendant was a student at the school. In support of his request for disclosure, plaintiff produced copies of what purports to be defendant's Facebook page from January 14 on which appears numerous postings allegedly by the defendant. In granting the motion to the extent provided within, the court found that plaintiff demonstrated that the Facebook postings attributed to defendant allegedly containing admissions of his intent to commit an assault and therefore, such statements were relevant to plaintiff's case in chief as well as to the affirmative defenses asserted by defendant. Furthermore, the court stated that to the extent that the postings were made to be seen by others, there was no reasonable expectation of privacy that attached to the postings. Plaintiff's private one-on-one messages made through his Facebook account were not subject to disclosure since they were not readily available for public viewing.

Motion to appoint receiver denied; no clear evidentiary showing that the property was in danger of being removed from the state, or lost, materially injured or destroyed.

In *Niki Mouzakiotis v. Styliani Mouzakiotis,* Index No.: 11682/2013, decided on September 21, 2015, the court denied defendant's motion for an order appointing a temporary receiver to sell certain real property. The court noted that the appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without adjudication on the merits. Here, no evidence of the value of the property was submitted to the court, nor was there sufficient evidence to support defendant's claim that a foreclosure sale was inevitable. The defendant had not made a clear evidentiary showing that the property was in danger of being removed from the state, or lost, materially injured or destroyed. Accordingly, the motion to appoint a receiver was denied.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6 percent of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Decision on Town Sign Regulations (Continued from page 11)

sion of an entire topic…"[9] Moreover, "…a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter…"[10] And since a regulation that targets a sign because it conveys the time and location of a specific event is content-based, it does not matter if this means that entirely reasonable-sounding laws must sometimes be struck down because of their content-based nature.

Thus, the Sign Code's restrictions could only stand if they survived strict scrutiny. The town argued unconvincingly that the restrictions were necessary to preserve the town's aesthetic appeal and to protect traffic safety. The court labeled both rationales "hopelessly underinclusive" since the favored signs could be unsightly, and the town had not shown why limiting directional signs eliminated threats to traffic safety.

Finally, the town argued that an "absolutist" content-neutrality rule would subject virtually all distinctions in sign laws to strict scrutiny. The court disagreed, concluding that the town had "…ample content-neutral options available to resolve problems with safety and aesthetics…"[11] For instance, a town might be justified in almost totally eliminating signs on public property. However, since the code restrictions challenged here were facially content-based and not justified by traditional safety concerns or narrowly tailored, they must be struck down.

Justice Alito's concurring opinion tried to allay the fears of Justices Kagan and Breyer, who concurred only in the judgment, by listing 10 kinds of sign rules that would not be content-based and thus would survive strict scrutiny. Justices Kagan and Breyer were unpersuaded, and they expressed the fear that making content discrimination an automatic trigger of strict scrutiny rather than an important but not dispositive factor would be fatal to many sensible regulations and would invite an onslaught of legal challenges to worthwhile municipal regulations. Only time will tell if they are right.

Note: Professor Thomas Schweitzer is on the Touro Law Center faculty. He graduated from Holy Cross College and received a Ph.D. in Modern European History from the University of Wisconsin and a J.D. from Yale Law School.

[1] Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015).
[2] Id. at .
[3] 512 U.S. 43 (1994).
[4] Before the Code was amended during litigation of the case, it had provided that such signs could not be posted more than two hours before the religious assembly began.
[5] 135 S.Ct. at .
[6] 587 F.3d 966, 979 (2009); 707 F.3d 1057, 1071-1072 (2013).
[7] 135 S.Ct. at >
[8] Id. at ., citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993).
[9] 135 S.Ct. at .
[10] Id.
[11] Id.

NYSBA Meeting (Continued from page 3)

vide American workers with up to 12 weeks of partial income while on leave for conditions including pregnancy and childbirth and illness of a child, spouse, parent or other family member. The FMILA, which is sponsored by Senator Kirsten Gillibrand of New York, would expand the protection provided by the current FMLA, which provides for unpaid leave and covers less than one-half of the nation's workforce. The FMILA would provide all workers, both full and part time, and regardless of the size of their employers, with 66 percent of their monthly wages up to a capped amount. It would be funded by equal payroll contributions by employers and employees of 0.2 percent.

Constitutional convention

In 2017, New York voters will face a mandatory referendum on whether to have a constitutional convention to revise and amend the State Constitution. In anticipation, the House approved a report and recommendation of the association's Committee on the New York State Constitution calling for the creation of a non-partisan preparatory commission to study and recommend changes to the Constitution (which is more than six times the length of the U.S. Constitution).

The death gamble

The House approved a resolution offered by the New York County Lawyers Association, and supported by the Suffolk County Bar Association, to amend section 60 of the NY Retirement and Social Security Law to permit state-paid judges to elect to have their beneficiaries receive a pension in lieu of regular death benefits should they die while still in office. Under current law, should the judge die while in office, his/her beneficiaries receive a modest death benefit, which is less than the pension benefits to which they would have been entitled had the judge died after retirement.

Report of the NYSBA Nominating Committee

The NYSBA Nominating Committee announced its selection of nominees for NYSBA offices for terms beginning on June 1, 2016, including: Sharon Stern Gerstman of Buffalo as President Elect; Ellen G. Makofsky of Garden City as Secretary; and Scott M. Karson of Melville as Treasurer. Peter H. Levy of Jericho was nominated to succeed Mr. Karson as Vice President for the Tenth Judicial District, which is comprised of Nassau and Suffolk Counties.

The next meeting of the House will be held on Friday, January 29, 2016, in conjunction with the Association's annual meeting in New York City.

Note: Scott M. Karson is the nominee for Treasurer of the New York State Bar Association. He currently serves as Vice President of the NYSBA for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He also serves as Chair of the NYSBA Audit Committee. He is a member and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction, and a current member of the NYSBA Committee to Review Judicial Nominations, the NYSBA Committee on Leadership Development and the NYSBA President's Committee on Access to Justice. He is also a former President of the SCBA, a member of the ABA House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and Vice Chair of the Board of Directors of Nassau Suffolk Law Services Committee, Inc. He is a partner at Lamb & Barnosky, LLP in Melville.

Increase Your Productivity with MS Office (Continued from page 5)

more helpful in certain circumstances. The "peek" view allows you to preview your calendar and upcoming appointments without having to leave mail. While in mail, simply hover your mouse over calendar and the peek view will appear. It shows where you are in the month and then lists all of your upcoming appointments for the next week. If you've assigned categories to specific appointments, they will appear in that color. You can also change the day you're viewing by clicking on a different date on the calendar.

You can also use "peek" to view tasks or people from other areas in Outlook. This can be especially helpful for quick access to the people you contact most; instead of performing a full search for their contact information, simply add them to your favorites in peek and you will be able to reach them in only one or two clicks.

Easily create a copy of a document while keeping the original intact

If you are not using document automation software, but you re-use the same content over and over, the easiest way to create new documents may be to develop a form and then customize some information for each individual client or matter. Rather than risking damage to the form, there's an easy way to create a copy of a document in Word, make your changes, and then save the new document in the proper file. Find the form you want to use, right-click on the filename and select either open a copy or new, depending on the version of Office you are running. Either of these steps will open a new document with the content from the old document, keeping the old document intact. Any changes that you make are saved to the copy. You can then save the new document to the appropriate file location.

Use Quick Parts to save time

Another way to save time when creating documents is by using Quick Parts. Quick Parts are building blocks that you create and save so that you can use them across multiple documents. So, for example, if there is a particular clause you insert into many of your contracts or a specific paragraph that you use to explain a legal concept to clients with regularity, you may want to consider creating a Quick Part from that block of text so you don't have to continue to reinvent the wheel.

To create a Quick Part, first type the text that you want to add as a Quick Part. Next, select the test, and on the insert tab in Word (or in an email message in Outlook), click Quick Parts. At the bottom of the menu that appears, select Save Selection to Quick Part Gallery. Another box will appear that will allow you to specify some details, including the name for your Quick Part and a short description if necessary. You can also categorize your Quick Parts if you develop a lot of them, to make them easier to find.

Once your Quick Part has been saved, you can re-use it in any document by clicking Quick Parts and choosing the desired Quick Part from the gallery.

A faster way to cut and paste text in a Word document

Using cut-paste (Ctrl-x and Ctrl-v) to move text from one place on the page to another within a Word document is fine. But you can also select any block of text and press F2 (the status bar at the bottom of your screen will display Move to where*)*. Place the cursor at the location where you wish to move the block of text. Press Enter and the selection will be moved. This feature works in older versions of Word as well.

I hope these tips help you to improve your productivity in 2016!

Note: Allison C. Shields, Esq. is the Executive Director of the Suffolk Academy of Law and the President of Legal Ease Consulting, Inc., which provides productivity, practice management, marketing, business development and social media training, coaching and consulting services for lawyers and law firms nationwide.

Claims Against Separate Property (Continued from page 6)

in value due to active involvement of one or both of the parties, whether directly or indirectly. Accordingly, the attorney's burden to hire experts is typically satisfied in obtaining two valuations: date of marriage and date of commencement of the action. The non-titled spouse's interest is thereafter determined by showing direct and indirect contributions to the increase in value during the marriage. Practitioners must note, however, that in instances where the business to be valued also holds assets that are subject to passive increases in value, the multiple appraisals discussed above may have to be secured in the context of the business valuation.

Note: Brian Johnson is a partner with the law firm Campagna Johnson, P.C. where he concentrates his practice almost exclusively on matters pertaining to family and matrimonial law. He has been a member of the Suffolk County Matrimonial Bar since 2011, and has served on the Bar's Board of Directors since his election thereto in 2014.

Rights of Gay and Lesbian Couples to Custody and Visitation (Continued from page 8)

the presumption is conclusively determined to be the child's parent, regardless of the existence of "obvious biological differences" that might physically preclude such a presumption from being true.

It helps if the presumption is imported from another state. In 2010 the Court of Appeals was able to grant parental access to the non-biological parent Debra H. in *Debra H. v. Janice R.*, 930 N.E.2d 184, despite rejecting her request that she be granted *de facto* parent status, because it deferred to a Vermont case (*Miller-Jenkins v. Miller-Jenkins)* involving a same sex civil union in which a child born during the union was deemed the child of the union. In that case, the Vermont court applied a Vermont equivalent of MEA that conferred the same rights on parties to a civil union as the parties to a marriage enjoyed, and concluded that the presumption of legitimacy applied equally well to a same sex union.

The New York Court of Appeals was able to use the Vermont case to give Debra H. parenting rights because the parties in *Debra H.* had been married in Vermont, and the New York court granted that marriage recognition ("comity") in New York. Once it recognized the Vermont marriage, it used Vermont law and applied the Vermont *Miller-Jenkins* case to the facts, by which it concluded that the marital presumption *under Vermont law* required the court to treat the child as the biological child of Debra H.

A similar result was reached on similar facts by the Suffolk County Family Court in *Kelly S. v. Farah M.* (V-06922-14, NYLJ 1202721838331, (Decided March 13, 2015, Poulos, J.). As in *Debra H.*, the Court in *Kelly S.* was compelled to reject equitable estoppel as a basis for the petitioning non-biological parent of two children born to the domestic partnership and, later, the marriage of the lesbian couple, to assert standing to sue for custody or visitation. Instead, the court utilized California law because the parties had strong connections with that state, having met, partnered, and married there, and the subject children were born and largely raised there. Under California law, one of the two subject children was presumed to be legitimate because he was born during the marriage. The child born just prior to the marriage, but after the parties had registered as domestic partners, was likewise presumed to be legitimate under a California statute that extended the same protections to domestic partners as enjoyed by married couples.

The court in *Kelly S.* pointedly followed the reasoning of the Court of Appeals in *Debra H.*, where a sister state's interpretation of the presumption of legitimacy as conclusive of legitimacy was adopted because, under principals of comity, it was not contrary to the prohibitions of natural law or the express prohibitions of statute. Unlike *Debra H.*, however, the Suffolk County Family Court interpreted the presumption of legitimacy afforded by California statutory law to be conclusive, whereas in *Debra H.*, the Court of Appeals was able to use the Vermont Supreme Court's interpretation of its own statute in determining that the presumption of legitimacy was conclusive.

The simple approach is always best, of course. The cases in which standing is an issue involve same sex couples who have not adopted or had an artificial insemination certified by a physician in the manner prescribed by Domestic Relations Law section 73. In a perfect world, every couple would plan a family with statutory compliance in mind. But we take 'em as we find 'em.

Note: Clifford J. Petroske is the managing partner of Petroske Riezenman & Meyers, P.C., a full service firm located in Bohemia. He has been practicing law on Long Island for over twenty-five years, and has devoted his practice to matrimonial and family law cases at the trial and appellate levels. Mr. Petroske is a member of the Family Law Committees of the Suffolk County and New York State Bar Associations, and the Suffolk Country Matrimonial Bar Association. He is the author of numerous articles on divorce and family law issues, at PetroskeLaw.com.

Suing the Mortgage Loan Servicer (Continued from page 18)

being set up for a lawsuit. The loan servicers are disadvantaged in that they cannot hire adequate help to conform to the "burden" created by the CFPB regulations. This may be because loan servicers do not and probably cannot adequately train the personnel in their loss mitigation departments. Computers and loss mit software govern their loan modification processes. There is very little human involvement at the servicer side concerning the application, the RFI and the NOE. Where humans are involved they are usually untrained or lack proper training in CFPB loss mitigation compliance. As a result servicer errors are pervasive.

A successful CFPB case depends upon the case being set up correctly from the very beginning. The process entails performing a complete forensic review of the modification application and the approval or denial by the loan servicer. These reviews require a high degree of technical knowledge and a comprehensive paper trail that documents the servicer's errors.

The Suffolk Academy of Law is presenting a CLE on January 20, 2016 on this topic. I am honored to be able present this program with Marc Dann Esq. and Robert Rivera as speakers. Marc Dann is the former attorney general for the state of Ohio. He has an active practice in foreclosure defense and with CFPB litigation in Cleveland. Robert Rivera is probably the most knowledgeable loan modification consultant I have ever met. Mr. Rivera's office is just outside of Philadelphia. The CLE is an introductory level course.

Defining Armed Forces (Continued from page 6)

with eight years of service as an officer in any reserve united of the armed forces or five years of active duty as merchant marine officer. However, it is important to point out that the application for appointment to the armed forces falls upon graduates. The United States Court of Appeals differentiated the USMMA from other military academies in *Whalen v. Office of Personal Management*, 959 F.2d 924 (Fed. Cir. 1992) in affirming the denial of a government employee's request for civil service credit for retirement purposes for time spent as a cadet midshipman at the USMMA. The Court of Appeals found that "The USMMA is a civilian institution and is not subject to the provisions of 10 USC § 971. 10 USC § 971 (b)(1) is explicitly direct to attendance at the service academies of the armed forces, for the purpose of computation of military service. The USMMA is not a military academy and is not listed in § 971." *Whalen v. Office of Personal Management*, 959 F.2d 924, 925-926 (Fed. Cir. 1992)

The common usage of "armed forces" is just a microcosm of how vague language in a stipulation of settlement or separation agreement can create a myriad of issues later down the line for divorcing couples. However, by constructing a carefully drafted and concise agreement, future litigation for clients can be avoided.

Note: Brittany C. Mangan is an associate at McGuire Condon P.C., which focuses primarily on the practice areas of matrimonial and family law. Ms. Mangan is presently serving as Co-Chair of the Membership Services & Activities Committee. She can be reached at bcmangan@mcguirecondon.com or (631) 421-8600.

Parental Alienation Syndrome (Continued from page 9)

and justified to suspend their continuing child support obligation. In the matter of *Coull v. Rottman,* the Appellate Division, Second Department, held that evidence warranted suspension of the father's child support obligation. *In the Matter of Robert Coull v. Pamela Rottman,* 131 A.d.3d 964 (2015). In *Coull,* the father appealed from a Family Court decision wherein the court denied his petition for modification of visitation and suspension of his child support obligation.

The mother cross-petitioned and the court held that the father's petition was denied and granted mother's petition to modify the prior custody and visitation order and ordered the suspension of father's visitation rights with his son. Family court held that there was a sound and substantial basis on the record to show that compelling the 13-year-old son to visit with his father would actually be detrimental to the child's wellbeing. The courts are finally sending a message, and it's about time.

Superior courts worldwide are now recognizing parental alienation as serious child abuse with long-term effects and grim outcomes for children. Some jurisdictions in Brazil and Mexico have even enacted parental alienation as a criminal offense. Moving forward, should all the jurisdictions follow suit, we may be able to curb some of this abhorrent behavior, although we will never be able to eliminate it completely and that is just fact.

Dote: Emily Bermudez is a senior associate with the law firm of Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP located in St. James. Ms. Bermudez engages in the general practice of law with an emphasis on matrimonial and family law with the firm.

[1] PAAO- Raising Awareness of Parental Alienation and Hostile Aggressive Parenting. *Parental Alienation Awareness Organization*. April 2015

[2] Excerpt from: Gardner, R.A. (1998), The Parental Alienation Syndrome, Second Edition, Cresskill, NJ

Commercial Litigation in New York State Courts (Continued from page 10)

Cardozo[1] and Karl Llewellyn,[2] through the establishment of the Commercial Division of the New York Supreme Court in 1995, through the present. Chief Judge Lippmann points with obvious pride to the fact that New York's Commercial Division has provided the business community with a viable alternative to the federal courts, courts of other states and alternative dispute resolution, and now serves as a model for the creation of business courts in many other jurisdictions.

The ensuing chapters of the treatise follow the progress of a commercial case, beginning with a series of chapters addressing the procedural aspects of handling a commercial matter in general. There are chapters covering such threshold subjects as case investigation and evaluation, determining jurisdiction and venue, identifying claims and parties and preparation of pleadings.

Continuing chronologically along the procedural continuum of commercial litigation, the treatise includes chapters on pre-trial procedure. There are separate chapters covering the major disclosure devices including bills of particulars, document discovery, interrogatories, requests for admissions, depositions and expert witness disclosure.

The chapter on document discovery is particularly useful because it contains a detailed and insightful cutting-edge discussion of the developing law of New York governing electronic discovery including, *inter alia*, discovery of electronic records stored in the cloud, discovery of social media sites, discovery of electronic records stored on personal devices, e-mail, text message and instant message policies and telecommuting policies. The text also covers the alternative means of searching for electronically stored information ("ESI") including, *inter alia*, objective culling, technology-assisted review such as keyword searches and predictive coding and the outsourcing of document review. The reader will also find a valuable examination of the form and manner of ESI production, including production of metadata, and cost-shifting in connection with the production of ESI.

Moving on along the procedural road to trial, the Fourth Edition contains chapters on selection of experts, pretrial motion practice (including a separate chapter on summary judgment), calendar practice and settlements.

With respect to trials, there are chapters devoted to topics including jury selection, opening statements, direct and cross examination, treatment of expert witnesses, admissibility of evidence, use of demonstrative evidence, and closing arguments. There are also chapters on damages, judgments, effect of bankruptcy on pending litigation, attorney's fees, costs and disbursements, sanctions, enforcement of judgments and appeals.

In addition, there are chapters covering many substantive areas of law, which commonly spawn commercial litigation, including contracts, insurance, bank litigation, letters of credit, collections, employment and restrictive covenants, sale of goods, warranties, bills and notes, secured transactions, agency, partnerships, products liability, mergers and acquisitions, securities litigation, shareholder derivative actions, director and officer liability, not-for-profit institution litigation, health care institution litigation, broker-dealer litigation and arbitration, professional liability litigation, franchising, antitrust litigation white collar crimes, the interplay between commercial and criminal actions, misappropriation of trade secrets, intellectual property, right of publicity claims, privacy and security, commercial defamation, consumer protection, e-commerce, information technology litigation, governmental entity litigation, CPLR Article 78 challenges to administrative determinations, commercial real estate litigation, construction litigation and environmental and toxic tort litigation.

One chapter of particular interest and great value is that containing a cutting-edge discussion of the evolving law of social media; *i.e.*, internet platforms in which members generate content, which they share within a community. Among the better known social media platforms discussed in this chapter are Facebook, Twitter, MySpace, Google+, Instagram, Wikipedia and LinkedIn. As discussed, there may be ethical implications and legal consequences when a lawyer posts information on social media or attempts to access a user's information. Because anything posted by a lawyer might become public, the text recommends that a lawyer should never post information about a client, and should never post information which contradicts that which the lawyer has told others (for example, don't post that you are leaving on vacation when you have advised the court that you will be on trial, and don't refer to the judge in disparaging terms).[3]

Of course, a lawyer utilizing social media as a means of soliciting business is bound by the rules governing attorney advertising which are contained in the *New York Rules of Professional Conduct,* and the text reviews in detail how those rules apply. The text also addresses concerns raised by use of social media by judges and jurors, as well as issues raised by interaction with judges and jurors by use of social media. There is also an important discussion about an attorney's use of social media as a means of case investigation and discovery. This chapter should be required reading for all litigators — commercial or otherwise.

In conclusion, it is the opinion of this reviewer that the Fourth Edition of *Commercial Litigation in New York State Courts* is an indispensable resource, which should be a part of every commercial litigator's library. Bob Haig and the many judges and lawyers who contributed to this great work are truly deserving of the thanks of the commercial litigation bar for providing us with a comprehensive, authoritative, up-to-date and eminently readable source of pertinent information and invaluable practical and strategic advice.

Note: Scott M. Karson is a partner at Lamb & Barnosky, LLP in Melville, where he chairs the Litigation Committee and Professional Ethics Committee. He is the Vice President of the New York State Bar Association for the Tenth Judicial District and serves on the NYSBA Executive Committee and in the NYSBA House of Delegates. He also serves as Chair of the NYSBA Audit Committee. He is a member and former Chair of the NYSBA Committee on Courts of Appellate Jurisdiction, and a current member of the NYSBA Committee to Review Judicial Nominations, the NYSBA Committee on Leadership Development and the NYSBA President's Committee on Access to Justice. He is also a former President of the Suffolk County Bar Association, a member of the American Bar Association House of Delegates, a member of the ABA Judicial Division Council of Appellate Lawyers and Vice Chair of the Board of Directors of Nassau Suffolk Law Services Committee, Inc.

[1] As an example of Cardozo's contribution to commercial jurisprudence, the text points to *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928), in which he offered his classic definition of fiduciary duty: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

[2] Llewellyn was the principal author of the Uniform Commercial Code.

[3] The text provides examples of lawyers who have suffered discipline and/or adverse employment consequences by violating these seemingly self-evident guidelines.

Attorneys' Eyes Only (Continued from page 14)

harms would arise from allowing plaintiff's attorneys to review the documents with a limited number of employees, and defendant did not show a clearly defined serious injury.[9] Rather, the *Global Material* court recognized the needless difficulty that plaintiff would incur in light of the over-designation:

It is important to note that an additional consideration in determining whether the continued AEO designation is appropriate is to weigh the risks to the defendants from disclosure against GMT's need to view the information in order to litigate its claims. [] Great care must be taken to prevent the unnecessary curtailment of a party's trial preparation. [] But trial preparation and trial itself are made significantly more difficult and expensive when a party's attorney is unable to share with the party facts that are material to its prosecution of the case. [] That is especially true here, where GMT's claims turn in part on whether it can prove that the defendants misappropriated its customer and pricing information in an attempt to lure away its business.[10]

Interestingly, the *Global Material* court upheld the non-party's AEO designations, finding that a non-party's showing of good-cause is less demanding because non-parties "are limited in their ability to control the manner in which parties use their confidential commercial documents."[11]

In light of the competing concerns between protecting a client's sensitive information and full disclosure to an adversary, counsel must carefully consider the definition and type of documents entitled to AEO designation in a Protective Order, and the potential for abuse that may arise if an AEO provision is included in a Protective Order.

Note: Leo K. Barnes, a member of Barnes & Barnes, P.C. in Melville, practices commercial litigation and can be reached at LKB@BARNESPC.COM.

[1] 2012 WL 2054243 (E.D.N.Y. 2012).

[2] *Id.*, at *5.

[3] *Global Material Technologies Inc. v. Dazheng Metal Fibre Co. Ltd.*, Docket No. 12-cv-1851, at 6 (N.D. Illinois, Sept. 23, 2015).

[4] See *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615, at 20-22 (S.D.N.Y. 2014)(imposing sanctions for over-designating documents as AEO).

[5] The full version of the New York City Bar Association's Model Protective Order can be found at http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf

[6] *Id.*, at 1.

[7] *Id.*, at 2-3.

[8] *Supra*, note 3.

[9] *Id.*, at 7-11.

[10] *Id.*, at 13-14.