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Westchester Bar Journal

Volume 44, No. 1 Fall 2019

Articles

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Westchester County Bar Association

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The editors encourage the submission of manuscripts for publication in the *Westchester Bar Journal*. All submissions should be forwarded to the WCBA electronically in Microsoft Word format as attachments to: editor@wcbany.org. Please indicate in the subject line of the email that an article for the *Westchester Bar Journal* is attached. Please feel free to call the Bar office at 914-761-3707, ext. 40, with any questions.

Articles should be between 1200 and 4000 words in length, and all citations should be written in accordance with a Uniform System of Citation published by The Harvard Law Review Association (popularly known as the "Blue Book"), and accuracy thereof verified by the author. Articles should be free from electronic formatting such as page numbering, headers or footers. "All caps" text formatting should NOT be used. All articles should be accompanied by a brief biography of the author(s), as well as digital headshot(s) as high resolution JPEGs.

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From the Editor-in-Chief

BY MONA D. SHAPIRO, ESQ.

I invite you to enjoy this edition of the Westchester Bar Journal, a varied compilation of well-researched articles by fellow practitioners elucidating timely topics and drawing our attention to recently decided cases. This is my last opportunity to tout the Journal since I am stepping down as Editor-in-Chief. As I have previously, I urge you to consider contributing your learning, thoughts, and ideas to future editions.

Some thanks are in order. First, to Kelly Welch who tapped me for this honor. Also, to Stephanie L. Burns, who will be ascending to my position. Thank you and enjoy! Finally, to Mary Ellen McCourt, now retired, whose devotion and competence have made the Journal possible, and whose humor and intelligence have lightened my tasks. I will miss her.

From the President

BY HON. LINDA S. JAMIESON

Welcome to the Fall 2019 Edition of the Westchester Bar Journal. Our Bar Journal gives our members and contributors an opportunity to publish more scholarly articles than those that appear in our monthly magazine, The Westchester Lawyer. We welcome all articles for future editions, whether short or long. As you will see from this edition, a variety of articles are published, and important issues addressed.

The Journal includes seven interesting and learned articles. There is the annual update of Tax Certiorari and Eminent Domain cases; the annual update on Estate Litigation and Estate Law; as well as an update on estate cases out of the Appellate Divisions; an article on use of Guardians Ad Litem in custody proceedings and one on the Pooled Community Trust and its use. Additionally, you will find an extremely interesting article on how courts have treated the distribution of embryos. Finally, there is an article by my esteemed colleague, Justice Giacomo, on when matrimonial attorneys are denied fees for failure to comply with 22 NYCRR Part 1400.

I am well into my term of office—more than halfway there—and I continue to learn more about this association and the people who are its members. It has been a privilege and an honor to lead this organization. During these last months, we have had many successful events and CLEs. It all began with our Annual Banquet at Brae Burn Country Club in May. It was a wonderful event, with four hundred people in attendance, and our esteemed Keynote Speaker, Colleen McMahon, Chief United States District Judge of the United States District Court for the Southern District of New York, delivered a superb speech.

In June, we celebrated the diversity of our legal community at our an-

nual BBQ and Blues event at the Bayou Restaurant in Mount Vernon. We enjoyed a wonderful feast and networking function presented jointly with the Westchester Black Bar Association, Westchester Women's Bar Association and the American Hispanic Business and Professional Association of Westchester. Days later, we paid tribute to, and celebrated the lives of, the colleagues lost to our profession and community through the eloquent words of Past President P. Daniel Hollis III and the Honorable Kathie E. Davidson, Administrative Judge of the Ninth Judicial District, who presided over the annual Memorial Ceremony held on June 20th in Courtroom 800 of the Westchester County Courthouse. Those honored were Richard S. Birnbaum, Hon. Louis C. Palella, Hon. Thomas A. Dickerson, Stephen Kenneth Flink, Neal S. Futerfas, Hon. John Henry Galloway III, Hon. Regina F. Kelly, Hon. James Reitz, and Hon. Joseph F. Nocca.

Our Westchester County Bar Foundation presented the 2019 Joseph F. Gagliardi Award for Excellence in September. This year's annual award, recognizing exceptional non-judicial employees in the Ninth Judicial District for their outstanding service to the public and dedication to the administration of justice, was presented to Renee S. Motola, Esq., Principal Law Clerk to the Honorable Bruce E. Tolbert, Supreme Court, and Joseph F. Beck, New York State Court Officer, Sergeant, Dutchess Supreme and County Courts. Our annual Golf Outing at Whipporwill Golf Club on September 23rd was spectacular. It was a great day for golf and a fantastic evening for conviviality. Finally, on October 2nd, we had a most successful "Meet the Judges" event in the Tudor Room of the Elisabeth Haub School of Law at Pace University. I hope you all enjoyed these events as much as I did and join me in looking forward to all of our coming events.

In conclusion, I want to thank Mona D. Shapiro for taking on the task of being Editor-in-Chief of the Westchester Bar Journal. The hours she has spent to put forth this edition, and all the past editions, are greatly appreciated and I thank her for her most distinguished service over the years. This will be her last Journal, as she is handing over the reins to Stephanie L. Burns, our Deputy Editor, and soon to be Editor-in-Chief, who I thank for stepping up and for all her years of service.

And of course, I want to thank Mary Ellen McCourt, the Association's Design and Production Manager, who will be retired by the time you read this, for her longstanding commitment and service. Without all of their labors, this edition would not have been possible. Lastly, please consider being an author published in the next edition of the *Westchester Bar Journal*. I hope everyone enjoys this edition!

Scaling the Best Interests of the Frozen Embryo

BY EMILY R. BANDOVIC, ESQ.

I. Introduction: Legally Categorizing an Embryo

The United States Supreme Court has long recognized that parents have a liberty interest in the upbringing of their children.[1] Accordingly, jurisprudence acknowledges that there is a fundamental right to parenthood embedded in the Fifth Amendment[2] under our United States Constitution. However, for some individuals, it is biologically impossible to reproduce.

Artificial Reproductive Technology ("ART") procedures involve "surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman."[3] An embryo may form from the combination of the man's sperm with the woman's eggs. In other words, an embryo is a fertilized egg. The Center for Disease Control and Prevention ("CDC") has stated that, after ART, the embryo can be implanted in the woman's body or donated to another woman.[4] However, there are two very important alternatives. Unimplanted embryos may be either frozen for future use or destroyed.[5]

If a frozen embryo is deemed property, any disputes that arise may be resolved through property law or contract law. Conversely, if a frozen embryo is deemed a human life, some constitutional protections will take effect. What does the legal classification of an embryo have to do with family or matrimonial law? Interpersonal conflicts surrounding frozen embryos tend to erupt during divorce proceedings. While marital property is subject to equitable distribution, a child in common triggers proceedings for custody and support. As the Supreme Court of the United States tends to avoid addressing matters surrounding domestic relations disputes,[6] there is no binding precedent that speaks directly to the issue. State courts have been left to determine whether a frozen embryo is marital property, subject to equitable distribution, or a human life requiring the court to engage in a custody analysis.

This article is not intended to rehash an analysis as to whether an embryo should or should not be deemed a person. Rather, it will explore how different jurisdictions currently view frozen embryos in divorce actions, and how those approaches would be modified if courts were to apply a best interest analysis to embryos,[7] similar to the standards in a custody dispute. Inspired by the factors considered for the best interest of the child standard, this article proposes a theoretical test that articulates how a court could engage in such an analysis for purposes of considering the best interest of an embryo, along with the legal consequences that would follow.

II. How Divorce Courts Handle the Issues

Courts have generally agreed that, for constitutional purposes, frozen embryos are not considered persons. There are thus three major approaches that may be used to determine the disposition of frozen embryos: (1) the balancing approach; (2) the contract approach; and (3) the mutual consent approach. Courts engage in a balancing approach by weighing the parties' interests in the frozen embryo; the court then attempts to balance those conflicting interests with one another.[8] Courts that utilize the contract approach distribute the frozen embryos as previously agreed by the parties in a written agreement.[9] The mutual consent approach mandates that frozen embryos cannot be distributed to or destroyed by either party without both parties' mutual and contemporaneous consent.[10]

A. The Balancing Approach

It was not until 1992 that the issues surrounding the disposition of frozen embryos found their way into an American court. During a divorce action in *Davis v. Davis*, a Tennessee court considered whether an embryo constitutes property or a human life.[11] The husband had wanted the frozen embryos destroyed, while the wife had wanted to donate them to another couple.[12] The court held that the party wishing to avoid procreation

should prevail where a dispute exists as to custody of embryos.[13] The court had reasoned that embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[14] However, the Tennessee court acknowledged that if the party seeking custody of the embryos has no reasonable alternative to achieve parenthood, then the parties' respective interests would require further analysis.[15] In other words, each party's interests must be weighed before determining the disposition of frozen embryos, giving rise to what we now know as the balancing approach.[16]

New Jersey has also adopted the balancing approach. In *J.B. v. M.B.*, the court addressed the disposition of frozen embryos during a post-divorce action.[17] The wife had wanted the frozen embryos to be destroyed, while the husband wanted to donate them.[18] The New Jersey court ruled in favor of the wife, reasoning that the wife's fundamental right not to procreate would be "irrevocably extinguished" by allowing the possibility of a surrogate mother birthing the wife's child through use of her frozen embryos.[19] Thus, similar to the Tennessee court, the New Jersey court held that the decision of what to do with frozen embryos should consider and appropriately balance both parties' interests.[20]

B. The Contract Approach

In a 1998 matrimonial action, the New York Court of Appeals also rejected the notion that embryos are "persons" for constitutional purposes and adopted a contract approach for evaluating their disposition.[21] In *Kass v. Kass*, the wife sought sole custody of pre-zygotes created during the parties' marriage, which they had planned to use for in vitro fertilization ("IVF").[22] The court rejected the wife's argument that denying her custody of the embryos would infringe upon her "right of privacy or bodily integrity in the area of reproductive choice."[23] Rather, the court considered that the parties had already entered into a stipulation addressing the disposition of their embryos in the event of a divorce. Because the "question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to 'special respect[.]'" [24] The court went on to hold that "[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."[25] The court therefore declined to engage in the same analysis as utilized by the Tennessee and New Jersey courts.[26]

C. The Mutual Consent Approach

In *In re Marriage of Witten*, the Iowa court rejected both the balancing approach and the contract approach.[27] There, the wife had appealed a dissolution decree issued by the lower court which had enjoined the parties

from unilaterally using their frozen human embryos presently being stored at a medical facility. The court held that (1) the statute governing child custody did not apply to frozen human embryos;[28] (2) enforcing a prior agreement regarding the use or disposition of embryos when a party had changed his or her mind would run contrary to public policy; (3) an agreement entered into at the time of IVF is enforceable and binding, subject to the right of either party to change his or her mind regarding the dispositions of the embryos; and (4) where donors cannot reach a mutual decision on disposition, then the transfer, release, disposition, or use of the embryos would be prohibited without a signed authorization from both donors. [29]

The Iowa court reasoned that the balancing test conflicts with public policy, "similar to those that prompt courts to refrain from enforcement of contracts addressing reproductive choice …"[30] It went on to reason that public policy would also prohibit the courts from substituting its decisions in a highly emotional and personal area by addressing the disposition of frozen embryos.[31]

The Iowa court also rejected the contract approach, holding that "agreements entered into at the time [IVF] is commenced are enforceable and binding on the parties, 'subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryos.'"[32]

Iowa relied on a theory which follows a contemporaneous mutual consent approach. Under the mutual consent theory, "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo."[33] Accordingly, when a couple is "unable to agree to any disposition decision, the most appropriate solution is to keep the embryos where they are – in frozen storage."[34] As maintaining frozen embryos is neither final nor irrevocable, this approach preserves the opportunity for partners to reach an agreement at a later time.[35]

Although the Iowa court rejected the best interest standard, it is one of few courts to have engaged in any extensive analysis. Like most jurisdictions, Iowa has a statute mandating that courts evaluate custody disputes in light of the best interest of the child.[36] However, the court declined to apply this standard, reasoning that the legislature did not intend to include fertilized eggs or frozen embryos within the scope of its statute.[37] The court noted that disputes over frozen embryos do not involve physical or emotional contact between both parents and a child; rather, such disputes encompass a decision whether the parties will be parents at all.[38] Thus, considering which parent could most effectively raise a child when the "child" is still frozen in a storage facility would be premature.[39]

III. The Best Interest of the Embryo: Entertaining an Analysis of First Impression

It is true that the courts have declined to view frozen embryos as persons for constitutional purposes. But perhaps the courts were too quick to dismiss the best interest standard before ruling on the disposition of frozen embryos in divorce proceedings? The best interest of the child is an analysis mandated by judicial and/or statutory authority for the purpose of protecting children.[40] For example, courts will generally enforce stipulations agreed to between parties in the area of domestic relations, such as prenuptial, marital, and separation agreements. Nevertheless, where such agreements implicate a child, that child becomes a third party to the contract. The child cannot be legally bound to that contract between his or her parents without review by the court. The court will measure that agreement accordingly against the best interest of the child.[41] The court's judicial role in such disputes is frequently known as *parens patriae* (parent of the nation).

"The best interests standard will be applied at all stages of judicial proceedings… A court cannot be bound by an agreement as to custody and visitation, or either custody or visitation, and simultaneously act as *parens patriae* on behalf of the child."[42] This stems from the common law notion that a child has a fundamental right to a "wise, affectionate, and careful parent."[43] Still, given a frozen embryo's "potential for human life[,]"[44] it is fair to assume, for the purposes of argument, that a frozen embryo shares the same fundamental right to a wise, affectionate, and careful parent.

A. Applying the Best Interest Standard in General

Courts are generally required to award custody in accordance with the best interest of the child. The Uniform Marriage and Divorce Act sets forth the considerations the courts often take into account when deciding custody: (1) the wishes of the child's parent or parents as to his or her custody; (2) the wishes of the child as to his or her custodian; (3) the interaction and interrelationship of the child with his or her parent(s), sibling(s), and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his or her home, school, and community; and (5) the mental and physical health of all individuals involved. When considering the distribution of frozen embryos, because an embryo is not considered a person and has no life experiences, the only two applicable factors would be the wishes of the embryo's parent(s) as to the embryo's custody, along with the mental and physical health of all individuals involved. Thus, the best interest of the embryo could require the consideration of additional factors and a different analysis than determining custody of the child.

In determining child custody, some courts apply rebuttable presumptions that encompass a variety of circumstances. In *Garska v. McCoy*, for example,

the West Virginia court found a primary caretaker presumption, holding that there is a presumption in favor of the primary caretaker for a child of the tender years of age.[45] Thus, absent a showing that the primary caretaker is an unfit parent, custody must be awarded to that primary caretaker.[46] The court referenced ten factors for purposes of determining which parent is the primary caretaker.[47] Such factors include which parent feeds, grooms, disciplines, educates, and transports the child, along with which parent provides medical care, education, and social interaction for the child.[48] Still, the presumption is subject to criticism on the grounds that one parent may have a more hands-on approach to raising the child, while the other parent may be the financial caregiver with a hands-off approach. It is unclear how a court would apply such a test to a frozen embryo.

Where an embryo is in the stages of early development, outside of the womb, while still frozen in a petri dish, there is no traditional primary caretaker. The embryo simply requires storage, along with money to fund that storage. In the most basic sense, the clinic where the frozen embryo resides could be deemed the primary caretaker. On the other hand, the parent paying the clinic for the embryo's storage could also be deemed the primary caretaker.[49]

A court would likely not presume that the parent who wants the frozen embryo destroyed or donated is the primary caregiver. However, does this mean that a parent who wants the embryos destroyed or donated waives standing to obtain custody of the embryos at a later date? Let us consider the following scenario: John and Jane Smith utilized ART and had been paying for the storage of the frozen embryos on a pro-rata basis. Years later, John and Jane sought divorce. Jane wants the embryos to remain frozen in the storage facility for later use, while John wants them destroyed. Let us assume that the court rules in favor of Jane, ordering her to pay the clinic for storage. One year later, John changes his mind and hopes to use the frozen embryos with his new wife. Has John waived his rights to the frozen embryos? In other words, did his original position that the embryos should be destroyed defeat his chance to parent the frozen embryos? Would the court recognize a presumption that Jane is the primary caregiver solely because she paid for the storage facility for the past year, even though John paid for storage on a pro rata basis for seven years? Paying to keep the embryos frozen should not satisfy the primary caretaker presumption for purposes of determining the best interest of the embryo.

Paying for the storage facility could be one factor, but not the only factor to consider. Although the embryo does not need to be fed, groomed, disciplined, transported, educated, socialized, or provided with medical care, it will when it becomes a child. Thus, a court could determine which parent is a "wise, affectionate, and careful parent"[50] based upon an analysis

of which party is likely to *become* the primary caretaker in the event that the embryo grows into a person. In doing so, the court could consider the following theoretical test: (1) the wishes of the embryo's parent or parents as to the embryo's custody; (2) the mental and physical health of all individuals involved;[51] (3) the financial competency of all individuals involved; and (4) whether the party opposing destruction or donation would be an unfit parent. For example, if the future child is likely to be subjected to abuse or neglect, then gestating might not be in the embryo's best interest. Now, we will explore how this theoretical test to determine how the best interest of the embryo would impact the balancing approach, the contract approach, and the mutual consent approach.

I. Applying the Best Interest Standard to the Balancing Approach

We know that courts engage in a balancing approach by weighing the parties' interests in the frozen embryo. Thus, under the theoretical four factor test, the court would be required to balance the parties' interests in light of the best interest of the embryo. In *Davis*, the court held that embryos occupy "an interim category that entitles them to special respect because of their potential for human life."[52] However, the court reached its holding without providing the embryos with any sort of special respect or consideration in its analysis. Instead, the court only considered the parties' interests, holding that the party wishing to avoid procreation should prevail, unless the party seeking custody has no reasonable alternative to achieve parenthood.[53]

To reconsider our theoretical four factor test[54] for evaluating the best interest of the frozen embryos under the balancing approach, let us return to Jane and John Smith, with a few modified facts. John and Jane utilized ART but later sought divorce. Jane suffers from endometriosis and will be unable to have biological children unless she uses the frozen embryos. Accordingly, Jane wants legal custody of the embryos to use at a later date, while John wants them destroyed. As Jane is seeking to use the frozen embryos, the potential for human life is high, and a best interest analysis should be triggered.

First, the court would consider the wishes of each party, which should be appropriately balanced. As Jane has no reasonable alternative means to parenthood, her interests in the embryos arguably outweigh John's interests. Thus, the first element would be satisfied in Jane's favor. Second, the court would consider the mental and physical state of both parties.[55] Third, the court would consider the financial competency of all individuals involved. For example, if Jane cannot afford to pay for the storage facility without financial assistance from John, then the third element would be satisfied in John's favor. Alternatively, if Jane could afford the costs without John's assistance, then the

third element might be satisfied in Jane's favor. Under the fourth factor of our theoretical test, courts would have to consider whether the first three factors provide any insight as to whether Jane would be a fit parent.

In considering whether Jane would be a fit parent, the court may utilize the factors used under the caretaker presumption.[56] For example, while Jane may have the funds to pay for the storage facility, she may not have the financial stability necessary to raise a child without financial support from John. This is one of many scenarios that could tilt the scale in John's favor. Where a party seeks to destroy frozen embryos, but the party seeking custody prevails, the court would presumably not order the objecting party to pay future child support. Without any means to provide for the future child, Jane might be an unfit parent, and the court might rule in favor of John.

That concludes our four factor analysis in applying the best interest standard to the balancing approach. In sum, the parties' conflicting interests are still weighed and appropriately balanced, but in light of the best interest of the embryo. After all, embryos "are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."[57]

2. Applying the Best Interest Standard to the Contract Approach

We already know that courts following the contract approach will distribute frozen embryos as previously stipulated to by the parties in the form of a contract or settlement.[58] In applying the best interest standard to the contract approach and ordering the disposition of frozen embryos, the court would be assuming its judicial role as *parens patriae*. Accordingly, courts would need to review such contracts in a divorce action by measuring the agreement against the embryo's best interest.[59]

Where a divorcing couple has previously stipulated to the destruction of their frozen embryos in the event of a divorce, the theoretical best interest standard would provide three potential scenarios. First, if both parties wish to uphold the contract by destroying the embryos, then the embryos have no potential for human life. In such an instance, a best interest analysis need not be applied, and the contract would be upheld. Second, if one party wishes to preserve the embryos for later use, contrary to their original contract and in spite of the other party's objection, the court would need to consider the best interest of the embryo by evaluating the parties' wishes, health, financial competency, and the parental fitness of the potential primary caretaker. Third, even if both parties agree to preserving the eggs contrary to their original contract, the court would nonetheless have to apply a best interest analysis in acting as *parens patriae*. Thus, the court would again have to consider the parties' wishes, health, financial competency, and the parental fitness of the potential primary caretaker.

Returning to John and Jane Smith to consider the theoretical four factor test[60] for evaluating the best interest of the frozen embryos under the contract approach, upon their divorce there are three possible scenarios. If neither John nor Jane object to the destruction of the embryos, there is no potential for human life, and the court will uphold their contract as to not inhibit the constitutional right to choose *not* procreate.[61] In the alternative, if Jane no longer wishes to abide by the terms of the agreement, and wants to preserve the embryos for use at a later date, a best interest analysis would need to be considered.[62] Lastly, if both John and Jane mutually agree that Jane could use the embryos at a later date, contradicting their original contract, a court could resume its role as *parens patriae* to determine whether such a mutual breach should be upheld by the courts in light of the theoretical four factor test.[63]

3. Applying the Best Interest Standard to the Mutual Consent Approach

Under the mutual consent theory, "no embryo should be used by either partner, donated to another patient, used in research, or destroyed without the [contemporaneous] mutual consent of the couple that created the embryo."[64] Accordingly, when a couple is "unable to agree to any disposition decision, the most appropriate solution is to keep the embryos where they are – in frozen storage."[65] Thus, similar to the contract approach, before a party to a divorce action can use or donate its frozen embryos, the court would resume its role as *parens patriae*, even if the embryo's use is contemporaneously agreed to by the opposing party. Under our theoretical four factor test, the court would consider the parties' mutual wishes, the physical health and financial competency of the party seeking to use the embryo, and whether the prospective parent would be a fit parent.

To consider the theoretical four factor test[66] for evaluating the best interest of the frozen embryos under the mutual consent approach, let us consider John and Jane Smith in one final scenario. John and Jane Smith utilized ART, but sought divorce one year later. Jane wants the embryos to remain frozen, while John wants them destroyed. The court would not engage in a best interest analysis until both parties contemporaneously agreed. Accordingly, the embryos would remain frozen until John and Jane contemporaneously consented to a resolution.

B. Constitutional Implications Stemming from the Best Interest of the Embryo

The theoretical best interest standard would raise major constitutional and policy concerns. Applying the best interest standard to the balancing, contract, and mutual consent approaches would treat the frozen embryo as a person, which would overturn well settled precedent.[67] Thus, to enact such a standard, the Supreme Court of the United States would be required

to engage in another excruciatingly complex analysis as to when human life begins, which would implicate constitutional law,[68] contract law,[69] criminal law,[70] and, of course, family law.

If embryos were subject to any best interest analysis, they would have some of the same protections as children and persons under our Constitution, case law, and statutory law. Thus, what would a court's analysis look like if the parties contemporaneously consented to donating their embryos? The majority of states prohibit paying or accepting money in connection with any placement of a child for adoption.[71] States have also held that a surrogate parenting contract for full surrogacy violates public policy on the grounds that such a contract amounts to baby selling.[72] Would a couple agreeing to donate their frozen embryos in a divorce action amount to baby selling? Under a best interest analysis, if a court assumed its role as *parens patriae* and ordered the donation of the embryos, the donation could amount to a proper adoption, rather than baby selling.

In our society, we are often required to obtain a license before we are able to engage in an array of activities. Even to legally exercise some of the rights embedded within the Constitution, we are required to obtain a license. For example, it is well settled that the Constitution provides the fundamental right to marriage.[73] However, for a marriage to be legally recognized, the couple generally must obtain a marriage license. These prerequisites are generally imposed by statute. Although there has been a social debate as to whether potential future parents should be required to take and pass a test before being permitted to reproduce, such a statutory requirement would be immediately struck down for infringing upon the constitutional right to procreate or not to procreate.[74] However, applying the theoretical best interest of the frozen embryo test, would essentially subject potential future parents to a test before allowing them to procreate.

Conclusion: The Unknown Interest of the Embryo

The discussion of how courts should handle frozen embryos in a divorce proceeding gives rise to an array of political, moral, religious, and constitutional debates. To date, there is no uniform method to distributing embryos. On the one hand, giving courts the authority to act as *parens patriae* for a frozen embryo would empower the courts to potentially improve the upbringing of future children. On the other hand, it gives courts an unprecedented amount of power over family autonomy.[75] "The possibility of regulation potentially raises complex morality-based issues concerning the scope of government control over families… the government should focus on regulating medical procedures, not family formation."[76]

While the concept of applying the best interest analysis to embryos appears salutary in theory, at the very least, now we understand why frozen

embryos fall within an "interim category that entitles them to special respect..."[77] The best interest of the frozen embryo is sound only in theory. In spite of their "potential for human life[,]"[78] applying a best interest analysis to frozen embryos would give courts an unprecedented amount of power over family autonomy, which would effect an undermining of the foundation upon which family law has been built.

Endnotes

1 *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (Justice Scalia holding that parents have liberty interests in their children because "the term 'liberty' in the Due Process Clause extends beyond the freedom from physical restraint").

2 *See* U.S. CONST. amend. V.

3 CDC, *What is Assisted Reproductive Technology?* (updated February 7, 2017) at https://www.cdc.gov/art/whatis.htm.

4 *Id.*

5 Embryos that have been frozen are often held within a fertility clinic for later use or for purposes of donation.

6 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, J., dissenting) (opining that the Court is reluctant to create binding precedent that will strip states of their powers provided under the Constitution, which includes managing their own state domestic relations laws).

7 *See generally* Unif.Marriage & Divorce Act § 402 [Best Interest of Child] (1973).

8 *See Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992). *See also J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

9 *See Kass v. Kass*, 696 N.E.2d 180 (N.Y. 1998).

10 *See In re* Marriage of Witten, 672 N.W.2d 768, 778-79 (Iowa 2003).

11 *Davis*, 842 S.W.2d at 594.

12 *Id.* at 595.

13 *Id.* at 604.

14 *Id.* at 597; *cf. York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (the court ruled against a husband and wife in an action against a medical college to obtain possession of their pre-zygotes, holding that pre-zygotes are property and subject to a bailment analysis).

15 *Davis*, 842 S.W.2d at 604.

16 *Id.* at 597.

17 *J.B.*, 783 A.2d at 707.

18 *Id.* at 714.

19 *Id.* at 717. *See Roe v. Wade,* 410 U.S. 113, 152-53 (1973) (holding that the Due Process Clause protects the right of a woman to choose to terminate her pregnancy prior to viability, reasoning that the right of privacy is broad enough to

encompass a woman's right to choose whether to procreate or not procreate).

20 *J.B.*, 783 A.2d at 719-20. *See Davis*, 842 S.W2d at 597.

21 *Kass*, 696 N.E.2d at 174.

22 *Id.* at 179.

23 *Id.*

24 *Id.* (internal citations omitted).

25 *Id.* at 180 (internal citations omitted).

26 *Id.* at 179; *cf. Davis*, 842 S.W2d at 596-97; *J.B.*, 783 A.2d at 719-20.

27 *Witten*, 672 N.W.2d at 778-79.

28 *Id.* at 774-76 (the court found no authority supporting a "best interests" analysis in determining the disposition of frozen embryos, reasoning that the legislature did not intend to include fertilized eggs or frozen embryos within the scope of Iowa Code § 598.41). *See generally* Iowa Code § 598.41 (mandating that a court must issue a custody award that reflects "the best interest of the child").

29 *Witten*, 672 N.W.2d at 771-784.

30 *Witten*, 672 N.W.2d at 779. *See* Matter of Baby M, 537 A.2d 1227, 1246 (N.J. 1988) (holding that a surrogate parenting contract for full surrogacy violated public policy on the grounds that such a contract amounts to baby selling). *See also* Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 Law & Soc'y Rev. 257 (2002) (noting that the notion of "self-ownership" does not permit individuals to sell their body organs, but permits buying and selling gametes, which can evolve into human life).

31 *Witten*, 672 N.W.2d at 779.

32 *Id.* at 782 (quoting J.B., 783 A.2d at 717).

33 *Id.* at 778 (quoting Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 Minn. L.Rev. 55, 66-68 (1999)). *See generally* Zev Rosenwaks & Owen K. Davis, *On the Disposition of Cryopreserved Human Embryos: An Opinion*, 12 Hum. Reprod. 1121, 1121 (1997).

34 Coleman, 84 Minn. L.Rev. at 66-68.

35 *Id.*

36 Iowa Code § 598.41. *See* N.Y. Dom. Rel. Law § 70 (McKinney).

37 *Witten*, 672 N.W.2d at 774-76. *See* Iowa Code § 598.41.

38 *Witten*, 672 N.W.2d at 774-76.

39 *Id.*

40 *Eschbach v. Eschbach*, 56 N.Y.2d 167, 172 (N.Y. 1982); N.Y. Dom. Rel. Law § 70.

41 *Glauber v. Glauber*, 192 A.D.2d 94, 97 (N.Y. 1993).

42 *Id. See Finlay v. Finlay*, 240 N.Y. 429, 434 (N.Y. 1925) ("Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for

the child").

43 *Finlay*, 240 N.Y. at 434. McLaughlin JH, *The Fundamental Truth About Best Interests*, 54 St Louis L.J. 113, 126-27 (2009).

44 *Davis*, 842 S.W.2d at 597.

45 *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981). *Cf. Rivero v. Rivero*, 216 P.3d 213, 223 (Nev. 2009) (holding that 50/50 joint custody is presumably in the best interest of the child if the parents agree to it).

46 *Garska*, 278 S.E.2d at 361.

47 *Id.* at 363.

48 *Id.*

49 *Witten*, 672 N.W.2d at 783 (mandating that the party opposing destruction of frozen embryos be required to pay for storage). *See* Coleman, 84 Minn. L.Rev. at 112 ("The right to insist on the continued storage of the embryos should be dependent on a willingness to pay the associated costs").

50 *Finlay*, 240 N.Y. at 434. McLaughlin, 54 St Louis L J at 113.

51 *See* § 402 [Best Interest of Child].

52 *Davis*, 842 S.W.2d at 597.

53 *Id.* at 604.

54 (1) the wishes of the embryo's parent(s); (2) the mental and physical health of all individuals involved; (3) the financial competency of all individuals involved; and (4) whether the party opposing destruction would be an unfit parent.

55 For example, if Jane suffers from a fatal illness with a life expectancy of only one year, awarding custody to Jane would not be in the best interest of the embryo, and the second element would be satisfied in John's favor. On the other hand, if Jane is mentally and physically competent to take care of a child, the second element would be satisfied in her favor.

56 *See e.g.*, *Garska*, 278 S.E.2d at 69.

57 *Davis*, 842 S.W.2d at 597.

58 *Kass*, 696 N.E.2d at180 (the court deferred to the divorcing couple's stipulation that addressed the disposition of their embryos in the event of a divorce).

59 *Cf. Glauber*, 192 A.D.2d at 97.

60 *See supra* note 55.

61 *Roe*, 410 U.S. 113 at 152-53 (there is a constitutional right not to procreate and the courts cannot inhibit that right).

62 *See infra* note 69.

63 (1) John and Jane's wishes; (2) Jane's mental and physical health; (3) Jane's financial competency; and (4) whether Jane would be an unfit parent that may subject the future child to abuse or neglect.

64 *Witten,* 672 N.W.2d at 778 (quoting Coleman, 84 Minn. L.Rev. at 66-68).

65 Coleman, 84 Minn. L.Rev. at 66-68.

66 *See supra* note 55.

67 *Roe*, 410 U.S. 152 (rejecting the notion that embryos are legal persons from the moment of conception).

68 Fundamental right to privacy.

69 *Lochner v. New York*, 198 U.S. 45 (1995) (holding that freedom to contract is a fundamental right) (overruled by Ferguson v. Skrupa, 372 U.S. 726 (1963) (freedom of contract should not be used as an obstacle to the government passing necessary regulations)).

70 At what point would destroying frozen embryos constitute murder?

71 *See Baby M*, 537 A.2d at 1246. *See also* N.Y. Dom Rel. Law § 122 (McKinney).

72 *Id.*

73 *Loving v. Virginia*, 388 U.S. 1, 12 (1967); Obergefell, 135 S. Ct. at 2604-05.

74 *See Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that a state statute allowing courts to order sterilization of those convicted of two or more crimes involving moral turpitude was unconstitutional on the grounds that it deprives individuals of a basic right). *Cf. Buck v. Bell*, 247 U.S. 200 (1927) (holding that the mentally impaired do not have the fundamental right to procreate).

75 *Troxel v. Granville*, 530 U.S. 57 (2000) (Scalia, A., dissenting) (opining that the Court's ruling would be "ushering in a new regime of judiciary prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures").

76 Naomi R. Cahn and Jennifer R. Collins, *Eight is Enough*, Nw. U. L. Rev. Colloquy (2009).

77 *Davis*, 842 S.W.2d at 597.

78 *Id.*

Endnotes

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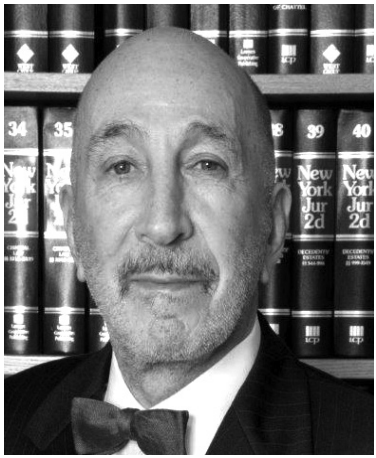

Estate Litigation Tidbits 2019

BY ANDREW FRISENDA, ESQ.
and GARY E. BASHIAN, ESQ.

Vacating a Probate Decree When the Totality of Facts, Law and Equity Requires the Court to Reverse Course

Although rare, when a Surrogate is confronted with evidence that significantly questions the legitimacy of a will already admitted to probate, the Court has the authority, if not the mandate, to vacate its previous decree.

Such was the case in *Matter of Thompson*, where Acting King's County Surrogate Ingram found sufficient evidence to support vacating a previously issued probate decree, and re-opening inquiry into whether or not the instrument admitted to probate was in fact a true and valid last will and testament.

Shortly after the tragic passing of former Brooklyn District Attorney Kenneth Thompson in October, 2016, at the age of 50, a document purporting to be his last will and testament, dated September 27, 2016 (the "2016 Will"), was admitted to probate on November 2, 2016.

However, pursuant to court order and under the threat of contempt to the draftsperson, a prior instrument dated August 7, 2008 was later produced (the "2008 Will") which differed substantially from the 2016 Will.

The petitioners, all of whom were given general bequests under the 2008 Will, but were disinherited under the 2016 Will, sought vacatur of the 2016 Will on the grounds of "fraud, misrepresentation, or other misconduct of an adverse party" and/or "in the interests of justice."

To that end, the Court's review of the record focused on the following facts which it relied upon to support its ultimate decision to vacate the probate decree:

A. The stark differences in testamentary planning between the 2008 and 2016 Wills;

B. Evidence that the decedent contemplated divorce prior to his death;

C. The execution of the 2016 Will was during the period when the decedent was receiving treatment for what became terminal cancer, and which significantly affected his testamentary capacity and susceptibility to undue influence; and

D. The concerted efforts by the beneficiary of the 2016 Will to prevent the petitioners from learning the contents of the 2008 Will.

Accordingly, the Court reasoned that "…[a]lone, any one of above facts might be insufficient to prove lack of capacity or undue influence…[but] the combination of these factors casts doubt on the validity of the probated will…"

Moreover, that "…[as] [t]he court's paramount concern is to admit only valid wills to probate…," vacatur of both the probate decree and letters testamentary issued to the decedent's surviving spouse was warranted based on the surrounding facts and circumstances.

Matter of Thompson
(Surr. Ct. Kgs. Cty. 2018) (Ingram, A.S.)
2018 NY Slip OP 51242(U)

Surviving Spouse Ordered to File Judgment of Divorce in Supreme Court as Fiduciary of Spouse's Estate

Although the fiduciary of an estate "stands in the shoes of the decedent," this maxim is not without limit, as a surviving spouse learned when

he argued that – upon being appointed the fiduciary of his separated wife's estate, he had the authority to abate a pending matrimonial action; vacate the appointment of a receiver; and cancel the support arrears he owed to his now deceased wife.

After years of contested divorce and Family Court Actions, a five day custody trial, post-trial family offense petitions and contempt applications, an eight day financial trial, an order of protection, the appointment of a receiver over property, an order finding child and spousal support arrears in excess of $90,000, and multiple applications by the husband to change counsel, the parties were finally left to complete the final ministerial act of entering a judgment of divorce.

Unfortunately, prior to the judgment of divorce being entered, plaintiff-wife passed away intestate, defendant-husband was appointed the administrator of her estate, and within days of his wife's passing, moved with the parties' children to Canada.

Thereafter, defendant-husband, as administrator, sought to abate the matrimonial action, vacate the appointment of a receiver, and cancel the support arrears.

Not unexpectedly, the Court was not receptive to defendant-husband's arguments in his capacity as administrator, or otherwise.

Indeed, relying on well-established authority, the Court determined that "…when a court has made its final adjudication in a matrimonial action but has not performed the 'mere ministerial act of entering the final judgment,' the action does not abate upon the death of a party."

It further held that "…when a party died after the trial court confirmed the report of a special referee but before a judgment of divorce was entered, it was proper to enter the judgment *nunc pro tunc* to the date of the order confirming the referee's report."

The Court not only ordered said filing "…within 10 days of the date of this decision and order," but also noted that:

A. "Should defendant fail to timely file the judgment of divorce, he risks not only violating this court's order but also breaching his fiduciary duty as an administrator, a role that he sought notwithstanding this divorce action and over the objection of plaintiff's family;" and

B. "…[I]n light of the court's finding that this action does not abate, defendant's counsel cannot represent both defendant and plain-

tiff in the same matter, as their interests are undisputedly adverse. Therefore, defendant's counsel's representation must be limited to his initial representation of defendant only."

However, while acknowledging the clear conflict, the Court was nonetheless "…constrained…absent further order of the Surrogate's Court…" to grant "…defendant's motion to vacate his child support obligation… nunc pro tunc as of the date of plaintiff's death…"

Phillips v. Phillips

62 Misc. 3d 669(Sup.Ct.N.Y. Cty, 2018) (Sattler, J.)

Joint Tenancy
+ Safe Deposit Boxes
+ Judgment Enforcement
= a Recipe for Disaster

As those familiar with Banking Law § 675 know all too well, the law regarding joint tenancies, survivorship rights, and "for convenience" accounts can be rather harsh on a co-tenant in a judgment enforcement proceeding, even when the co-tenant is not a judgment debtor.

Banking Law § 675 articulates the rules, and sets forth the legal presumptions of how the titling of a bank account and/or safe deposit box affects a co-tenant's rights of ownership to these types of jointly held assets.

Generally speaking, where a bank account and/or a safe deposit box is properly designated as having a right of survivorship, the surviving tenant becomes the owner of the asset upon the death of their co-tenant, that is, absent a showing, *inter alia*, that the asset was titled in such a way merely "for the convenience" of the co-tenants.

Similarly, where a bank account and/or a safe deposit box is properly designated as having a right of survivorship, the co-tenants have an equal, immediate right to access the bank account and/or the safe deposit box during life, that is, again, absent a showing, *inter alia*, that the asset was titled in such a way merely "for the convenience" of the co-tenants.

Should the titling of the bank account and/or a safe deposit box be determined to be "for convenience," the joint tenant who has not deposited monies into the account only really has a legal right of access, and little

more.

In *Matter of New York Community Bank v. Bank of Am., N.A.* the Appellate Division, First Department was asked to find that a jointly held safe deposit box was, in fact, titled in joint names "for convenience," and therefore that it should not be subject to judgment enforcement against one of the co-tenants who was the solely named judgment debtor.

To that end, the Court found the attorney affirmation submitted in support of this argument – an affirmation without probative value as the affirmant lacked personal knowledge – could not rebut the judgment creditor's *prima facie* showing of joint ownership as established by the bank's internal policy regarding the titling of jointly titled safe deposit boxes, and/or the presumption of law afforded by Banking Law § 675.

As the presumption of joint ownership was not rebutted, and it was not established that the asset was titled in such a way merely "for convenience," the Court held that judgment enforcement could proceed against the entirety of the jointly held asset.

The Court found that the judgment creditor properly executed against the entirety of the safe deposit box contents, regardless of the fact that only one judgment debtor was a named joint tenant.

Matter of New York Community Bank v. Bank of Am., N.A.
169 AD3d 35 (1st Dep't 2010)

Facts and Findings at Prior Guardianship Proceeding Collaterally Estop Objectants from Arguing Revocation of 1976 Instrument in Surrogate's Court

As is common when an "allegedly incapacitated person (AIP)" is judicially determined to be an "incapacitated person (IP)," and a Guardian is appointed to care for the IP's person and/or property, the guardianship court will often revoke any advanced directives and testamentary instruments that it determines were created when the IP lacked capacity and/or was the victim of undue influence, fraud, duress, etc.

It therefore stands to reason, and was made resoundingly clear by Surrogate Mella when considering the *Estate of Kronik* – that judicial determinations of incapacity, and the revocation of any testamentary instruments and/or testamentary substitutes created when the IP lacked capacity, carry

with them a collateral estoppel effect precluding a party from later arguing that any such testamentary instrument and/or testamentary substitute is valid.

In 2000, the Nassau County Supreme Court had found the decedent to be an IP, and revoked an irrevocable trust, dated March 22, 2000 on the dual grounds that the decedent (then grantor) lacked testamentary capacity, and that the trust was the product of (the future) objectant's undue influence.

Subsequent to the decedent's passing, proponent offered a will for probate, dated june 24, 1976, and was met with an objection based on the argument that a purported will – executed at the same time as the 2000 trust – revoked the 1976 instrument, and as a consequence, the decedent's estate must be distributed pursuant to the rules of intestacy.

Applying a standard collateral estoppel analysis, the Court easily found sufficient commonality between the parties, the previous adjudicated issues, and that the necessary due process concerns were satisfied so as to collaterally estop objectant's argument that the 1976 instrument had been revoked.

Continuing its collateral estoppel analysis, the Court further found:

A. "The March 22, 2000 purported will and irrevocable trust were integral parts of a single estate plan… The two instruments were also the product of the same transaction, and the purported will was merely incidental to the trust."

B. "…[T]he revocation clause of the March 22, 2000 purported will served the interests of the undue influencer…[as the 2000 will] ensured that any asset owned by decedent at his death…would be disposed of in accordance with the terms of the March 22, 2000 irrevocable trust…

C. "[T]he issue of the invalidity of the revocation clause of the March 22, 2000 purported will was [therefore] 'necessarily decided and material' in the Nassau County Supreme Court [guardianship] proceeding…" and

D. "[T]he issue of] undue influence was conclusively decided by that court…[and] [a]ccordingly, any claim [made by] objectants that the purported will and its revocation clause, which were an integral part of that same transaction, are a reflection of the decedent's wishes and not the product of any restraint is barred by res judicata."

As such, the objections seeking to prevent the admission of the 1976 instrument to probate were summarily dismissed as they were conclusively barred by the doctrines of collateral estoppel and res judicata.

Estate of Kronik

New York County Surrogate's Court
Surrogate Mella
Case No.: 2009-2812
Decided: January 28, 2019
Published NYLJ: February 11, 2019

Statute of Limitations, SCPA § 2103, and CPLR § 3211(a)(5)

As many Surrogate's Court litigants know, SCPA § 2103 turnover proceedings are not immune from statute of limitations defenses.

The general rule is that notwithstanding various tolling provisions and statutory extensions, the statute of limitations may preclude claims in SCPA § 2103 turnover proceedings. The applicable statute of limitations barring a claim is determined by the nature of the underlying wrong which in an SCPA § 2103 setting is typically fraud and/or conversion.

In the *Matter of Sponholz*, Erie County Surrogate Mosey addressed this common SCPA § 2103 turnover statute of limitations question in regard to claims sounding in Conversion, and a pre-death sale of real property.

Decedent, who had lived with his partner "as husband and wife" for decades, was the sole owner of real property that was sold in 2015, his partner having no ownership interest.

Subsequently, during the administration of the decedent's estate, his children from a prior marriage commenced an SCPA § 2103 proceeding to determine, *inter alia*, the location of the sale proceeds.

Upon a CPLR § 3211(a)(5) motion to dismiss, the Surrogate determined that, as pled, the claims related to this real property were barred by the three (3) year statute of limitations as:

A. The essential nature of the claim was one sounding in conversion;

B. It was undisputed that the sale was completed on July 30, 2015;

C. It was undisputed that the SCPA § 2103 turnover proceeding was

commenced via e-filing on August 22, 2018; and thus

D. Inquiry into the sale was precluded by the three (3) year Statute of Limitations set forth in CPLR **§ 214**.

Estate of Sponholz
62 Misc3d 1222(A)
(Surr. Ct. Erie Cty. 2019) (Mosey, S.)

Guardian Removal and Successor Appointment

The process of being appointed the guardian for a loved one is, in almost every sense and circumstance, an arduous process.

Even in uncontested guardianship proceedings, emotions can run very high given that the life of the incapacitated person is forever shaped by the guardian appointed to their care.

It is therefore no surprise that once appointed, a guardian will rarely resign, even in the face of their own cognitive and physical decline, as was the case in *Matter of Joseph A.F.*_

At the age of 86, and suffering with dementia and memory loss which prevented her from attending to her own daily needs, the guardian of Joseph A.F. could no longer provide care to her son and ward but nevertheless refused to step down as his guardian.

Between a "rock and a hard place," Joseph A.F.'s sister, who was designated as his successor guardian sought formal removal of the primary guardian, and appointment as successor guardian, given that her mother could no longer serve.

In support of her application for removal and appointment, the nominated successor guardian submitted *inter alia*:

A. A psychologist's evaluation "…corroborating memory impairment and compromised executive functioning with the recommendation that an alternate guardian be appointed;"

B. A report by the guardian *ad litem* appointed for the mother which found she "…could not recall the name of the caretaker, date or day of the week, nor that she lived with respondent and the father;" and

C. A report of the guardian *ad litem* for the IP which found that "… the mother did not remember who the daughter and the guardian *ad litem* were nor the name of the current president."

Accordingly, as it was clearly in the best interests of the IP, the court vacated the decree granting guardianship to the IP's mother, and appointed the IP's sister as successor guardian.

Matter of Joseph A.F.
Bronx County Surrogate's Court
Surrogate Malave-Gonzalez
Case No.: 188G-2005/A
Decided: February 21, 2019
Published NYLJ: March 18, 2019

Copy of a Purported Will Not Admitted to Probate Revokes Prior Instrument

While not unlimited, the manner in which a testamentary instrument may be revoked is as varied and nuanced as the intentions of testators themselves.

indeed, so long as a Surrogate is presented with suitable proof that a testator sought to revoke a prior will – even if revocation presents itself in the form of a will that has not been, and will not be, admitted to probate – the court may deem a prior instrument revoked, and thus deny probate.

In re: Will of Harper the argument was presented to Surrogate Kelly that the revocation clause found in a photocopy of a document purporting to be the decedent's last will and testament from 2006, effected the revocation of a 1997 instrument, and that, as a consequence, the decedent's estate must pass pursuant to the rules of intestacy.

The Court reasoned that, although there was no question that the 2006 instrument was a copy and portions of it were blurred, a *prima facie* case had been made that the 2006 instrument was not the product of undue influence, duress and/or fraud, the decedent had testamentary capacity at the time of the 2006 instrument's purported execution, and the elements of due execution were satisfied.

Accordingly, the Court determined that the 2006 instrument's revocation clause was effective and the prior 1997 instrument was therefore revoked. As there was no known pre-1997 testamentary instrument, the decedent's estate was to be distributed pursuant to the rules of intestacy.

Will of Harper
Queens County Surrogate's Court
Surrogate Kelly
Case No.: 2009-209-A
Decided: March 20, 2019
Published NYLJ: March 26, 2019

A Promise, Standing, and Constructive Trusts

As Justice Cardozo aptly stated, "[a] constructive trust is the formula through which the conscience of equity finds expression." As such, constructive trusts are, by their very nature, "elastic," and can be crafted to remedy all manner of situations where a party has been unjustly enriched.

Nevertheless, the equitable nature of a constructive trust is not without constraint and, as Surrogate Lopez Torres found, a party seeking the imposition of a constructive trust must first have standing before the Court can afford them any relief.

In *Matter of Estate of Fogel*, though not a beneficiary of the estate, petitioner sought the imposition of a constructive trust over estate assets which were bequeathed to a sole beneficiary/executor.

Petitioner was not a named beneficiary, did not object to probate, and went so far as to testify in support of admitting the decedent's will to probate when it was previously offered by the beneficiary/executor.

At various times, the beneficiary/executor, who enjoyed a confidential relationship with petitioner, promised to petitioner that they would share the estate's assets, and partially performed upon this promise by transferring "substantial sums" of estate assets to the petitioner after the will had been admitted to probate.

However, before petitioner's "promised" share of the estate had been fully paid to him, the beneficiary/executor passed away. Petitioner then initiated a creditor claim against the estate seeking the imposition of a constructive trust over the remaining estate assets.

Although the executor/beneficiary's promises and his partial performance were established on the record before the Court, the Surrogate found that petitioner lacked standing to assert his claim.

To that end, the Court held that:

A. Petitioner did not have standing as a distributee, having waived any pecuniary interest in the estate when he supported the will's admission to probate, and was judicially estopped from now taking a contrary position; and

B. Petitioner did not have standing as a creditor of the estate because the promises to share in the estate assets were made by the sole beneficiary/executor, not the decedent, and therefore had "…no direct interest in the *res* of the decedent's estate…"

Accordingly, the petition seeking the imposition of a constructive trust was dismissed pursuant to CPLR § 3211(a)(3).

Matter of Estate of Fogel
King's County Surrogate's Court
Surrogate: Lopez Torres
Case No.: 2006-1234/B
Decided: April 10, 2019
Published: NYLJ April 15, 2019

Posthumous Preservation of Genetic Material

On February 23, 2019, decedent, a cadet at West Point Military Academy, was involved in a tragic ski accident that left him with a fractured spinal cord.

Decedent was later declared brain dead, and remained on life support "…pending organ donation…pursuant to his wishes as set forth on…" an organ donation card.

While he was on life support, decedent's parents petitioned the Court "…to retrieve [the decedent's] sperm… provide such sperm to a sperm bank…[and allow] petitioners to use [decedent's] sperm for third party reproduction…"

In a case of first impression, the Westchester Supreme Court (Colangelo, J.) insightfully found that:

A. "…[T]he talisman must be the decedent's intent;"

B. In the absence of a writing regarding the decedent's intent as to the posthumous disposition of his genetic material, "…presumed intent can be gleaned from certain of his prior actions and statements,

in conjunction with statutes designed to serve as surrogates for a decedent's intent;"

C. Decedent signed an organ "…donor card authorizing the donation of his 'organs, eyes, and tissues…"

D. Petitioner testified that decedent "…had always been motivated by a desire to help others…"

E. Decedent's "…decision to embark upon a career in service to his fellow citizens and, as a military doctor, to his comrades in arms, is further indicia of his generosity of spirit…Thus, even though [decedent] did not expressly state that he wanted his sperm to be used for reproductive purposes, should his parents choose to do so in the future, it would not do violence to his memory;

F. "[S]uch use would not be contrary to [decedent's] moral or religious beliefs, but would be consistent with his past conduct and statements;

G. "In seeking to divine [decedent's] intent from his past statements and actions, there is a consistent thread running through his short life: the primacy of family and family relationships…considerations of family -- past, present and future -- were vital to [decedent];

H. Decedent communicated to an educational mentor and officers that he intended to have a family and several children;

I. In the absence of written intentions, PHL 4301(2) allows for a "… person or persons close to the potential donor who would presumptively give voice to his ineffable wishes…" to authorize "…the donation and therefore disposition of bodily organs, and by extension, bodily fluids…; "

J. GHL 4301(2) grants authority to a parent to execute an anatomical gift in the absence of organ donation documentation, another statutorily prioritized candidate, or evidence establishing that the decedent did not want to make such a gift; and

K. EPTL 4-1.1 disposes a decedent's property to his parents in the absence of a will, surviving spouse, or issue.

Accordingly, and given the totality of facts and controlling law, the Court granted the petition, and allowed the decedent's parents to extract and preserve the decedent's sperm, placing no restrictions on their use of this genetic material in the future, though cautioning about the ethical and

legal ramifications of posthumous reproduction.

Matter of Zhu
Westchester County Supreme Court
Justice Colangelo
2019 NY Slip Op 29146
Decided May 16, 2019

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What Is a Pooled Community Trust and How Can It Be Used?

BY ANTHONY J. ENEA, ESQ.

A pooled community trust is often discussed and utilized within the context of its important ability to prevent the spend down of income by the recipient of Home Care Medicaid. However, what is often misunderstood about a pooled trust is that it is a specific type of Special Needs Trust (SNT).

An SNT allows a person with a disability to continue receiving government benefits, such as Medicaid and Supplemental Security Income (SSI), irrespective of the dollar value of assets and income held by the SNT. The purpose of the SNT is to supplement (not supplant) the benefits paid by the government to help improve the quality of the life of the person with the disability. The legal requirements for an SNT in New York are delineated in *New York Estates, Powers and Trusts Law of New York* (EPTL) §7-1.12.

Unlike an SNT that is created by a disabled person with his or her assets ("a self-settled SNT"), which must be created by or for the person with a disability prior to reaching the age of 65, or a third party SNT created by a third party (parent, grandparent, etc.) with his or her assets for the benefit of the person with a disability, the pooled community trust has no age limitation and has no payback to the government requirements (such as a self-settled SNT). However, the funds held in the pooled trust at the time of the beneficiary's passing remain in the pooled trust and may not be paid to the beneficiary's estate or family. If the pooled trust chooses not to keep said remaining funds, they must be paid to Medicaid up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary by Medicaid. As such, it is recommended to use the funds deposited to the pooled trust on a monthly basis.

The pooled community trust is established and managed by a not-for-profit association that acts as the Trustee of the Trust; a trust company must also act as a Co-Trustee. As a pooled community trust can have numerous beneficiaries, a separate sub-account is created and maintained for the sole benefit of each disabled beneficiary.

The pooled community trust is often referred to as a "D4C" trust. While any person irrespective of their age (even over age 65) can establish and fund the pooled trust, there may be Medicaid and/or SSI transfer of asset penalties for those over age 65.

If a disabled person has mental capacity, he or she may execute the requisite joinder agreement for the pooled community trust. Additionally, an agent under a power of attorney may also execute the agreement on behalf of the disabled person if the Power of Attorney allows for gifting of the principal's income and/or assets. The use of a power of attorney lacking specific authorization to the agent to create a trust for the principal has created an issue with Medicaid. Thus, it is advisable that the power of attorney have both the specific power to create a trust and/or enroll the principal in a pooled community trust as well as the Statutory Gift Rider with broad gifting powers.

The most frequent utilization of a pooled community trust occurs when an applicant for Community (home care) Medicaid has income in excess of the amount permitted by Medicaid. For example, for the year 2019, an applicant for Medicaid is permitted monthly income in the amount of $879.00. If the applicant has income of $2,000.00 per month, the excess income of $1,121.00 is paid to Medicaid assuming the applicant does not

enroll in a pooled community trust or has monthly medical expenses in the amount of the surplus. However, once enrolled in the pooled community trust, the surplus income less the monthly administrative fee paid to the not-for-profit can then be used to pay for the disabled person's living expenses, such as food, rent, taxes, mortgage, clothing, telephone, utilities, private day care services, etc. Without the ability to enroll in the pooled community trust, most disabled seniors would not be able to retain their monthly income and continue to reside at home and receive Medicaid Home Care.

Additionally, the pooled community trust can be of use and advantage to a disabled younger person with special needs. For example, a disabled younger person may be a beneficiary of SSI and Medicaid. If said person were to receive an inheritance, an accident settlement or recovery, or accumulates too much income which would otherwise disqualify them from SSI and/or Medicaid, the use of the pooled community trust may be of significant advantage to them. Depending on the facts for each disabled person, they may be able to receive the inheritance, settlement, recovery and/or excess income while continuing to receive SSI and/or Medicaid. Said funds and/or income can be deposited into the pooled trust and be used for the disabled person's living expenses as delineated above. The beneficiary still retains a separate pooled trust account and the trust distribution is tailored to his or her specific needs and lifestyle.

In conclusion, there are presently over 20 not-for-profit organizations in New York that offer pooled trusts. The assistance of an experienced elder law attorney in selecting a suitable pooled trust not-for-profit and enrolling in a pooled trust can be invaluable.

Endnotes

1 42 U.S.C.S. § 1396P(d)(4)(c).

2 POMS SI 01120.203(E)(2), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203.

3 POMS SI 01120.203(D), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203.

4 *Id.*

5 42 U.S.C.S. § 1396P(d)(4)(c). See also, POMS SI 01120.203, available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203.

6 Soc. Serv. L. § 366.5(d). See also, 18 NYCRR § 360-4.4(c)(2); POMS SI 01120.203(D)(1), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203; POMS SI 01120.225, available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120225.

7 POMS SI 01120.203(D)(6), available at http://policy.ssa.gov/poms.nsf/lnx/0501120203.

8 N.Y. Gen. Oblig. L. § 5-1514. *See also*, NYC HRA MICSA Alert, *Powers of Attorney and Statutory Gifts Rider,* dated July 26, 2017, available at http://www.wnylc.com/health/download/627; NYC HR MICSA Alert, *Deferral of SNT's Submitted with Invalid Power of Attorney*, dated June 25, 2018, available at http://www.wnylc.com/health/download/658.

9 Soc. Serv. L. §§ 366.5(f)-(g), as amended June 16, 2018. *See also*, 18 NYCRR §§ 360-2.3, 360-4.3 .

10 POMS SI 01120.203(D)(7)(b), available at http://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203. *See also*, POMS SI 01120.201(F)(2) (2018), available at http://policy.ssa.gov/poms.nsf/lnx/0501120201; POMS SI 01120.200 (G)(1)(d), available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200.

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The State of Estates

BY PAUL S. FORSTER, ESQ.

These recent cases (all Appellate Division decisions) concern the amendment of a complaint more than two years after the decedent's death to add a cause of action for wrongful death; the creation of a Supplemental Needs Trust by an attorney-in-fact; and the denial of executor's commissions on the value of a specifically bequeathed cooperative apartment, despite services having been rendered by the fiduciary in connection therewith.

Amendment of a Complaint Allowed More Than Two Years After the Decedent's Death to Add a Cause of Action for Wrongful Death

The decedent allegedly was injured on October 11, 2014, when she was struck by a motor vehicle that was owned and operated by the defendants. On January 16, 2015, the decedent commenced an action to recover damages for personal injuries. The decedent died on March 16, 2015. More than two years after the decedent's death, on August 11, 2017, the fiduciary of the decedent's estate moved pursuant to CPLR §3025 (b) for leave to amend the complaint to add a cause of action to recover damages for wrongful death.

In opposition, the defendants argued that the motion should be denied, *inter alia*, because the cause of action alleging wrongful death was barred by the two year statute of limitations, and the plaintiff failed to demonstrate a reasonable excuse for the delay in seeking leave to amend the complaint and a lack of prejudice to the defendants. The Supreme Court, Kings County (Rivera, J.) granted the motion and the defendants appealed.

HOLDING: Affirmed. The Appellate Division, Second Department reasoned that motions for leave to amend a pleading under CPLR §3025 (b) are addressed to the sound discretion of the Court, and, unless the proposed amendment is palpably insufficient or patently devoid of merit, should be granted in the absence of prejudice or surprise resulting directly from delay in seeking leave. It agreed with defendants that a motion for leave to amend a complaint or other pleading to add a cause of action or theory of recovery that is time-barred under the applicable statute of limitations is patently devoid of merit.

However, the Court held that since the original complaint, which was interposed prior to the decedent's death, gave notice of the transactions, occurrences, or series of transactions or occurrences on which the wrongful death cause of action in the amended complaint was based, the wrongful death cause of action asserted in the amended complaint related back to the original complaint and was deemed to have been timely interposed under CPLR §203(f) and EPTL §11-3.3(b)(2). The wrongful death cause of action consequently was not barred by the statute of limitations.

The Appellate Division also held that the amended complaint sufficiently alleged a cause of action to recover damages for wrongful death and therefore no evidentiary showing of merit was required. Thus, the Supreme Court had providently exercised its discretion in granting the plaintiff's motion for leave to amend the complaint. *DeLuca v PSCH, Inc.***,** 170 A.D.3d 800 (2nd Dept. 2019)

Creation of A Supplemental Needs Trust by an Attorney-in-Fact Approved

Delaney executed a statutory short form power of attorney designating Pacchiana as his attorney-in-fact and granted him authority, as his agent, to handle, among other things, "claims and litigation," "estate transactions," and "all other matters" on his behalf. Pacchiana, acting as Delaney's agent under the power of attorney, commenced a proceeding in the Surrogate's Court seeking an order creating and funding a supplemental needs trust in

order to provide for Delaney's "supplemental care, maintenance, support and education."

The petition alleged that Delaney was disabled, had been diagnosed with paranoid schizophrenia, and received Social Security disability benefits. The petition further alleged that both of Delaney's parents were deceased, that the trust funds would consist of funds that Delaney had inherited from his mother which had not yet been disbursed, and that the trust, when established, would enable Delaney to "maintain his medical insurance under the Medicaid Program."

The Surrogate's Court appointed a Guardian *ad litem* to represent Delaney. In his report, the Guardian *ad litem* found that the proposed supplemental needs trust "would not jeopardize [Delaney]'s [Medicaid] eligibility" and complied with the relevant provisions of Social Services Law § 366. However, the Guardian *ad litem* asserted that Pacchiana, as Delaney's attorney-in-fact, was not permitted to commence a proceeding to create a supplemental needs trust on Delaney's behalf, and, further, that Pacchiana was not properly designated Delaney's attorney-in-fact.

The Surrogate's Court, Rockland County (Thorse, S.) denied the petition "for the reasons set forth in the Report of the Guardian Ad Litem," and Pacchiana appealed.

HOLDING: Reversed. The Appellate Division, Second Department stated that, to be valid, a statutory short form power of attorney must be signed and dated by a principal with capacity, and with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property. Under the applicable statute, "capacity" with regard to a power of attorney is defined as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney." General Obligations Law § 5-1501(2)(c).

The Court further stated that a party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, that the party asserting incapacity bears the burden of proof, and that the incapacity must be shown to exist at the time the pertinent document was executed. It held that such incapacity had not been shown.

The Appellate Division concluded that Pacchiana, as Delaney's attorney-in-fact, had the authority to commence a proceeding in the Surrogate's

Court for the creation of a supplemental trust in Delaney's behalf under General Obligations Law § 5-1502H. Accordingly, the Surrogate's Court should not have denied the petition on the ground that Pacchiana lacked the authority to commence the proceeding and remitted the matter for further proceedings on the petition. *Matter of Delaney*, 170 A.D.3d 1008 (2nd Dept., 2019)

Executor's Commissions Denied on the Value of a Specifically Devised Cooperative Apartment, Despite Services Having Been Rendered by the Fiduciary in Connection Therewith

In their estate accounting, the fiduciaries took commissions on the value of a specifically bequeathed cooperative apartment, contending that services were rendered with regard thereto, such as visiting weekly to collect mail, arranging for insurance, paying maintenance and bills, and insuring that necessary repairs were properly made. Petitioners also contended that respondent's meritless litigation and dilatory conduct in seeking to have the apartment transferred to him required them to act to preserve the asset.

The apartment was specifically devised to respondent. The Surrogate's Court, New York County (Mella, S.) granted respondent's motion for partial summary judgment with regard to his objections to the accounting concerning the commissions taken. The fiduciaries appealed.

HOLDING: Affirmed. The Appellate Division, First Department held that the Surrogate providently exercised her discretion in determining that the value of the apartment, which was specifically bequeathed to respondent, should not be included in the computation of petitioners' commissions. The services rendered could have been performed by respondent, and, in any event, it was undisputed that those services were not mandated by the deceased's will or required by the circumstances. The Court also noted that respondent had the right to challenge the appointment of one of the fiduciaries as an executor, and petitioners could have deferred to respondent to protect the asset that was specifically left to him. *Matter of Kass*, 170 A.D.3d 408 (1st Dept., 2019)

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When Does Failure to Comply With 22 NYCRR Part 1400 Deny Recovery of Legal Fees in Domestic Relations Matters?

BY HON. WILLIAM J. GIACOMO

I. Introduction to Part 1400 of Title 22 of the Codes, Rules and Regulations of the State of New York (22 NYCRR)

Part 1400 of Title 22 of the Codes, Rules and Regulations of the State of New York ("Part 1400"), effective November 3, 1993, mandates requirements that attorneys must adhere to at the outset of representation in domestic relations matters. Sections 1400.2 and 1400.3 of Part 1400 govern the mandated Statement of Client's Rights and Responsibilities and the mandated written Retainer Agreement, respectively, and require an attorney to include certain provisions in each document.[1] An attorney must give both documents to a client when he or she is retained.[2] This article will explore whether an attorney's Statement of Client's Rights and Responsibilities and written Retainer Agreement may be read together for the purposes of complying with Part 1400 in domestic relations matters.

Case Study

Consider the following scenario: Plaintiff sues defendant seeking to recover legal fees for representation of defendant in a domestic relations matter. Defendant claims that plaintiff is not entitled to fees, as plaintiff failed to comply with Part 1400.

At the outset of representation, plaintiff provided defendant with a Statement of Client's Rights and Responsibilities that was missing several provisions required under Section 1400.2.[3] Defendant argues that this omission automatically precludes recovery of legal fees. However, plaintiff claims that most of the required provisions missing from the Statement of Client's Rights were included in the written Retainer Agreement provided to defendant. Plaintiff argues that this technical omission should not preclude collection of a fee, as all of the required information was provided to defendant between the two documents. Accordingly, the issue raised is whether an attorney's Statement of Client's Rights and Responsibilities and written Retainer Agreement may be viewed together for the purposes of complying with Part 1400.

A. Purpose of the Rules

The rules contained in Part 1400 (the "Part 1400 Rules") were "promulgated to address abuses in the practice of matrimonial law."[4] Since the Court in *Julien* identified the purpose of Part 1400 in 1997, a large volume of cases has consistently recognized that precise purpose, often quoting that definition from *Julien*.[5] The purpose of complying with the mandates of Part 1400 has not been a subject for judicial debate, as case law indicates unanimous agreement across Appellate Division Departments. In many cases, courts have elaborated on the purpose of the Part 1400 Rules, noting that they were created in response to common instances of abuse by attorneys in matrimonial cases, and designed to protect litigants from overreaching by attorneys.[6] A policy of protecting the public underlies the Part 1400 Rules.[7]

B. Statement of Client's Rights and Responsibilities

Section 1400.2 requires an attorney to inform a prospective client of his/her rights in domestic relations matters.[8] Those rights include, but are

not limited to, the right to a competent attorney, the right to read through the details of the Retainer Agreement and understand the fee arrangement, the right to have written, itemized bills sent at least every sixty days, and the right to refuse any fee arrangement found unsatisfactory.[9] The official Statement of Client's Rights and Responsibilities prescribed by the Appellate Divisions includes thirty provisions detailing what a client is "entitled to by law or by custom" in a domestic relations case.[10] An attorney must provide a prospective client with the Statement at the initial conference before the signing of a written Retainer Agreement.[11]

C. Written Retainer Agreement

Section 1400.3 governs what information an attorney must include in his or her written Retainer Agreement in domestic relations matters. It is comprised of thirteen provisions, which mandate how an attorney must set forth the terms of compensation and the nature of services to be rendered.[12] As noted above, the Part 1400 Rules were designed to protect against overreaching. Accordingly, an attorney must state in plain language the nature of the services to be rendered, to prevent a situation wherein a client is billed for services he or she did not contemplate. With regard to the fee arrangement, an attorney must include information as to the amount of the retainer, and what that amount is intended to cover. Additionally, an attorney must state the circumstances under which any portion of the retainer may be refunded.[13] Section 1400.3 also requires an attorney to include information regarding the frequency of billing in the Retainer Agreement; it is the same requirement as included in Section 1400.2 – that written, itemized bills must be sent to the client at least every sixty days.[14]

II. Compliance with the Rules

In order for a court to award an attorney legal fees in a domestic relations action, it must find that the attorney complied with the Part 1400 Rules in the underlying matter. "An attorney is precluded from seeking fees from his or her client where the attorney has failed to comply with 22 NYCRR 1400.3."[15] An attorney who fails to comply with Section 1400.3 by filing a highly deficient Retainer Agreement is unable to recover legal fees.[16] Likewise, an attorney's failure to comply with Section 1400.2 has the same consequence of precluding collection of a fee.[17]

The standard for compliance with the Part 1400 Rules is substantial compliance; "substantial, not strict, compliance with 22 NYCRR 1400 *et*

seq., is required."[18] Therefore, a court may find an attorney entitled to recovery despite the attorney's failure to fully comply with the Part 1400 Rules, so long as the court is satisfied that the attorney substantially complied with the Rules.

> [A]lthough the respondent-attorney did not fully comply with the mandates of 22 NYCRR §§ 1400.2 and 1400.3…there was substantial compliance with those requirements….This, along with the fact that counsel rendered substantial services and achieved reasonably favorable results, should entitle him to a reasonable fee. [19]

In *Flanagan,* the Court found that the respondent-attorney did not fully comply with Part 1400 because certain provisions specified in Section 1400.3 were omitted from the Retainer Agreement he presented his client.[20] However, noting strict compliance with the Rules is not required, the Court considered whether the attorney had substantially complied with the Rules despite the omissions; it found that the attorney did and was entitled to recovery of legal fees.[21]

An attorney's conduct amounts to noncompliance with the Rules when it demonstrates either a disregard for the Part 1400 Rules, or a hallmark of abuse for which the Rules were designed.

> Generally, the finding of a lack of substantial compliance has been based upon a complete, nearly complete or flagrant disregard for the applicable rules. [citations omitted] On the other hand, a technical violation which does not undermine the underlying policy of protecting the public from known abuses in the field of matrimonial law will not prevent a recovery.[22]

Therefore, in order to find a lack of substantial compliance, a court must find that the attorney either disregarded the applicable rules for domestic relations matters or that the attorney's conduct reveals an instance of abuse.

An attorney's failure to adhere to the rules applicable for domestic relations matters in Part 1400 will result in a denial of recovery of attorney fees. For example, in one case an appellant law firm was precluded from recovering a legal fee from its client in the underlying divorce litigation when the Court found that the law firm "failed to execute and file a written retainer agreement that complied with the relevant rules for such matters."[23] Failure

to consult the relevant rules for domestic relations matters demonstrates a level of disregard sufficient to support a finding of lack of substantial compliance and a denial of recovery of attorney fees.[24]

However, where an attorney includes some of the provisions required to be in the Retainer Agreement in the Statement of Client's Rights and Responsibilities, that attorney has not demonstrated complete, nearly complete, or flagrant disregard for the Rules.[25] Furthermore, to include certain provisions in one's Retainer Agreement that are supposed to be in one's Statement of Client's Rights and Responsibilities resembles a technical violation more so than a disregard for the Rules.

Given that the finding of a lack of substantial compliance is generally based on an attorney's disregard for the Part 1400 Rules, courts should consider whether the attorney's Retainer Agreement and Statement of Client's Rights and Responsibilities, read together, comport with the spirit of Part 1400. Viewing the two documents jointly will provide the court with a clearer indication as to whether the attorney disregarded the relevant rules. By viewing the two documents together, the court can reach a more equitable result in cases where an attorney commits only a technical violation of the Rules.

> In cases where an attorney can establish, *inter alia,* substantial compliance and/or that the alleged omission does not implicate an abuse "for which those rules were promulgated," he or she may recover a fee from his or her own client.[26]

Certain violations of the Part 1400 Rules implicate known abuses in the practice of matrimonial law and therefore will preclude recovery. Attorneys who failed to substantially comply with the rules requiring periodic billing statements at least every 60 days were denied recovery.[27] "An attorney's failure to provide a prospective client with a statement of rights and obligations will also preclude collection of a fee, as will the attorney's failure to provide itemized bills at least every 60 days."[28] This periodic billing requirement is found under both Sections 1400.2 and 1400.3. Overbilling is one of the known abuses for which the Part 1400 Rules were promulgated; an attorney's failure to substantially comply with the billing requirement under Sections 1400.2 and 1400.3 will consequently preclude recovery.

As mentioned previously, overreaching is an abuse that the Part 1400 Rules were designed to protect against. Thus, an attorney who set forth a

limited scope of engagement in the Retainer Agreement, and then sought fees for services outside that scope was denied recovery as the Court found that the attorney's failure to file a Retainer Agreement for the additional services constituted a failure to comply with the Rules.[29]

Conversely, an attorney's failure to enter into a new Retainer Agreement upon her substitution as the attorney-of-record, as required under Section 1400.3, did not amount to noncompliance with the Rules.[30] In *Gross,* the attorney failed to execute and file a new Retainer Agreement upon her substitution as the attorney-of-record after the dissolution of her firm. The Court found that the attorney substantially complied with the Rules, as there was no evidence that the attorney took advantage of the client. "The conduct of counsel did not evince any of the hallmarks of abuse for which those rules were promulgated."[31] The Court relied on evidence of the former client expressly referencing the original Retainer Agreement as determinative of her current fee arrangement in sworn court submissions in finding that the attorney did not take advantage of the client.

In light of the above, where a court is satisfied that the attorney did not take advantage of the client, an attorney's technical violation of the Rules should not automatically preclude recovery. Furthermore, where an attorney omits a required clause under Section 1400.2 in his or her Statement of Client's Rights and Responsibilities but includes that clause in his or her Retainer Agreement, that omission should not implicate an abuse for which the Rules were promulgated. Accordingly, it is suggested that a court should find substantial compliance in such a situation and allow the attorney to recover legal fees.

III. Conclusion

The Part 1400 Rules were enacted to protect the public from known abuses in the practice of matrimonial law.[32] Courts allow attorneys to collect legal fees as long as they substantially comply with these Rules, provided the purpose for the Rules is not violated.

Returning to our case study, the issue is whether the plaintiff's Retainer Agreement and the Statement of Client's Rights and Responsibilities may be viewed together for the purpose of complying with Part 1400. Plaintiff omitted several required clauses from the Statement of Client's Rights and Responsibilities, but included those clauses in the Retainer Agreement. This author believes that the Statement of Client's Rights and Responsibilities and the Retainer Agreement may be read together in order to determine if the Part 1400 Rules have been adhered to. Accordingly, plaintiff here should be entitled to recovery of legal fees.

Endnotes

1 22 N.Y.C.R.R. §§ 1400.2, 1400.3 (Thomson Reuters 2019). For matters that do not involve domestic relations, Section 1201 of Title 22 of the Codes, Rules and Regulations of the State of New York imposes requirements for the Statement of Client's Rights that are different than the requirements mandated by Section 1400.2. *See* 22 N.Y.C.R.R. § 1210 (Thomson Reuters 2019).

2 22 N.Y.C.R.R. §§ 1400.2, 1400.3.

3 22 N.Y.C.R.R. § 1400.2.

4 *Julien v. Machson,* 245 A.D.2d 122, 666 N.Y.S.2d 147, 148 (1st Dep't 1997).

5 *Mulcahy v. Mulcahy*, 285 A.D.2d 587, 588, 728 N.Y.S.2d 90, 92 (2d Dep't), *lv. to appeal denied*, 97 N.Y.2d 605 (2001); *Bishop v. Bishop*, 295 A.D.2d 382, 383, 743 N.Y.S.2d 724 (2d Dep't 2002); *Gross v. Gross*, 36 A.D.3d 318, 322, 830 N.Y.S.2d 166, 170 (1st Dep't 2006); *Gahagan v. Gahagan*, 51 A.D.3d 863, 864, 859 N.Y.S.2d 218, 219 (2d Dep't 2008); *Hovanec v. Hovanec*, 79 A.D.3d 816, 817, 912 N.Y.S.2d 442 (2d Dep't 2010); *Rosado v. Rosado*, 100 A.D.3d 856, 955 N.Y.S.2d 119, 120 (2d Dep't 2012); *Montoya v. Montoya*, 143 A.D.3d 865, 40 N.Y.S.3d 151, 152 (2d Dep't 2016).

6 *Mulcahy*, 285 A.D.2d at 588, 728 N.Y.S.2d at 92; *Gross*, 36 A.D.3d at 322-323, 830 N.Y.S.2d at 170.

7 *Julien*, 245 A.D.2d at 122, 666 N.Y.S.2d at 148.

8 22 N.Y.C.R.R. §1400.2.

9 *Id.*

10 *Id.*

11 *Id.*

12 22 NYCRR §1400.3.

13 *Id.*

14 22 NYCRR §§ 1400.2, 1400.3.

15 *Mulcahy*, 285 A.D.2d at 588, 728 N.Y.S.2d at 92.

16 *Julien*, 245 A.D.2d at 122, 666 N.Y.S.2d at 147.

17 *Bishop*, 295 A.D.2d at 383, 743 N.Y.S.2d at 724.

18 *Behrins & Behrins, P.C. v. Chan*, 305 A.D.2d 348, 758 N.Y.S.2d 527 (Mem.) (2d Dep't 2003), citing *Mulcahy v. Mulcahy*, 285 A.D.2d 587, 728 N.Y.S.2d 92.

19 *Flanagan v. Flanagan*, 267 A.D.2d 80, 81, 699 N.Y.S.2d 406, 407 (1st Dep't 1999).

20 *Flanagan v. Flanagan*, 175 Misc. 2d 160, 163-64, 668 N.Y.S.2d 302, 304 (Sup. Ct., N.Y. County, 1997), *modified*, 267 A.D.2d 80, 699 N.Y.S.2d 407 (1st Dep't 1999).

21 *See Flanagan*, 267 A.D.2d at 81, 699 N.Y.S.2d at 407.

22 *Reisman, Peirez & Reisman, LLP v. Gazzara*, 15 Misc.3d 1113(A), 839 N.Y.S.2d 436 (Table), 2007 WL 949436 at *4 (Sup. Ct., Nassau County, 2007), *citing Gross v. Gross* 36 A.D.3d 318, 830 N.Y.S.2d 166 (1st Dep't 2006).

23 *Kayden v. Kayden*, 278 A.D.2d 202, 717 N.Y.S.2d 908 (Mem.), 909 (2d Dep't 2000).

24 *See Mulcahy*, 285 A.D.2d at 588, 728 N.Y.S.2d at 92.

25 *See Reisman, Peirez & Reisman*, LLP, 15 Misc.3d 1113(A), 839 N.Y.S.2d 436 (Table), 2007 WL 949436 at *4.

26 *Schlissel Ostrow Karabatos, PLCC v. Vandeweghe-Mullarkey*, 2009 N.Y. Misc. Lexis 5486, 2009 WL 3062470 (Sup. Ct., Nassau County, Aug. 31, 2009) (emphasis supplied).

27 *Bishop*, 295 A.D.2d at 383, 743 N.Y.S.2d at 724; *Wagman v. Wagman*, 8 A.D.3d 263, 777 N.Y.S.2d 678 (Mem.) (2d Dep't 2004); *Rosado*, 100 A.D.3d at 856, 955 N.Y.S.2d at 120; *Montoya*, 143 A.D.3d at 866, 40 N.Y.S.3d at 152.

28 *Bishop*, 295 A.D.2d at 383, 743 N.Y.S.2d at 724.

29 *Mulcahy*, 285 A.D.2d at 588, 728 N.Y.S. 29 at 92.

30 *Gross*, 36 A.D.3d at 322-23, 830 N.Y.S.2d at 170.

31 *Id.* at 321-23, 830 N.Y.S.2d at 168-70.

32 *Julien*, 245 A.D.2d at 122, 666 N.Y.S.2d at 147.

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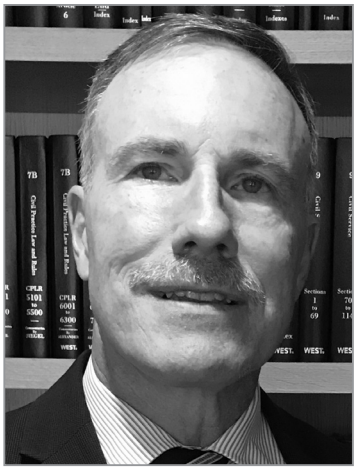

Tax Certiorari and Eminent Domain Decisions 2018-2019

BY JOHN RAYMOND MECHMANN, JR., ESQ.

This annual article discusses tax certiorari and eminent domain decisions covering a broad range of issues such as valuation in tax certiorari and eminent domain proceedings involving large retail parcels (using the income capitalization method) and religious foundation properties (analyzing proper highest and best use determinations). This article also reviews recent cases involving selective reassessment, standing to contest tax assessments at the local level and pursuant to Article 7 of the Real Property Tax Law ("RPTL"), lack of notice to school districts, the scope of discovery including appraisal exchanges, the sufficiency of appraisal evidence, the taxability of fiber-optic lines, and additional allowances in eminent domain matters.

TAX CERTIORARI

1. Valuation Methodology

Matter of Champlain Centre North LLC v. Town of Plattsburgh[1] contains a detailed analysis of two appraisers' income capitalization methods for

a retail parcel. The property, an enclosed shopping mall consisting of 477,954 square feet of retail space on 75.5 acres of land, was assessed by respondent Town at $49,400,000 for both the 2015 and 2016 tax years. At trial, petitioner's appraiser utilized the income capitalization method and valued the property at $27,912,000 for tax year 2015, and $24,483,000 for tax year 2016. Respondents' appraiser, using the same method, valued the property at $45,700,000 for both tax years.[2] The trial court analyzed the experts' conclusions of value and found for petitioner.[3] On appeal, the Court found that petitioner had met its initial burden of rebutting the presumptive validity of the tax assessments, by submitting the detailed appraisal of its appraiser, who utilized an accepted method of valuation, and who adequately set forth his calculations and the data upon which his conclusions were based.[4] The Appellate Division, Third Department, then weighed the entire record to review the trial court's findings, to determine whether they were supported by or were against the weight of the evidence, deferring to the trial court's resolution of credibility issues where conflicting expert testimony of the appraisers was presented.

Valuation by the income capitalization approach was proper since that method "is recognized to be the best indicator of value with respect to income-producing property."[5] The experts differed substantially, however, regarding the property's gross income and operating expenses. Petitioner's expert estimated future net income by analyzing historical operations data for the property, that showed substantial declines in retail sales and corresponding increases in vacancy rates, which were consistent, in his opinion, with industry trends. This trend resulted in lower base rents, higher vacancy rates and extensive tenant concessions. Retail sales of one of the larger, anchor stores (occupying 17.9% of the leasable area of the mall) had in fact declined to a level by 2014 that suggested a significant risk that it would close. If the store closed, he opined, it would be very difficult to find a tenant or even tenants to occupy that same space, and, even if potential tenants were located, substantial tenant concessions would likely be required to lease the space. He therefore concluded that the property's actual historical income did not accurately reflect future income, and thus fair market value.[6]

Petitioner's expert then estimated future gross rental income for each category of tenant, by multiplying projected sales by an occupancy cost ratio; this ratio represents total occupancy costs–including base rent and additional costs such as real estate taxes and common area charges–that tenants are

willing to pay as a percentage of their retail sales.[7] His estimated expenses also properly included expenses for likely tenant concessions, which he believed would be necessary to entice tenants to lease property. Finally, although his selection of the appropriate capitalization rate was based in part on his personal experience and knowledge, the Court found that the appraisal contained an adequate factual basis for the capitalization rate employed in his analysis being utilized in the industry for similar properties.[8]

The trial court, on the other hand, did not credit respondent's expert's estimates of future income and expenses; he failed to account, for example, for declining occupancy rates and income, or the likely loss of a major anchor tenant, and he overestimated effective gross income by utilizing total payments from tenants in 2015, which he conceded at trial was substantially higher than the average year's receipts.[9] The trial court also found that he failed to properly account for tenant reimbursements for real estate taxes and common area charges, and disregarded necessary expenses incurred by petitioner to attract and retain tenants and to maintain the property. The Third Department thus concluded that the trial court had an ample basis for finding petitioner's expert's analysis more credible, and in adopting the values proposed by him.[10]

2. Selective Reassessment

In *Matter of Southgate Associates v. Town of West Seneca*,[11] petitioner commenced an RPTL Article 7 proceeding challenging its real property assessment. The Supreme Court, Erie County, granted petitioner's motion for summary judgment, arguing that the reassessment was unconstitutionally selective. The Appellate Division, Fourth Department, reversed. While a system of selective reassessment that has no rational basis in law violates the equal protection provisions of the U. S. and State Constitutions, reassessment merely upon improvement is not illegal in and of itself, so long as the policy is "applied even-handedly to all similarly situated property."[12] A party seeking summary judgment on selective reassessment must establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment in their favor."[13] Petitioner's moving papers, however, only made bald assertions that the reassessment was unconstitutionally selective, while not identifying any similarly situated property that was purportedly treated differently than the subject property. The Court also noted that the absence from the record of a 'comprehensive written plan of reassessment' did not, by itself, warrant the granting of summary judgment to petitioner.[14]

3. RPTL Article 7 Exclusive Remedy to Challenge Assessments

In *Level 3 Communications v. Jiha*,[15] plaintiffs had commenced a plenary action seeking, *inter alia*, to challenge tax assessments on electric production (back-up generator) and other associated equipment, asserting that they constituted real property under the RPTL. The Supreme Court, New York County, denied plaintiffs' motion to consolidate with a separate Article 7 proceeding, and granted defendants' motion for summary judgment dismissing the action. The Appellate Division, First Department, affirmed holding that, to the extent that plaintiffs challenged tax assessments as excessive, unequal or unlawful, or that the real property was misclassified, the court properly determined that their exclusive remedy was a proceeding pursuant to RPTL Article 7.[16] The First Department also determined the Supreme Court correctly dismissed plaintiffs' remaining claims, including speculative challenges to the assessment methodology and the constitutionality of the tax itself. Defendants' assessments were not palpably arbitrary or the product of invidious discrimination.[17]

4. Summary Judgement

Sleepy Hollow Lake, Inc. v. McBride[18] involved a non-profit homeowners' association responsible for, among other things, the operation and management of a recreational and residential community. The development, spread over two towns and a village, includes over 2,000 parcels with approximately 800 residences, 210 "common area" parcels, including roads, maintenance facilities, parks, a swimming pool, a dam, a clubhouse/lodge, a marina and a 324–acre lake, maintained for the use and enjoyment of the individual lot owners. One town and village assessed the common area parcels at $2,556,700 and $2,770,200, while the other town assessed them at $942,100, and $1,417,700, respectively, for the 2016–2017 and 2017–2018 tax years.[19] Petitioner challenged these assessments in RPTL Article 7 proceedings, and moved for summary judgment contending, among other things, that the common area parcels are encumbered by covenants and restrictions, such that the parcels have no marketable value and, therefore, should be assessed at zero.[20] Respondents opposed the motion, and cross-moved for summary judgment dismissing the petitions. The Supreme Court, Greene County, "granted petitioner's motion and denied respondents' cross motion, determining, among other things, that the assessments of the common area parcels were 'unequal and excessive' and ordered that the assessments be reduced to zero.'"[21] Respondents appealed.

The Appellate Division, Third Department, noted that Petitioner's proof included its declaration of protective covenants, its bylaws, the quitclaim deeds transferring the common area parcels to petitioner and the affidavit of and market study drafted by a licensed real estate appraiser. Since the deeds to the individual lot owners were made subject to both the covenants and bylaws, an ambiguity exists regarding the nature of the property interest held by individual lot owners in the common areas; such conflicts should not be resolved by summary judgment.[22] Petitioner also failed to demonstrate, as a matter of law, that the assessed property values of the individual lot owners already included an enhanced value or premium sufficient to cover or offset the value of petitioner's common area parcels.[23] Nor did petitioner sufficiently establish that the subject common area parcels have zero or only nominal value.[24] Thus, while petitioner sufficiently demonstrated the existence of a valid and credible dispute regarding the valuation of the common area parcels, the court found that triable issues of fact remain regarding the nature of the property interests in, and valuation of, the common area parcels; summary judgment therefore was not appropriate.[25]

In *Matter of Rite Aid Corp. v. Darling*,[26] petitioner challenged tax assessments for a commercial property for tax years 2009 through 2014. Respondent City and intervenor school district moved for summary judgment seeking dismissal of the petitions alleging that the appraisal report and the opinions of petitioner's expert were unreliable and invalid as a matter of law. Petitioner cross-moved to amend its appraisal report. The Supreme Court, Steuben County, granted the motion in part, dismissing the petitions for tax years 2009–2011 and denying the cross motion to amend, while granting the cross motion to amend for the remaining tax years. The Supreme Court also, *sua sponte,* struck the notes of issue and deemed the proceedings for the 2009–2011 tax years to be abandoned pursuant to RPTL Section 718(2)(d).[27] The Appellate Division, Fourth Department, reversed and denied the motion for summary judgment dismissing the 2009–2011 tax years, concluding that respondents failed in their burden to show they were entitled to relief as a matter of law.[28]

Petitioner properly argued that the appraisal report was not deficient as a matter of law, since it set forth substantial evidence that the property was overvalued by the taxing authority to rebut the presumption of validity of tax assessments.[29] "The exchange and filing of appraisal reports prior to trial is 'to afford 'opposing counsel the opportunity to effectively prepare for cross-examination"…. any 'deficiencies in an appraisal may be cured by

the expert's trial testimony…."[30] In addition, at trial, the court has broad discretion to reject expert testimony and arrive at a determination of value that is either within the range of expert testimony or supported by other evidence and adequately explained by the court. Thus, there was also no basis for striking the notes of issue for tax years 2009-2011. Likewise, it was an abuse of discretion for the motion court to *sua sponte* strike the remaining notes of issue, and to determine that that the proceedings for the remaining tax years should be deemed abandoned pursuant to RPTL 718(2)(d).[31]

5. Standing

In *Matter of Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck,*[32] the Court of Appeals addressed challenges to the assessments on a parcel belonging to a family-owned corporation which operates a pancake restaurant on the parcel. The property was owned by a husband and wife until the husband's death, whereupon the wife became the sole owner; upon her death, the property was transferred to a revocable trust. The corporation continued to operate the restaurant on the parcel, paying all operating costs including taxes. The parcel was subsequently transferred to the couple's daughters pursuant to the terms of the trust. Petitioner corporation timely grieved the assessments for tax years 2010 through 2013; each complaint for those years included an authorization signed by one of the daughters as president or owner of the restaurant. The Board of Assessment Review confirmed the assessments, and petitioner commenced RPTL Article 7 proceedings challenging each assessment.[33]

Respondents moved to dismiss, arguing that the Supreme Court, Westchester County, lacked subject matter jurisdiction, because neither petitioner corporation nor the daughter was the owner of the parcel, and, therefore, had not satisfied RPTL Section 524(3) regarding commencement of the administrative proceeding. Respondents also argued that petitioner corporation also lacked standing to challenge the assessments in Article 7 proceedings because petitioner was not an aggrieved party pursuant to RPTL Section 704(1).[34] The Supreme Court denied the motion finding that petitioner, a beneficiary of the Trust, had not failed to comply with the precondition for an administrative challenge in RPTL Section 524. The Supreme Court also found that there was standing for an Article 7 action, since the daughter was also an aggrieved party.[35] The Appellate Division,

Second Department, reversed and granted the motions to dismiss, holding that petitioner had standing as an "aggrieved party" for purposes of RPTL Article 7 (because the tax assessments had a "direct adverse effect" on petitioner's pecuniary interests), but that the Court lacked subject matter jurisdiction because properly filing a grievance is a condition precedent and jurisdictional prerequisite to an Article 7 action, and pursuant to RPTL Article 5 the property owner must file the complaint or grievance. Since petitioner corporation never owned the subject parcel, it was not authorized to file the grievance.[36] Petitioner appealed.

RPTL Section 524(3) provides that a complaint with respect to an assessment must be made by the person whose property is assessed or by some person authorized in writing by the complainant.[37] If the Board of Assessment Review has made a determination against the grievance, an "aggrieved party" may thereafter seek judicial review of the assessment, alleging in its petition that a complaint was made in due time to the proper officers to correct such assessment.[38] The proper filing of an administrative grievance pursuant to RPTL Article 5 is thus a condition precedent to judicial review pursuant to RPTL Article 7. The Court held first that a taxpayer is aggrieved under Article 7 when the tax assessment has a "'direct adverse effect on the challenger's pecuniary interest.'"[39] Taxpaying owners are, of course, aggrieved parties, but lessees of an undivided assessment unit may also be aggrieved by a tax assessment "if legally bound by the lease to pay the entire assessment on behalf of the owner at the time it is laid."[40] Partial commercial lessees are generally not aggrieved, even if responsible, under the terms of the lease, to pay a pro rata share of the property taxes, absent the right to commence an action or the duty to pay the entire tax bill. While the property assessment had an adverse financial impact on the petitioner (the corporation), it had, "in the legal sense," only a "remote and consequential impact" on the petitioner's pecuniary interest, and not the required direct adverse effect necessary to confer standing."[41]

There is no dispute here that petitioner did not own the subject parcel, nor was it legally bound to pay all of the real property taxes. Petitioner contended, nevertheless, that the assessments had a direct impact on its pecuniary interest sufficient to render it "aggrieved" within the meaning of RPTL Article 7, because, as the sole occupant of the property (not a partial lessee) petitioner paid all of the taxes directly, not just a pro rata share.[42] But petitioner here was not "legally responsible" for paying the undivided tax liability; only a lessee who is "obligated to pay" an assessment

is sure to "lose something from his own property or means."[43] "While 'paying taxes always has a direct adverse effect on one's pecuniary interest [citation omitted]', that alone has never been enough."[44] Without a direct contractual obligation, the remote and consequential impact of the assessment on petitioner did not confer standing.[45] Nor was the daughter an aggrieved party by being merely a beneficiary of the family trust. The trust itself, not the daughter, owned the subject property. Like petitioner, the daughter was neither authorized to pursue an Article 7 proceeding on behalf of the property owner, nor did she have any legal obligation to pay the real property taxes (in fact she was explicitly relieved of such obligation by the terms of the trust).[46] In any event, the petitioner in this matter is the Larchmont Pancake House – not the daughter. "Petitioner is a non-owner with no legal authorization or obligation to pay the real property taxes and, as such, petitioner is not an aggrieved party within the meaning of RPTL Article 7."[47] Because petitioner lacked standing, the Court did not address the scope of appropriate challengers under RPTL Section 524.[48]

Matter of Long Island Power Authority v. Assessor of the Town of Huntington[49]—In 1997, the former Long Island Lighting Company ("LILCO") agreed to sell and deliver energy produced by its power generating facilities in Nassau and Suffolk Counties (including the Northport Power Station, the subject parcel) to petitioner, Long Island Power Authority ("LIPA"). Under the power supply agreement with LILCO, LIPA agreed to make monthly payments to LILCO, including a "Monthly Capacity Charge," which partly consisted of "property and all other taxes."[50] LIPA commenced an RPTL Article 7 action to challenge assessments for the property for tax years 2010-2011 through 2014-2015. Respondent Town moved to dismiss for lack of standing. The Supreme Court, Suffolk County, granted the motion, and LIPA appealed.[51] The Appellate Division, Second Department, noted that RPTL Article 7 grants standing to aggrieved persons to review an assessment of real property. A person is 'aggrieved' when an assessment has 'a direct adverse effect on the challenger's pecuniary interests.[52] The agreement required LIPA to pay all of the taxes levied against the property, as if LIPA was the owner of the property. These tax assessments thus directly affected LIPA's pecuniary interest, since what it pays under the agreement increases or decreases with the assessment. LIPA thus has standing to challenge the assessments.[53]

Matter of Eastbrooke Condominium v. Ainsworth,[54] reported on from the Appellate Division, Fourth Department last year,[55] addresses whether

Real Property Law ("RPL") Section 339–y(4) requires a condominium board of managers to obtain a separate authorization granting authority to challenge assessments from each condominium unit owner for each tax year. Eastbrooke consists of 402 individually-owned units and common recreational property on an adjacent parcel. Petitioner (the condominium board of managers, as the agent for individual owners) filed grievances with respondents for assessments for tax years 2008 through 2011. Respondents denied the respective complaints, and, thereafter, petitioner commenced RPTL Article 7 proceedings for each tax year for each of the unit owners.[56] Petitioner asserts that RPL Section 339–y(4), which permits a board of managers of a condominium complex to act as an agent of each unit owner who has given written authorization to seek administrative and judicial review of an assessment, permits the board to act as an ongoing agent. The board of managers notified each owner annually to afford them an opportunity to participate in challenges, providing them with an authorization for present and future representation. Some owners signed authorizations for each year, but all unit-owners were listed on the petitions.[57] Respondent moved to limit recovery to owners who had only signed authorizations for each year. The Supreme Court, Monroe County, granted the motion.

At trial, the Supreme Court determined that the units had been over-assessed by a total of $4,485,300 for each tax year between 2008 and 2011. Petitioner appealed, and the Appellate Division, Fourth Department, affirmed, reasoning that unit owners must sign authorizations for each tax year challenged, and that an authorization for one year did not give the permission for other years.[58] The Court of Appeals reversed, however, citing to RPL Section 339–y, which permits agency where an owner has given a written authorization to seek administrative and judicial review of an assessment. While a signed authorization is a condition precedent to commencing administrative and/or judicial review, the Court found nothing in RPL Section 339–y(4) that prohibits a standing authorization; at worst the statute is ambiguous on the subject, and thus must be construed liberally in favor of the challenger to an assessment. RPL Section 339–y(4) thus allows an owner to confer authority to act as agent for that owner by a standing authorization, for the tax year in which that authorization was issued, and in all subsequent tax years, unless such authorization is cancelled or retracted by the owner.[59]

6. RPTL §708—Lack of Notice to School District Excused

Matter of Champlain Centre North LLC v. Town of Plattsburgh[60] deals with RPTL Section 708(3), which requires that copies of the notice of petition and petition be mailed to the superintendent of schools of any school district within which any part of the real property on which the assessment to be reviewed is located within 10 days of service on the assessing unit. The failure to comply will result in the dismissal of the petition, unless excused for good cause shown. Petitioner timely commenced a proceeding in 2016 with service upon the Town, but copies of the notice and petition were mailed to the wrong school district due to law office failure (petitioner was aware of the proper school district because of pending litigation). The Appellate Division, Third Department, found that law office failure does not constitute "good cause shown" for which noncompliance with RPTL Section 708(3) may be excused, nor does lack of prejudice to the school district excuse the failure to comply unless good cause is shown.[61] Nevertheless, the Supreme Court, Clinton County, properly denied the school district's motion to dismiss; the defense of lack of notice pursuant to RPTL Section 708(3) is waived, where a party informally appears by substantially participating in the proceeding before seeking dismissal.[62] The school district participated in the 2016 proceeding before it answered or moved to dismiss; its counsel was also aware of the 2015 and 2016 challenges and that a trial on those matters was scheduled for a set date. School district counsel had also participated in a court conference during which commencement of the 2016 proceeding was discussed; an extension of time to file an appraisal report (to include a valuation for the 2016 tax year) was sought, and the issue was also the subject of correspondence the same day as the conference. The Third Department found that such acts, done with knowledge of the 2016 proceeding and failing to object to the untimeliness of notice of the proceeding, "constituted an informal appearance that was sufficient to waive any objection to the late notice."[63]

7. RPTL §718–Timely Filing Note of Issue

In *Matter of the Shubert Organization, Inc. v. Tax Commission of the City of New York,*[64] the Supreme Court, New York County, granted respondents' motions to dismiss RPTL Article 7 petitions for tax years 2007-2008 through 2011-2012, and dismissed the actions pursuant to RPTL Section 718(1), on the ground that the proceedings had been abandoned as a matter of law due to petitioner's failure to timely file the notes of issue within four years of commencement.[65] Pursuant to a so-ordered stipulation, the

notes of issue for the subject years were permitted to be filed on or about September 1, 2016; they were filed on December 6, 2016. The Appellate Division, First Department, reversed, applying a "reasonableness" analysis to whether petitioner's filing of those notes of issue some months after the four-year mark was timely and thus satisfied the "on or about" provision. The Court found that, given the parties' course of conduct, which included respondents' multiple stipulated extensions to complete discovery and its appraisal reports; the many interactions between the parties and with the court about the petitions after September 1, 2016 without raising the issue of abandonment until the eve of the scheduled trial, and that extensive trial preparation had taken place, the filing of the Note of Issue just over three months after the stipulated date constituted a reasonable time for performance.[66]

8. RPTL §720–Petition Sets Floor for Assessment after Trial

In *Matter of Champlain Centre North LLC v. Town of Plattsburgh,*[67] the Appellate Division, Third Department, held that the Supreme Court, Clinton County, erred when it valued the property after trial at below the amount that petitioner requested in the petitions. RPTL Section 720[1][b] provides that "an assessment may not be ordered reduced to an amount less than that requested by the petitioner in a petition or any amended petition."[68] In its RPTL Article 7 petitions, petitioner sought to reduce the 2015 assessed value of the property to only $28 million and the 2016 assessed value to only $25 million. Since the Supreme Court concluded the value of the property for the 2015 tax year was $27,912,000, and for the 2016 tax year was $24,483,000, or below the value sought in the petitions, the orders and judgments must be modified to reflect as the proper amounts the values the petitioner claimed in its pleadings.[69]

9. 22 NYCRR 202.59–Scope of Discovery

Matter of South Central Plaza, Inc. v. Village of Spring Valley[70] involves RPTL Article 7 proceedings challenging assessments for tax years 2012 through 2014. The Supreme Court, Rockland County, granted the motion of the respondent to compel discovery pursuant to Section 408 of the New York Civil Practice Law and Rules ("CPLR § 408"), and denied petitioner's cross motion seeking, *inter alia*, to preclude the respondents from filing a trial appraisal. The Appellate Division, Second Department, affirmed.[71] Respondent Village sought to compel the production of documents to assist

its appraiser in preparing a trial appraisal. Petitioner had opposed the motion, arguing that respondents were precluded from obtaining the materials for their failure to timely request an audit.[72] While Section 202.59 of Title 22 of the Codes, Rules and Regulations of the State of New York ("Section 202.59") requires the parties in a tax certiorari proceeding to exchange certain documents and information, and permits an audit if requested, CPLR § 408 separately provides the court with broad discretion to address discovery disputes outside of Section 202.59, including by directing the disclosure of material and necessary information.[73] Contrary to the petitioner's argument, the failure to timely request an audit pursuant to Section 202.59(c) does not preclude respondents from seeking information which is material and necessary for their expert to prepare a trial appraisal.[74] The Supreme Court properly determined that the sought materials were material and necessary to respondents' trial preparation, and thus should be produced.[75]

10. 22 NYCRR 202.59–Sufficiency of Appraisal

In *Matter of Buscaglia v. Assessor, Town of Hamburg,*[76] petitioner had commenced RPTL Article 7 proceedings challenging the assessments for tax years 2013–2014 through 2016–2017 on a waterfront parcel. At trial, petitioner and respondents stipulated to the admission into evidence of their respective appraisal reports, the only evidence presented, and the parties' attorneys presented arguments thereupon.[77] The trial court held that petitioner had failed to overcome the presumption of validity of the assessment by introducing substantial evidence that the property was overvalued, and dismissed the petitions.[78] On appeal, the Appellate Division, Fourth Department, reversed. Although a petitioner challenging a tax valuation has the initial burden to rebut the presumption of the validity of the assessment, "by introducing substantial evidence that the property was overvalued," "substantial evidence" merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation.[79] "The ultimate strength, credibility or persuasiveness of petitioner's arguments are not germane during this threshold inquiry."[80] This burden is commonly met by submission of a "detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser," so long as the appraisal also complies with Section 202.59(g)(2) by setting forth the facts, figures and calculations supporting the appraiser's conclusions.[81] The trial court improperly found that, since respondent's counsel argued that petitioner misidentified the transactions underlying each comparable, and there

was no other evidence to support petitioner's arguments and to overcome the presumption of validity that this permitted dismissal of the petitions.[82] Rather, the Fourth Department held, the appraisal reports stipulated into evidence presented a valid and credible dispute regarding valuation, and petitioner had no obligation to come forward with additional evidence to rebut the unsworn allegations of counsel disputing the validity of petitioner's comparables.[83]

11. Taxability of Fiber-optic Lines

In *Matter of Level 3 Communications, LLC v. Erie County,*[84] petitioners commenced a hybrid CPLR Article 78 proceeding/Declaratory Judgment action seeking, *inter alia*, a determination that the subject properties, including fiber optic cables and accompanying equipment, are not taxable and to compel respondents to issue refunds of the taxes paid on the property in certain tax years. Petitioners had previously submitted applications pursuant to RPTL Section 556–b seeking refunds, which respondents either denied on procedural grounds or failed to consider. The Supreme Court, Erie County, concluded that the properties were taxable pursuant to RPTL Section 102(12)(f), which applies, *inter alia*, to equipment for the distribution of light.[85] On a prior appeal, the Appellate Division, Fourth Department, reversed that determination and remitted, concluding that the Supreme Court had relied on different grounds than those stated by respondents in rejecting the applications.[86] On remittal, respondents again denied the RPTL Section 556–b applications on the grounds, *inter alia*, that the fiber optic installations constitute taxable real property within the meaning of RPTL Section 102(12)(i), and that the exception in subdivision (D) of that statute did not apply. Respondents appealed.[87]

The Fourth Department noted first that, after the prior appeal in this matter, the Court of Appeals had conclusively determined that fiber-optic cables are taxable as 'lines' under RPTL Section 102(12)(i), in spite of the fact that they do not conduct electricity.[88] However, the Fourth Department also found that the motion court erred in determining that the fiber optic installations were not taxable pursuant to the exception set forth in RPTL Section 102(12)(i)(D).[89] Respondents had argued that the exception for lines in that statute, which are used in the transmission of news or entertainment radio, television or cable television signals, for immediate, delayed or ultimate exhibition to the public, does not apply to petitioners' fiber optic installations, relying on, *inter alia*, a 2007 opinion by counsel for the State Board of Real Property Services (SBRPS) (11 Ops Counsel SBRPS

No. 103 [2007]). The Fourth Department declined to defer to SBRPS and agreed with respondents, holding that, while an agency's interpretation of the statutes it administers must normally be upheld absent demonstrated irrationality or unreasonableness, where the question is one of pure statutory reading and analysis, there is little basis to rely on any special competence or expertise of the administrative agency. In any event, the Fourth Department agreed with respondents; petitioners had the burden of establishing that the subject properties are excluded from taxation, given the Court of Appeals' decision that the lines are taxable, and petitioners had failed to meet that burden.[90] Petitioners also failed to demonstrate non-taxability pursuant to RPTL Section 102(12)(i)(D) because, *inter alia*, while the lines are used to some unspecified extent to transmit news or entertainment radio, television or cable television signals, petitioner failed to establish the percentage of their use for those purposes. Such lines are non-taxable, the Fourth Department held, only where they are primarily or exclusively used for one of the exempt purposes in RPTL Section 102(12)(i)(A)—(D).[91]

In *Matter of T-Mobile Northeast, LLC v. DeBellis,*[92] T–Mobile brought a hybrid declaratory judgment action/CPLR Article 78 proceeding seeking a declaration that its property was not taxable, and a judgment annulling the school district's contrary determination. T–Mobile argued that its property is not taxable under RPTL Section 102(12) (b) or (i), since its installations fall within categories of property phased out from taxation in 1987 or constitute "station connections" excepted from taxation in paragraph (i).[93] Respondent argued that the property is encompassed by paragraph (i) based on the plain text of that provision and its legislative history and, alternatively, that certain components of the equipment are fixtures and thus taxable under RPTL Section 102(12)(b).[94]. Respondents moved to dismiss; the Supreme Court, Westchester County, *inter alia*, denied the petition and dismissed the proceeding, holding that the property in question was taxable. The Appellate Division, Second Department, affirmed reasoning that under the plain text of the statute each component of T–Mobile's equipment is taxable under RPTL Section 102(12)(i).[95] The Second Department, however, conceded that this conclusion conflicted with the decision of the Appellate Division, First Department, in *Matter of RCN New York Communications, LLC v. Tax Commission of the City of New York.*[96] The Appellate Division , Second Department, further noted that, even if RPTL §102(12) (i) did not apply here, the antennas that are part of the equipment installations at issue are structures that are "affixed" to real estate under the common law definition of "fixtures," and thus are taxable real property under

RPTL Section 102(12)(b).[97]

The Court of Appeals held that the plain language and legislative history of RPTL Section 102(12)(i), given that all "real property within the state" is subject to real property taxation unless otherwise exempt by law, is that real property subject to taxation includes "all lines, wires, poles, supports and enclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain...," which characterizes petitioner's equipment and installations.[98] In addition, according to the Court, petitioner's equipment is precisely the type of property the legislature intended to cover when it substantially revised the RPTL in 1987 to adopt a consistent scheme of taxation that did away with artificial distinctions such as ownership of the property which characterized the law before 1987, and instead made taxability dependent on use or function.[99]

CONDEMNATION

1. Valuation—Highest and Best Use

Matter of Oakwood Beach Bluebelt-Stage 1[100] involves an approximately seven-acre plot of land which was donated to claimant in separate parcels by separate donors, for the construction of a yeshiva. After a 1985 wetland mapping by the New York State Department of Environmental Conservation ("DEC"), claimant sought but was unable to procure substitute property. Claimant then applied to the Freshwater Wetlands Appeals Board for a hardship exemption from the wetlands designation, which exemption was granted in 1991. The claimant's plans for the parcel consisted of the construction of a 53,000 square–foot facility, with classroom space, a synagogue, a playground and park, and outdoor lecture space, plus additional space for student and faculty housing.[101] Claimant later moved for, and was granted, permission to exceed the planned Yeshiva's size of 53,000 square feet, but claimant failed to proceed with applications for the project for over 10 years, when the Commissioner of the DEC imposed a one-year (later extended to three year) moratorium on the issuance of wetland development permits. At the end of the moratorium, the New York City Department of Environmental Protection and the Department of Citywide Administrative Services applied for site selection and acquisition of the subject property for condemnation.[102] New York City then commenced this condemnation proceeding to determine just compensation to the claimants. At a nonjury

trial in October 2014 as to the valuation of the property, claimant presented revised plans for development which included additional housing. As the trial court, the Supreme Court, Richmond County, found that the value of the subject property was $10,100,000 and awarded the claimants that sum. New York City appealed.[103]

"The measure of damages in condemnation is the fair market value of the condemned property in its highest and best use on the date of the taking."[104] Fair market value in turn is the price for which the property would sell if there was a willing buyer who was under no compulsion to buy and a willing seller under no compulsion to sell.[105] A determination of the highest and best use of a property must be based upon evidence of a use which reasonably could or would be made of the property in the near future.[106] The parties stipulated that the site preparation and foundation work for the plans would cost an additional $581,152. The Appellate Division, Second Department, found, as had the trial court, that the concrete step taken by the claimant of pursuing a hardship wetlands exemption demonstrated that the use as a yeshiva was not hypothetical, and therefore that use was the highest and best use of the property. The failure to develop the property in accordance with this highest and best use was explained by actions taken by New York City to acquire the property and the wetlands development moratoria; thus, a finding that the "highest and best use" of the property was for development of the proposed yeshiva was amply supported by the evidence.[107]

As to valuation, the trial court also properly concluded that value should be by comparable sales, as employed by claimant's appraiser, whose comparables were zoned like the subject for residential use, as well as for use for community facilities and schools.[108] The Second Department noted that, where the parties offer inconsistent highest and best uses, and their experts appraise only their own proposed uses, the award must be based upon the evidence offered by the party prevailing on the use question, "with such adjustments as the evidence will support."[109] The trial court correctly determined valuation based on the claimant's appraisal, as adjusted, and properly dismissed New York City's argument that the comparable properties offered by claimant were not comparable. The trial court should however have valued the parcel based on claimant's original plan, not for the additional buildings in the updated plan. This also reduced the amount of extraordinary foundation work required, and thus the value arrived at should have been $3,165,513.[110]

2. EDPL §207 – Review of Determination to Condemn

Matter of City of New York v. Yonkers Industrial Development Agency[111] was a challenge to a taking by the City of Yonkers from the City of New York and the Metropolitan Transportation Authority ("MTA"). Petitioner owns an improved 3.64–acre parcel leased to the Metropolitan Transportation Authority and the MTA Bus Company, for use as a bus depot. In 2017, the City of Yonkers Industrial Development Agency (the "Agency") adopted a resolution to condemn the parcel, to return the parcel to use in furtherance of Urban Renewal and Master Plans.[112] After a public hearing, the Agency sought to condemn the fee interest in the subject parcel, but not the leasehold interest.[113] Petitioners commenced a proceeding under Section 207 of the New York Eminent Domain Procedure Law ("EDPL") proceeding to review the determination.

The Appellate Division, Second Department, noted first that review of a municipality's decision to condemn seeks to determine whether "'a public use, benefit or purpose will be served by the proposed acquisition.'"[114] "What qualifies as a 'public purpose' or 'public use' is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility or advantage."[115] This includes any use "which contributes to 'the health, safety, general welfare, convenience or prosperity of the community' [citations omitted] including to stimulate the local economy, create jobs, and provide infrastructure."[116] A challenge to a municipal finding that a proposed condemnation will further a public use must establish that the determination bears no rational relation to a conceivable public purpose.[117] The Second Department found that claimant failed to establish that the proposed condemnation does not rationally relate to a conceivable public purpose.[118] However, the Second Department also found that the proposed condemnation was prohibited under the doctrine of prior public use, where land already devoted to a public use may not be condemned absent legislative authority for the acquisition at issue, unless the new use would not materially interfere with the prior use.[119] Here the proposed condemnation would materially interfere with its existing public use as a bus depot, and thus the taking was rejected as it was not legislatively approved.[120]

3. 22 NYCRR §202.59—Scope of Appraisal

In *Matter of Rochester Genesee Regional Transportation Authority v. Stensrud,*[121] the Appellate Division, Fourth Department, considered an appeal from an order *in limine* striking a portion of respondents' appraisal report regarding "investment value," and precluding proposed expert testimony

at trial on the issue. The measure of damages in condemnation is the fair market value of the condemned property at its highest and best use on the date of the taking. Absent evidence of a recent sale of the subject property, valuation should be by comparable sales, capitalization of income or reproduction cost less depreciation. Where, as here, the highest and best use is the one the property presently serves, and that use is income-producing, then the capitalization of income is a proper method of valuation of the property.[122] While the respondent's appraisal used the term "investment valuation," the Appellate Division, Fourth Department, concluded that it constituted an income capitalization approach, since it used the standard income capitalization formula (that value equals net income divided by a capitalization rate.)[123] Issues regarding factors considered by respondents' appraiser in valuing the property, and that his opinion might not reflect market value, go to the weight to be accorded the appraisal and not its admissibility.[124] The trial court properly precluded certain testimony by respondents' expert regarding his own valuation of the property, since, at trial, respondents are "limited in their affirmative proof of value to matters set forth in their respective appraisal reports."[125] But the trial court erred in precluding testimony that was consistent with the proof of valuation set forth in the appraisal report.[126]

4. NYCRR §202.59 -- Discovery of Prior Appraisals

In *Matter of Klein v. County of Suffolk,*[127] condemnor had acquired an easement over a portion of petitioners' property by eminent domain, as part of a federally-funded construction project to reduce hurricane and storm damage. Condemnor's experts developed appraisals relating to the property, which were submitted to the federal government for reimbursing the County the amount paid for the easement. After petitioners rejected the County's offer of settlement, they filed a claim for just compensation, and thereafter served interrogatories and sought production of the prior appraisals submitted to the federal government. The Supreme Court, Suffolk County, granted petitioners' motion to compel responses to the interrogatories, and *sua sponte*, directed the production of all appraisals. Condemnor appealed.[128] The Appellate Division, Second Department, noted that an appraisal report, such as those sought by petitioners here, loses its immunity under Section 3101(d) of the CPLR where the condemnor adopts the appraisal by using it in dealing with some third party in such a way that it can be said to have vouched for its authenticity. Here, condemnor submitted the appraisal to federal authorities for reimbursement, and thereby adopted

it.[129] While the motion court properly ordered production of those appraisals, it should not have, *sua sponte*, directed production of all appraisals, since condemnor had not so employed the other appraisals.[130]

5. 22 NYCRR §206.21 -- Exchange of Appraisals

In *Kermanshahchi v. State,*[131] the State of New York condemned real property owned by claimants. At the trial on the issue of condemnation damages, the Court of Claims, *inter alia*, allowed a New York State Department of Transportation landscape architect to testify regarding a wetlands map for the subject property, which was relied upon by the State's appraiser in choosing comparable sales to determine valuation. The trial court rejected claimants' valuation, based upon a highest and best use of retail commercial, since the property was zoned industrial, and awarded damages based on the State's appraisal. Claimants appealed, arguing that the trial court erred in admitting the testimony of the architect, and should have awarded damages based on the claimants' appraisal.[132] The Appellate Division, Second Department, held that the trial court correctly rejected the claimants' valuation, based as it was on comparable properties that were neither comparable, nor properly adjusted to account for the differences, including historic landmark designation of the property, potential wetlands, commercial rather than industrial zoning of the properties, and other differences.[133] Nevertheless, the trial court also improperly admitted the testimony of the landscape architect.

Section 206.21 of Title 22 of the New York Codes, Rules and Regulations of the State of New York requires the parties to file an appraisal for each appraiser expected to testify, as well as reports of any expert to be called at trial. It also limits expert witnesses' testimony to matters set forth in their appraisals or other reports and permits preclusion of expert testimony at trial where there was no proper exchange of appraisals or reports. Here, the State failed to file a copy of the architect's report, and the trial court thus improvidently exercised its discretion in admitting the testimony, which was the only basis for the State's appraiser's attribution of wetlands to the property. The State's contention that he did not testify as an expert is belied by the trial record, in which he provided expert opinion testimony regarding the wetlands on the property.[134] The matter was thus remitted for a new trial limited to the issues of the existence, if any, of wetlands and the bearing of any such wetlands on valuation.[135]

E6. DPL §701 – Award of Attorneys' Fees to Condemnee

In *Matter of City of Long Beach v. Sun NLF Ltd. Partnership,*[136] condemnor City initially offered claimant the sum of $2,080,000 as compensation for the taking of its real property. Four years later, the City of Long Beach offered claimant $6,335,000, and made an advance payment in that amount. After a nonjury trial, the Supreme Court, Nassau County, determined that the sum of $11.8 million constituted just compensation for the taking.[137] The Appellate Division, Second Department, affirmed.[138] Claimant thereafter moved, pursuant to EDPL Section 701, for an additional allowance of $1,956,888 in attorney's fees, plus expert fees and costs and disbursements.[139] On the motion for an additional allowance, the Supreme Court awarded $831,303.22 in attorney's fees, plus the sums sought for expert fees and costs and disbursements, relying on the contingency fee retainer agreement, which provided for a fee of 20% of the first $500,000 (less expenses) of the excess of the award over the City of Long Beach's initial offer, and 15% of the remaining excess of the award over the initial offer. The Supreme Court applied the percentages contained in the retainer agreement to the excess over the advance payment, exclusive of interest, and found that the requests for expert fees and costs and disbursements were reasonable. Claimant and condemnor appealed.[140]

EDPL Section 701 "assures that a condemnee receives a fair recovery by providing an opportunity for condemnees whose property has been substantially undervalued to recover the costs of litigation establishing the inadequacy of the condemnor's offer."[141] The motion court must make two determinations: First, was the award substantially in excess of the amount of the condemnor's proof, and second, does the court deem an additional award necessary for claimant to achieve just and adequate compensation? Where both tests are satisfied, the court may award reasonable fees.[142]" Here, the condemnation award significantly exceeded the amount of the City of Long Beach's proof, and thus the Supreme Court appropriately determined that an additional award for attorney's fees was necessary for claimant to receive just and adequate compensation.[143] Contingency fee arrangements are also proper for the court to consider regarding reasonable counsel fees, but the court is not bound by such agreements; rather, it must determine what a reasonable counsel fee would be.[144] The Second Department, found that the trial court improvidently exercised its discretion in basing the fee award on the retainer agreement, by its application of the percentages in the agreement to the excess over the advance payment, rather than over initial offer, since the retainer agreement was based in part on the estimated value of the

properties over the initial offer.[145] Here, a fee of $ 1,366,250 is reasonable considering the undervaluation of the properties by the City of Long Beach and the effort required to establish the highest and best use of the properties. The expert fees and costs and disbursements were also reasonable and necessary to achieve just and adequate compensation.[146]

In *Matter of Village of Spring Valley,*[147] condemnor Village made an advance payment to the claimant in the sum of $90,960, as compensation for trade fixtures taken by condemnation of property leased by claimant. After trial, the Supreme Court, Rockland County, determined that the sum of $469,114 constituted just compensation for the taking. The claimant subsequently moved for an additional allowance pursuant to EDPL Section 701. The trial court granted the motion and awarded an additional allowance in the amount of $233,391.46; condemnor appealed.[148] Here, where the condemnation award substantially exceeds the condemnor's advance payment and proof, the motion court properly determined that an additional allowance, including for reasonable attorney and appraiser fees, was necessary to achieve just and adequate compensation.[149] The contingency fee charged by the claimant's attorneys, and the expert appraiser's fees, were both reasonable given condemnor's extreme undervaluation of the fixtures, as well as the effort required to establish the inadequacy of the offer.[150]

In *Matter of Village. of Haverstraw v. AAA Electricians, Inc.,*[151] condemnor Village offered claimant $2,596,150, as compensation for the taking of its real property. After a nonjury trial, the Supreme Court, Rockland County, determined that the sum of $6,500,000 constituted just compensation for the taking. The award was affirmed on appeal.[152] Claimant subsequently moved for an additional allowance pursuant to EDPL Section 701, and the Supreme Court granted the motion, awarding the amount of $1,190,582.91.[153] Here, the condemnation award significantly exceeded the amount of the evidence at trial; therefore, the motion court correctly exercised its discretion to determine that an additional allowance, including reasonable attorney and expert fees, was necessary for the claimant to receive just and adequate compensation. The sliding scale contingency fee charged by the claimant's attorneys, as well as the experts' fees, were reasonable in light of the Village's undervaluation of the property and the effort required to establish the inadequacy of its offer.[154] While the trial court rejected claimant's expert's valuation of the property based on the number of residential housing units that could be developed on the property, and instead valued it on a per-acre basis, claimant's attorneys and experts' fees were nonetheless necessary to establish the highest and best use of the property and its market value on a per-acre basis.[155]

Endnotes

1 *Matter of Champlain Ctr. N. LLC v. Town of Plattsburgh*, 165 A.D.3d 1440, 86 N.Y.S.3d 629 (3d Dep't 2018).

2 *Id.* at 1440-41, 86 N.Y.S.3d at 631.

3 *Id.* at 1444-45, 86 N.Y.S.3d at 634.

4 *Id.* at 1442-43, 86 N.Y.S.3d at 6324.

5 *Id.* at 1443, 86 N.Y.S.3d at 632-33; s*ee also Matter of Ctr. Albany Assocs. LP v. Bd. of Assessment Review of City of Troy*, 151 A.D.3d 1420, 1422, 58 N.Y.S.3d 669, 671 (3d Dep't 2017).

6 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1443-44, 86 N.Y.S.3d at 633 (holding that actual income may be disregarded where there is evidence that it does not accurately reflect fair market value); *see also Matter of Ctr. Albany Assocs. LP,* 151 A.D.3d at 1423, 58 N.Y.S.3d at 672.

7 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1444, 86 N.Y.S.3d at 633; *see also Matter of Sangertown Square, L.L.C. v. Assessor of Town of New Hartford*, 118 A.D.3d 1344, 1344–1345, 988 N.Y.S.2d 319, 320 (4th Dep't), *lv. to appeal denied*, 24 N.Y.3d 907 (2014) (citing *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 508–511, 438 N.Y.S.2d 761, 766-68 (1981)).

8 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1444, 86 N.Y.S.3d at 633-34; *see also Matter of George A. Donaldson & Sons, Inc. v. Assessor of Town of Santa Clara*, 135 A.D.3d 1138, 1142, 43 N.Y.S.3d 459, 463 (3d Dep't), *lv. to appeal denied*, 27 N.Y.3d 906 (2016).

9 *Matter of Champlain Ctr. N. LLC, 165 A.D.3d at 1444-45, 86 N.Y.S.3d at 634.*

10 *Id. at 1445, 86 N.Y.S.3d at 634.*

11 *Matter of Southgate Assocs., LLC v. Town of W. Seneca*, 163 A.D.3d 1516, 81 N.Y.S.3d 701 (4th Dep't 2018).

12 *Id.* at 1516, 81 N.Y.S.3d at 702 (citing *Matter of Bd. of Managers v. Assessor, City of Buffalo*, 156 A.D.3d 1322, 1324, 68 N.Y.S.3d 238, 240 (4th Dep't 2017)); *see also Matter of Carroll v. Assessor of City of Rye*, 123 A.D.3d 924, 925, 999 N.Y.S.2d 155, 157 (2d Dep't 2014).

13 *Matter of Southgate Assocs., LLC*, 163 A.D.3d at 1516, 81 N.Y.S.3d at 702 (citing *Matter of Bd. of Managers,* 156 A.D.3d at 1323, 68 N.Y.S.3d at 240).

14 *Matter of Southgate Assocs., LLC*, 163 A.D.3d at 1516-17, 81 N.Y.S.3d at 702.

15 *Level 3 Commc'ns, LLC v. Jiha*, 162 A.D.3d 465, 465, 74 N.Y.S.3d 750 (Mem.) (1st Dep't), *lv. to appeal denied,* 32 N.Y.3d 906 (2018), *lv. to appeal denied sub nom*. *Level 3 Commc'ns, LLC v. RCN Telecom Servs. of N.Y. L.P.,* 32 N.Y.3d 917 (2019).

16 *Level 3 Commc'ns, LLC*, 162 A.D.3d at 465, 74 N.Y.S.3d at 750; *see* N.Y. Real Prop. Tax Law §§700, 706 (McKinney 2013); *see also Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v. Town of Fallsburg*, 78 N.Y.2d 194, 204, 573 N.Y.S.2d 43, 48, *reargument denied*, 78 N.Y.2d 1008, 575 N.Y.S.2d 459 (Table) (1991).

17 *Level 3 Commc'ns, LLC*, 162 A.D.3d at 465, 74 N.Y.S.3d at 750 (citing *Trump v. Chu*, 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 459 (1985), *appeal dismissed,* 474 U.S. 915 (1985)).

18 *Sleepy Hollow Lake, Inc. v. McBride*, 174 A.D.3d 1027, 104 N.Y.S.3d 756 (3d Dep't July 3, 2019).

19 *Id.* at 1028, 104 N.Y.S.3d at 757.

20 *Id.* at 1028-29, 104 N.Y.S.3d at 757.

21 *Id.*

22 *Id.* at 1029, 104 N.Y.S.3d at 757.

23 *Id.* at 1029-30, 104 N.Y.S.3d at 758.

24 *Id.* at 1030, 104 N.Y.S.3d at 759.

25 *Id.* at 1031, 104 N.Y.S.3d at 759.

26 *Matter of Rite Aid Corp. v. Darling*, 162 A.D.3d 1599, 79 N.Y.S.3d 401 (4th Dep't 2018).

27 *Id.* at 1599-1600, 79 N.Y.S.3d at 402-403.

28 *Id.* at 1600-1601, 79 N.Y.S.3d at 403.

29 *Id.* at 1601, 79 N.Y.S.3d at 403.

30 *Id.* (citing *Matter of Bd. of Managers of French Oaks Condo. v. Town of Amherst*, 23 N.Y.2d 168, 176, 989 N.Y.S.2d 642, 648 (2014)).

31 *Matter of Rite Aid Corp.*, 162 A.D.3d at 1601, 79 N.Y.S.3d at 404.

32 *Matter of Larchmont Pancake House v. Bd. of Assessors and/or Assessor of Town of Mamaroneck*, 33 N.Y.3d 228, 236, 100 N.YS.3d 680, 682 (2019).

33 *Id.* at 236, 100 N.Y.S.3d at 682-83.

34 *Id.* at 236, 100 N.Y.S.3d at 683*; see* N.Y. Real Prop. Tax Law § 524(3) (McKinney 2017); N.Y. Real Prop. Tax Law §704(1) (McKinney 2013).

35 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 236-37, 100 N.Y.S.3d at 683.

36 *Id.* at 237, 100 N.Y.S.3d at 683.

37 N.Y. Real Prop. Tax Law § 524 (McKinney 2017).

38 N.Y. Real Prop. Tax Law § 706(2) (McKinney 2013); *see Matter of Larchmont Pancake House*, 33 N.Y.3d at 235, 100 N.Y.S.3d at 682.

39 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 235, 237, 100 N.Y.S.3d at 682, 683-84 (quoting *Matter of Waldbaum, Inc., v. Finance Adm'r of City of N.Y.,* 74 N.Y.2d 128, 132, 544 N.Y.S.2d 561, 563 (1989)).

40 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 237-38, 100 N.Y.S.3d at 684 (quoting *Matter of Waldbaum, Inc.,* 74 N.Y.2d at 133, 544 N.Y.S.2d at 563).

41 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 238, 100 N.Y.S.3d at 684 (quoting *Matter of Waldbaum, Inc.,* 74 N.Y.2d at 133, 544 N.Y.S.2d at 563-64).

42 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 238-39, 100 N.Y.S.3d at 684.

43 *Id.* at 239, 100 N.Y.S.3d at 684-85 (quoting *Matter of Waldbaum, Inc.*, 74 N.Y.2d at 133, 544 N.Y.S.2d at 563-64); *see also Matter of Walter*, 75 N.Y 354, 357-58 (1878).

44 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 239, 100 N.Y.S.3d at 685; *see also Matter of Waldbaum, Inc*, 74 N.Y.2d at 131, 544 N.Y.S.2d at 562.

45 *Matter of Larchmont Pancake House*, 33 N.Y.3d at 239, 100 N.Y.S.3d at 685.

46 *Id.* at 240, 100 N.Y.S.3d at 685-86.

47 *Id.* at 240, 100 N.Y.S.3d at 686.

48 *Id.* at 240-41, 100 N.Y.S.3d at 686.

49 *Matter of Long Island Power Auth. v. Assessor of Town of Huntington*, 164 A.D.3d 591, 81 N.Y.S.3d 189 (2d Dep't 2018).

50 *Id.* at 591, 81 N.Y.S.3d at 190.

51 *Id.* at 591-92, 81 N.Y.S.3d at 190.

52 *Id.* at 592, 81 N.Y.S.3d at 190-91 (citing *Matter of Steel Los III/Goya Foods, Inc. v Bd. of Assessors of County of Nassau,* 10 N.Y.3d 445, 452-53, 859 N.Y.S.2d 576, 579 (2008)).

53 *Matter of Long Island Power Auth.,* 164 A.D.3d at 592, 81 N.Y.S.3d at 191.

54 *Matter of Eastbrooke Condo. v. Ainsworth*, 33 N.Y.3d 139, 99 N.Y.S.3d 763 (2019)

55 *Matter of Eastbrooke Condo. v. Ainsworth.* 147 A.D.3d 1510, 47 N.Y.S.3d 205 (4th Dep't), *lv. to appeal granted*, 30 N.Y.3d 904, 67 N.Y.S.3d 577 (Table) (2017), *rev'd*, 33 N.Y.3d 139, 99 N.Y.S.3d 763 (2019); reported last year at Thomas Dickerson & John Mechmann, *Tax Certiorari and Eminent Domain Decisions 2017-2018*, 43 Westchester B.J. No 1, 19, 31 (Fall 2018).

56 *Matter of Eastbrooke Condo.,*33 N.Y.3d at 141-42, 99 N.Y.S.3d at 765.

57 *Id.* at 142-43, 99 N.Y.S.3d at 765 (citing N.Y. Real Prop. Law §339–y(4) (McKinney 2015)).

58 *Matter of Eastbrooke Condo.,* 33 N.Y.3d at 143, 99 N.Y.S.3d at 765-66.

59 *Id.* at 144-45, 99 N.Y.S.3d at 766-67.

60 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1441, 86 N.Y.S.3d at 631.

61 *Id.* at 1441-42, 86 N.Y.S.3d at 631-32 (citing N.Y. Real Prop. Tax Law § 708[3] (McKinney 2013)); *see Matter of Highbridge Dev. BR, LLC v. Assessor of Town of Niskayuna*, 121 A.D.3d 1324, 1325, 995 N.Y.S.2d 305, 308 (3d Dep't 2014).

62 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1442 86 N.Y.S.3d at 632 (citing *Matter of Sessa v. Bd. of Assessors of Town of N. Elba*, 46 A.D.3d 1163, 1164, 847 N.Y.S.3d 765, 766 (3d Dep't 2007)).

63 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1442, 86 N.Y.S.3d at 632.

64 *Shubert Org., Inc. v. Tax Comm'n of City of N.Y.*, 170 A.D.3d 453, 93 N.Y.S.3d

569 (1st Dep't 2019).

65 *Id.* at 459-60, 93 N.Y.S.3d at 569-70.

66 *Id.* at 460, 93 N.Y.S.3d at 570.

67 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1445, 86 N.Y.S.3d at 634.

68 *Id.* (citing N.Y. Real Prop. Tax Law § 720[1][b] (McKinney 2013)); *see also Matter of Village Square of Penna, Inc. v. Bd. of Assessment Review of Town of Colonie*, 123 A.D.3d 1402, 1405–1406, 999 N.Y.S.2d 610, 613 (3d Dep't 2014), *lv. to appeal denied*, 25 N.Y.3d 903, 7 N.Y.S.3d 275 (Table) (2015).

69 *Matter of Champlain Ctr. N. LLC*, 165 A.D.3d at 1445, 86 N.Y.S.3d at 634.

70 *Matter of South Cent. Plaza, Inc. v. Village of Spring Valley*, 159 A.D.3d 915, 70 N.Y.S.3d 56 (Mem.) (2d Dep't 2018).

71 *Id.* at 915-16, 70 N.Y.S.3d at 56.

72 *Id.* at 916, 70 N.Y.S.3d at 56 (citing 22 N.Y.C.R.R. § 202.59).

73 *Matter of South Cent. Plaza, Inc.,*159 A.D.3d at 916, 70 N.Y.S.3d at 56 (citing *Matter of Greens at Washingtonville, Ltd. v. Town of Blooming Grove*, 98 A.D.3d 1118, 1119, 951 N.Y.S.2d 201, 202 (2d Dep't 2012)).

74 *Matter of South Cent. Plaza, Inc.,*159 A.D.3d at 916, 70 N.Y.S.3d at 56 (citing *Niagara Mohawk Power Corp. v. City of Saratoga Springs Assessor*, 2 A.D.3d 953, 954, 767 N.Y.S.2d 683, 684 (3d Dep't 2003)).

75 *Matter of South Cent. Plaza, Inc.,*159 A.D.3d at 916-17, 70 N.Y.S.3d at 56-57; *see also* N.Y. C.P.L.R. §3101[a] (McKinney 2018); N.Y. C.P.L.R. §408 (McKinney 2010).

76 *Matter of Buscaglia v. Assessor, Town of Hamburg*, 162 A.D.3d 1709, 79 N.Y.S.3d 450 (4th Dep't 2018).

77 *Id.* at 1709, 79 N.Y.S.3d at 451.

78 *Id.*

79 *Id.* at 1709-10, 79 N.Y.S.3d at 451 (quoting *Matter of Roth v. City of Syracuse*, 21 N.Y.3d 411, 417, 972 N.Y.S.2d 161, 164 (2013)).

80 *Matter of Buscaglia,* 162 A.D.3d at 1710, 79 N.Y.S.3d at 451 (quoting *Matter of FMC Corp. [Peroxygen Chem. Div.] v. Unmack*, 92 N.Y.2d 179, 188, 677 N.Y.S.2d 269, 273 (1998)).

81 *Matter of Buscaglia,* 162 A.D.3d at 1710, 79 N.Y.S.3d at 451-52 (quoting *Matter of Bd. of Managers of French Oaks Condo.,* 23 N.Y.3d at 175-76, 989 N.Y.S.2d at 647-48); *see also Matter of Niagara Mohawk Power Corp. v. Assessor of Town of Geddes,* 92 N.Y.2d 192, 196, 677 N.Y.S.2d 275, 277 (1998).

82 *Matter of Buscaglia,*162 A.D.3d at 1710, 79 N.Y.S.3d at 452.

83 *Id.* at 1711, 79 N.Y.S.3d at 452.

84 *Matter of Level 3 Commc'ns, LLC v. Erie County*, 174 A.D.3d 1497, 1498, -- N.Y.S.3d – (4th Dep't 2019).

85 *Matter of Level 3 Commc'ns, LLC*, 174 A.D.3d at 1498.

86 *Id.*, *see also Matter of Level 3 Commc'ns, LLC v. Erie County*, 132 A.D.3d 1271, 17 N.Y.S.3d 810 (4th Dep't 2015), *lv.to appeal denied,* 26 N.Y.3d 918 (2016).

87 *Matter of Level 3 Commc'ns, LLC*, 174 A.D.3d at 1498-99.

88 *Id.* at 1499 (*citing Matter of T–Mobile Northeast, LLC v. DeBellis*, 32 N.Y.3d 594, 608, 94 N.Y.S.3d 211, 219-20 (2018), *reargument denied,* 32 N.Y.3d 1197 (2019)).

89 *Matter of Level 3 Commc'ns, LLC*, 174 A.D.3d at 1499.

90 *Id.* at 1499-1501.

91 *Id.* at 1501.

92 *Matter of T-Mobile Northeast, LLC,* 32 N.Y.3d at 606, 94 N.Y.S.3d at 218.

93 *Id.*

94 *Id.*

95 *Id.*

96 *Matter of RCN N.Y. Commc'ns, LLC v. Tax Comm'n of City of N.Y.,* 95 A.D.3d 456, 943 N.Y.S.2d 480 (1st Dep't), *lv. to appeal denied*, 20 N.Y.3d 855 (2012).

97 *Matter of T-Mobile Northeast, LLC,* 32 N.Y.3d at 606, 94 N.Y.S.3d at 218.

98 *Id.* at 607-08, 94 N.Y.S.3d at 219-220; *see* N.Y. Real Prop. Tax Law § 300 (McKinney 2017).

99 *Matter of T-Mobile Northeast, LLC,* 32 N.Y.3d 608-10, 94 N.Y.S.3d at 220-21.

100 *Matter of Oakwood Beach Bluebelt-Stage 1 (City of N.Y. – Yeshivas Ch'San Sofer, Inc.),* 164 A.D.3d 1453, 84 N.Y.S.3d 518 (2d Dep't 2018*), lv. to appeal denied,* 33 N.Y.3d 903, 100 N.Y.S.3d 705 (Table) (2019).

101 *Id.* at 1454, 84 N.Y.S.3d at 520.

102 *Id.* at 1454-55, 84 N.Y.S.3d at 520-21.

103 *Id.* at 1455, 84 N.Y.S.3d at 521.

104 *Id.* (quoting *Matter of City of New York (Franklin Record Ctr.),* 59 N.Y.2d 57, 61, 463 N.Y.S.2d 168, 169 (1983)).

105 *Matter of Oakwood Beach Bluebelt-Stage 1,*164 A.D.3d at 1455, 84 N.Y.S.3d at 521 (quoting *Keator v. State of New York,* 23 N.Y.2d 337, 339, 296 N.Y.S.2d 767, 769 (1968)).

106 *Matter of Oakwood Beach Bluebelt-Stage 1,*164 A.D.3d at 1455, 84 N.Y.S.3d at 521 (quoting *Matter of Town of Oyster Bay (55 Motor Ave. Co., LLC),* 156 A.D.3d 704, 708, 67 N.Y.S.3d 221, 225 (2d Dep't 2017)).

107 *Matter of Oakwood Beach Bluebelt-Stage 1,*164 A.D.3d at 1455-56, 84 N.Y.S.3d at 521-22.

108 *Id.* at 1456-57, 84 N.Y.S.3d at 522.

109 *Id.* at 1457, 84 N.Y.S.3d at 522 (quoting *Crosby v. State of New York,* 54 A.D.2d 1064, 1065, 388 N.Y.S.2d 768, 769 (4th Dep't 1976)).

110 *Matter of Oakwood Beach Bluebelt-Stage 1,*164 A.D.3d at 1457-58, 84 N.Y.S.3d at 522-23.

111 *Matter of City of New York v. Yonkers Indus. Dev. Agency*, 170 A.D.3d 1003, 97 N.Y.S.3d 123 (2d Dep't 2019).

112 *Id.* at 1003-04, 97 N.Y.S.3d at 125.

113 *Id.* at 1004, 97 N.Y.S.3d at 125.

114 *Id.* (citing N.Y. Em. Dom. Proc. Law § 207(C)(4)(Westlaw 2019)); *see also Matter of 10 Garvies Point Rd. Corp. v. Glen Cove Indus. Dev. Agency,* 28 A.D.3d 569, 812 N.Y.S.2d 357, 357-58 (2d Dep't 2006).

115 *Matter of City of New York,* 170 A.D.3d at 1004, 97 N.Y.S.3d at 125-26 (quoting *Matter of Goldstein v. New York State Urban Dev. Corp.,* 64 A.D.3d 168, 181, 874 N.Y.S.2d 524, 533 (2d Dep't), *aff'd,* 13 N.Y.3d 511, 893 N.Y.S.2d 472 (2009), *reargument denied*, 14 N.Y.3d 756, 898 N.Y.S.2d 85 (Mem)(2010)).

116 *Matter of City of New York,* 170 A.D.3d at 1004, 97 N.Y.S.3d at 126 (quoting *Goldstein,* 64 A.D.3d at 181, 874 N.Y.S.2d at 533); *see also Vitucci v. New York City Sch. Constr. Auth.,* 289 A.D.2d 479, 481, 735 N.Y.S.2d 560, 562 (2d Dep't 2001), *lv. to appeal denied*, 98 N.Y.2d 609, 747 N.Y.S.2d 409 (Table) (2002).

117 *Matter of City of New York,* 170 A.D.3d at 1004, 97 N.Y.S.3d at 126 (quoting *Matter of Aspen Creek Estates, Ltd. v. Town of Brookhaven,* 47 A.D.3d 267, 272, 848 N.Y.S.2d 214, 218 (2d Dep't 2007), *aff'd*, 12 N.Y.3d 735, 876 N.Y.S.2d 80 (2009), *cert. denied*, 558 U.S. 820 (2009)).

118 *Matter of City of New York,* 170 A.D.3d at 1004, 97 N.Y.S.3d at 126; *see also Goldstein,* 64 A.D.3d at 181, 874 N.Y.S.2d at 534.

119 *Matter of City of New York,* 170 A.D.3d at 1005, 97 N.Y.S.3d at 126-27 (citing *Buffalo Sewer Auth. v. Town of Cheektowaga,* 20 N.Y.2d 47, 53, 281 N.Y.S.2d 326, 330 (1967)).

120 *Matter of City of New York,* 170 A.D.3d at 1005-06, 97 N.Y.S.3d at 127.

121 *Rochester Genesee Reg'l Transp. Auth. v. Stensrud,* 173 A.D.3d 1699, 101 N.Y.S.3d 549 (4th Dep't 2019).

122 *Id.* at 1700-01, 101 N.Y.S.3d at 551.

123 *Id.* at 1701, 101 N.Y.S.3d at 551-52.

124 *Id.* at 1701, 101 N.Y.S.3d at 552.

125 *Id.* (citing 22 N.Y.C.R.R. § 202.61[e]); *see also Matter of Town of Guilderland (Pietrosanto)*, 267 A.D.2d 837, 837-38, 700 N.Y.S.2d 287, 288 (3d Dep't 1999).

126 *Rochester Genesee Reg'l Transp. Auth.,*173 A.D.3d at 1701-02, 101 N.Y.S.3d at 552.

127 *Matter of Klein v. County of Suffolk*, 169 A.D.3d 1044, 94 N.Y.S.3d 553 (2d Dep't 2019).

128 *Id.* at 1045, 94 N.Y.S.3d at 554.

129 *Id.* at 1045-46, 94 N.Y.S.3d 554-55.

130 *Id.* at 1046, 94 N.Y.S.3d at 555 (citing *815 Assocs., Inc. v. State of New York,* 251 A.D.2d 538, 539, 674 N.Y.S.2d 774, 775 (2d Dep't 1998)).

131 *Kermanshahchi v. State*, 168 A.D.3d 695, 91 N.Y.S.3d 493 (2d Dep't 2019).

132 *Id.* at 695, 91 N.Y.S.3d at 494-95.

133 *Id.* at 696, 91 N.Y.S.3d at 495.

134 *Id.* at 696-97, 91 N.Y.S.3d at 495*; see* 22 N.Y.C.R.R. § 206.21.

135 *Kermanshahchi,* 168 A.D.3d at 697, 91 N.Y.S.3d at 495-96.

136 *Matter of City of Long Beach v. Sun NLF Ltd. P'ship*, 172 A.D.3d 1061, 101 N.Y.S.3d 86 (2d Dep't 2019).

137 *Id.* at 1061, 101 N.Y.S.3d at 88.

138 *Id.*; *see also Matter of City of Long Beach v. Sun NLF Ltd. P'ship,* 124 A.D.3d 654, 656, 1 N.Y.S.3d 246, 248 (2d Dep't), *lv. to appeal denied*, 26 N.Y.3d 902, 17 N.Y.S.3d 83 (Table) (2015).

139 *See* N.Y. Em. Dom. Proc. Law §701 (Westlaw 2019); *Matter of City of Long Beach*, 172 A.D.3d at 1061-62, 101 N.Y.S.3d at 88.

140 *Matter of City of Long Beach*, 172 A.D.3d at 1062, 101 N.Y.S.3d at 88.

141 *Id.* at 1062, 101 N.Y.S.3d at 88 (quoting *Hakes v. State of New York,* 81 N.Y.2d 392, 397, 599 N.Y.S.2d 498, 500 (1993)).

142 *Matter of City of Long Beach*, 172 A.D.3d at 1062, 101 N.Y.S.3d at 88 (quoting *Hakes*, 81 N.Y.2d at 397, 599 N.Y.S.2d at 500*)*; *see also Matter of Village of Port Chester (Bologna),* 137 A.D.3d 802, 803, 25 N.Y.S.3d 666, 668 (2d Dep't 2016).

143 *Matter of City of Long Beach*, 172 A.D.3d at 1062, 101 N.Y.S.3d at 88.

144 *Id.* at 1062-63, 101 N.Y.S.3d at 88-89; *see Matter of City of Long Beach v. Sun NLF Ltd. P'ship*, 146 A.D.3d 775, 777, 45 N.Y.S.3d 494, 496 (2d Dep't), *lv. to appeal denied*, 30 N.Y.3d 908, 70 N.Y.S.3d 448 (Table) (2017); *Matter of City of New York*, 52 A.D.3d 387, 388, 860 N.Y.S.2d 85, 86 (1st Dep't 2008).

145 *Matter of City of Long Beach*, 172 A.D.3d at 1063, 101 N.Y.S.3d at 89; *see Matter of City of Long Beach,* 146 A.D.3d at 777, 45 N.Y.S.3d at 496.

146 *Matter of City of Long Beach*, 172 A.D.3d at 1063-64, 101 N.Y.S.3d at 89.

147 *Matter of Village of Spring Valley*, 171 A.D.3d 934, 98 N.Y.S.3d 210 (2d Dep't 2019).

148 *Id.* at 935, 98 N.Y.S.3d at 211.

149 *Id.*; *see Matter of City of Long Beach,* 146 A.D.3d at 777-78, 45 N.Y.S.3d at 496-97; *Matter of Village of Port Chester [Bologna],*137 A.D.3d at 803, 25 N.Y.S.3d at 668.

150 *Matter of Village of Spring Valley,* 171 A.D.3d 935-36, 98 N.Y.S.3d at 211-12; *see Matter of City of Long Beach, supra,* 146 A.D.3d at 777, 45 N.Y.S.3d at 496.

151 *Matter of Village of Haverstraw v. AAA Electricians, Inc.,* 165 A.D.3d 955, 86 N.Y.S.3d 604 (2d Dep't 2018).

152 *Id.* at 956, 86 N.Y.S.3d at 605; *see Matter of Village of Haverstraw v. AAA Electricians, Inc.*, 114 A.D.3d 955, 957, 981 N.Y.S.2d 436, 439 (2d Dep't), *lv. to appeal denied*, 24 N.Y.3d 906, 995 N.Y.S.2d 715 (Table) (2014).

153 *Matter of Village of Haverstraw*, 165 A.D.3d at 956, 86 N.Y.S.3d at 605.

154 *Id.* at 956, 86 N.Y.S.3d at 605-606.

155 *Id.* at 957, 86 N.Y.S.3d at 606; *see Matter of City of Long Beach*, 146 A.D.3d at 778, 45 N.Y.S.3d at 496.

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The Use of Guardians Ad Litem in Custody Proceedings

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A *Guardian Ad Litem*, better known as a GAL is a special advocate, special guardian, or law guardian "appointed by the court to appear in a lawsuit on behalf of a minor party."[1]

New York Courts define a GAL as "… someone the Judge assigns to help a person who cannot come to court or protect their rights and interests for a single case. … They do not have any legal power to manage a person's personal affairs. A GAL is an officer of the court and reports to the court what he or she is doing in the case."[2]

If only it were that easy. Although the definition appears straight forward, the actual roles and responsibilities of a GAL are much more complicated. In the context of representing children, many of us ponder whether a GAL represents a child as their advocate or whether a GAL is a court investigator for the protection of a child? Or is it both? This article

seeks to clarify the roles and responsibilities of a GAL in the context of representing children, specifically in contested child custody disputes, and further demonstrate the benefits of a GAL in contested custody proceedings where parental alienation has been alleged.

One of the first instances in which the United States Supreme Court ever addressed a GAL was in a Washington D.C. case known as *Kent v. United States*, involving a juvenile delinquent matter.[3] In *Kent*, sixteen (16) year old Morris A. Kent, Jr. was interrogated by police officers for more than seven (7) hours on a rape charge without the presence of counsel or a parent.[4] In his decision, Justice Fortas referred to the State as *parens patriae*.[5] Due to the fact that the state is regarded as "sovereign," it has the "capacity to be provider of protection for those unable to care for themselves."[6,7] Justice Fortas noted that "[t]he objectives [of the Juvenile Court and the Juvenile Court Act] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[8]

A year after this case was decided, in 1967, the Supreme Court of the United States revisited the subject of child advocate in *Gault*.[9] In *Gault*, fifteen (15) year old Gerald Gault was accused of making an obscene telephone call to a neighbor.[10] At the time Gault was arrested, his parents were at work, and the arresting police officer left no notice for Gault's parents, nor did he make an effort to inform them.[11] In his decision, Justice Fortas elaborated on child representation in Juvenile proceedings stating, "[t]he Juvenile Court movement began in this country … from the juvenile court statute adopted in Illinois in 1899"[12] in which

> ... early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals... [t]hey believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial.[13]

As Justice Fortas understood it, the "idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to

be 'clinical' rather than punitive … [t]hese results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as *parens patriae*."[14]

Finally, it was in *Gault* in which the Court concluded that the Due Process Clause of the Fourteenth Amendment requires that in "proceedings to determine delinquency … in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."[15]

Interestingly enough, *Kent*[16] and *Gault*[17] were both decided only a few years after *Gideon v. Wainwright* where the Supreme Court of the United States unanimously ruled that the guarantee of counsel provided in the Sixth Amendment of the United States Constitution is a fundamental right that is applicable to the states through the Fourteenth Amendment, and, therefore, states are required to provide an attorney to all defendants in criminal cases who cannot afford one.[18]

Fast forward fifty-two (52) years later, *Kent*[19] and *Gault*[20] are really the only federal legal authorities we can rely on that address a child advocate's role. The issue here is that the United States Supreme Court has only addressed the role of a child's advocate in (1) juvenile cases; and (2) in instances in which the advocate is an attorney or legal counsel, not a GAL or law guardian.

New York case law has little to no authority on the role of a GAL in the context of a Juvenile Delinquency proceeding, let alone a custody matter. In fact, "there is no statutory authority in New York for the appointment of guardians ad litem to protect the interests of nonparty infants in a proceeding; rather, appointing authority for so-called parens patriae guardian ad litem derives from the common law and in particular from the parens patriae powers of the court."[21]

The only mention of statutory authority for GAL appointments for minors can be found under Article 12 of the Civil Practice Law and Rules (CPLR) which allows family court judges to appoint GALs to assist in Juvenile Delinquency or Persons In Need of Supervision proceedings, and stand in 'loco parentis'[22] where the parent has failed to appear in court with their child, or where the child's interests stand adverse to their parent's interests.[23] As a matter of practice, the duties pursuant to Article 12 of

the CPLR should include: (1) standing *in loco parentis* and advising the ward of the risks, benefits and consequences of different courses of action as discussed by the ward's attorney; and (2) standing *in loco parentis* and advising the court of what is perceived to be in the best interest of the ward.

More than anything else, there are split opinions about the differences between a GAL and a child's advocate, also known as an attorney for the child. In one case, *Scott L. v. Bruce*, the New York County Family courts understood the functions of a law guardian and a GAL to be the same.[24] While other New York courts, such as *Bradt v. White*, believed the roles and responsibilities of each were not so clear.[25]

In 2010, the New York State legislature recognized this confusion and sought to provide some clarity by replacing the term "law guardian" with the term "attorney for the child" in several statutes.[26] The New York State Assembly Memorandum In Support of Legislation that accompanied the bill (A7805B) that was enacted in 2010 stated "almost from its inception, the ambiguous term 'law guardian,' although defined in section 242 of the Family Court Act as an attorney, has created debate and confusion. The term suggests a role that combines functions of the attorney-advocate with those of a *guardian ad litem*, functions that are inherently incompatible."[27] However, despite this clarification and the passage of approximately nine (9) years, the New York State legislature has still failed to address the role or functions of a GAL in custody proceedings.

For purposes of clarity, the rest of this article will refer to law guardians or attorneys for children (hereinafter, "AFC") as "lawyers who the judge assigns to represent a child in Family Court;" and GALs as "individuals (non-attorneys and attorneys alike) that act in the place of a parent or guardian for a child whose parents or guardians must appear in court but [do not]."[28] The ultimate goal of this article if to clarify the roles and responsibilities of a GAL in the context of representing children, but more importantly, to promote the advantages of a GAL in contested custody disputes and the need for related legislation.

So what if a judge is confronted with a contested child custody proceeding? Only imagine: a mother goes into court and files for sole custody of her children after getting a divorce with the father.[29] The father then goes to court and also files for sole custody claiming the mother has alienated the children from him.[30] What now? How will the parties resolve their issues? More importantly, how will the court determine what is in the best interests of the

children? The reality is that contested custody proceedings with allegations of alienation are better settled if a GAL is appointed in the matter.

One major issue in contested custody proceedings is parental alienation.[31] Parental alienation looks something like a mother "badmouth[ing]" the father to the children and limiting the father's contact.[32] "The parental alienation doctrine [also known as the parental alienation syndrome] has become a basis for contentious parents to undercut parenting agreements."[33] Although "the theory of parental alienation syndrome (PAS) is not accepted by the American Psychiatric Association, the American Psychological Association, or any other reputable mental health organization, and courts in New York have rejected PAS as having no scientific foundation," lower courts still embrace its concept in custody and visitation cases.[34] In custody proceedings, these courts have "accepted the notion of parental alienation as a factor [particularly] in determining whether a change in circumstances exists."[35] An alienated child is "one who expresses, freely and persistently, unreasonable negative feelings and beliefs toward a parent that are significantly disproportionate to the child's actual experience with that parent."[36] Generally, a child who is alienated from one parent is influenced by the other parent who is systemically programming the child to reject the non-alienating parent and refuse contact.

A GAL would be most beneficial in a case where a court finds a parent guilty of parental alienation for several reasons. One main reason is because a GAL is a neutral advocate in a custody proceeding. As a neutral advocate, a GAL is not arguing for the best interest of a parent, or even a judge for that matter, they are, in essence, an intermediary of the court that only seeks what is in the best interest of the child, even if the child does not agree with it.[37]

A GAL can also provide clear and unbiased explanations about the custody proceeding to the child, as well as guidance to the court and/or parents as to what would be in the best interests of the child. As we see from the example above, a parent alienating their child from the other parent is essentially harming the child, which is not in the best interest of the child.[38]

Another major issue in contested custody proceedings is the substituted judgment doctrine. Under the Rules of the Chief Judge of New York State, "[w]hen the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating

a position that is contrary to the child's wishes."[39] In the New York Family Court, substituted judgment occurs "in all circumstances where an attorney is substituting judgment in a manner that is contrary to a child's articulated position or preferences or when the child is not capable of expressing a preference…." [40] If and when an attorney for the child substitutes judgment for the child, they should do so by first informing the court and the child. Thereafter, the attorney should introduce evidence to support their position, and of course, explain what the child's articulated position is.[41]

Under New York law, if an attorney uses substituted judgment they should (1) conduct a thorough investigation, which includes interviewing the child, reviewing the evidence, and applying it against the applicable legal standard; and (2) should consider the value of consulting a social worker or other mental health professional to assist the attorney in determining whether it is appropriate to override the child's articulated position and/or to assist the attorney in formulating a legal position on behalf of a child who is not competent.[42]

A GAL may be most beneficial in cases where an attorney has to substitute judgment because rather than subjecting the child to additional investigation from yet another person in a custody proceeding, the GAL would have already completed the investigation. More importantly, it is inherent to a GAL's role to investigate and substitute judgment, if ever, because they are in a more appropriate position to articulate the child's position to the court.

In a case where parental alienation exists and a child no longer wants to spend time with one of two parents, the GAL can actually promote the best interest of the child by also substituting judgment. Rather than an attorney for the child, a GAL would in fact be in the best position to substitute judgement for a child, if need be, because as aforementioned, a GAL is a neutral actor to the entire proceeding; they reflect the best of interest of the child, while also being an arm of the court.

A GAL is and should be considered as an appointment in contested custody cases, particularly in those involving parental alienation. In this role, a GAL may then be an investigator for the court, a counselor and mouth piece for the child and advocator for the best interests of the child in the overall family dispute with little to no restrictions. For these reasons,

New York legislators and policy makers should clearly distinguish the differences, roles, and responsibilities of an AFC and GAL, and require GALs be considered in appropriate contested custody proceedings.

Endnotes

1 *Guardian*, Black's Law Dictionary (10th ed. 2014).

2 *Guardians ad Litem* (GAL), NYCourts.gov, https://nycourts.gov/courthelp/Guardianship/GAL.shtml (2019).

3 *Kent v. United States*, 383 U.S. 541 (1966).

4 *Id*. at 543-44.

5 *Id*. at 551-52.

6 *Parens Patriae*, Black's Law Dictionary (10th ed. 2014); Julian W. Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909).

7 This phrase "was taken from chancery practice, where, it was used to describe the power of the state to act *in loco parentis* for purposes of protecting the property interests and the person of the child." *See Application of Gault*, 387 U.S. 1, 15 (1967). Accordingly, "[t]he right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody' … If his parents default in effectively performing their custodial functions–that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled." *Id*. at 17.

8 *Kent*, 383 U.S. at 554.

9 *Application of Gault*, 387 U.S. 1 (1967).

10 *Id*. at 4.

11 *Id*.at 5.

12 *Gault*, 387 U.S. at 14.

13 *Id*. at 15.

14 *Id*. at 15-16.

15 *Id*. at 41; Interestingly enough, Justice Black in his concurrence stated, "where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could,

because they are children, be denied these same constitutional safeguards." *Gault*, 387 U.S. at 61 (Black, J., concurring). On the other hand, however, Justice Stewart in his dissent expressed his disagreements by expressing that he believes juvenile proceedings are not criminal trials, nor civil trials, and that the Court's opinion in this case serves to convert a juvenile proceeding into a criminal prosecution." *Gault*, 387 U.S. at 78-79 (Stewart, J., dissenting).

16 383 U.S. 541 (1966).

17 387 U.S. 1 (1967).

18 *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (this includes children under the age of 18 too).

19 383 U.S. 541 (1966).

20 387 U.S. 1 (1967).

21 25 Carmody-Wait 2d § 149:239 (2019); *Scott L. v. Bruce N.*, 134 Misc. 2d 240, 242, 509 N.Y.S.2d 971, 973 (Family Ct., N.Y. County, 1986).

22 *In Loco Parentis* is the supervision of a young adult by an administrative body such as a university. Black's Law Dictionary (10th ed. 2014).

23 N.Y. C.P.L.R. §§ 1201, 1202 (McKinney 2019); N.Y. Surr. Ct. Proc. Act Law § 403 (McKinney 2019).

24 134 Misc. 2d at 245-46, 509 N.Y.S.2d at 975.

25 *Bradt v. White*, 190 Misc. 2d 526, 529-32, 740 N.Y.S.2d 777, 780-782 (Sup. Ct., Greene County, 2002).

26 2010 N.Y. Sess. Laws Ch. 41 (A. 7805-B) (McKinney 2010).

27 N.Y. Assembly Memo In Support of Legislation that accompanied 2010 Bill A7805B, rev. Feb. 26, 2010.

28 Gerald Lebovits, *Introductory Guide to the New York City Family Court*, The Assoc. of the Bar of the City of N.Y. (2006) at 5.

29 *J.F. v. D.F.*, 61 Misc. 3d 1226(A), 2018 N.Y. Slip Op. 51829(U) at *1 (Sup. Ct., Monroe County, 2018).

30 *Id*.

31 *P.M. v. S.M.*, 17 Misc. 3d 1122(A), 851 N.Y.S.2d 71, 2007 WL 3194535 *8 (Sup. Ct., Nassau County, 2007) ("parental alienation has been described as 'the programming of the child/children by one parent, into a campaign of denigration against the other. The second component is the child's own contributions that dovetail and complement the contributions of the programming parent. It is this combination of both factors that define the term parental alienation'.").

32 *J.F.*, 61 Misc.3d 1226(A), 2018 N.Y. Slip Op. 51829(U) at *1-2.

33 *Id*. at *2.

34 2 NY Law of Domestic Violence §4:14 (2018).

35 *J.F.,* 61 Misc. 3d 1226(A), 2018 N.Y. Slip Op. 51829(U) at *4.

36 Joan B. Kelly and Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, Family Court Rev, Vol 39, No. 3, 251 (2001).

37 Marcia M. Boumil, Cristina F. Freitas, Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian Ad Litem Practice*, 13 J. L. & Fam. Stud. 43, 43, 52 (2011) ("GALs [perform] diverse tasks including fact investigator, mental health evaluator, next friend attorney, family mediator, and child's attorney").

38 *Young v. Young*, 212 A.D.2d 114, 115, 628 N.Y.S.2d 957, 959 (2d Dep't 1995) ("a form of interference … has the potential for greater and more permanent damage to the emotional psyche of a young child than other forms of interference; namely, the psychological poisoning of a young person's mind to turn him or her away from the noncustodial parent.").

39 22 N.Y.C.R.R. 7.2(d)(3) (Westlaw 2019).

40 *Standards for Attorneys Representing Children in Custody, Visitation and Guardianship Proceedings*, NYSBA Comm. on Children and the Law § A-4, 11 (5th ed. 2015).

41 *Id*.

42 *Id*.