**Family Law Annual Review**

BY MICHAEL AND DAVID DIKMAN

“DOMA”

One of this year’s major decisions came from a divided Second Circuit Court of Appeals in WINDSOR v. U.S., declaring “DOMA”, the Defense of Marriage Act, unconstitutional. The definition of “marriage” as solely between one man and one woman was found to violate the equal protection clause of the U.S. Constitution. DOMA has been assailed for denying the same federal protections to thousands of same sex American families as are available to traditional man/woman marriages. The Supreme Court is expected to take up this issue and of course, we will “stay tuned.”

TEMPORARY MAINTENANCE

In 2010 we reviewed the provisions of the then new DRL § 236B, sections 5-a & 6-a, establishing temporary maintenance guidelines. The N.Y.S. Law Revision Commission was directed to:

1) Review and assess the economic consequences of divorce on parties;
2) Review the maintenance laws and their administration to determine their impact on post marital economic disparities and the laws’ effectiveness in achieving the state’s goals; and
3) Recommend legislation deemed necessary to achieve those goals.

A preliminary report to the Legislature & Governor was to be made no later than 9 months from the effective date with a final report to be rendered by December 31, 2011. There was a preliminary report. But that did nothing more than review the provisions and history, various problems and positions involved. There was no recommendation for any legislation. The final report date (December 31, 2011) came, went and was extended at least 3 times. At this writing we are still awaiting the recommendations. When this topic was discussed by us, last year, we said:

“the myriad of different, relevant facts in each case, and the application of a “reality test” (actually computing what disposable income will be left for each spouse upon application of the guidelines) have convinced a number of judges that the temporary maintenance guidelines did, in fact, result in unjust or inappropriate awards, which they refused to make. More and more cases continue to be reported, where the judges are “deviating”, and in different ways and upon different analyses.

The result is that although it is taking the judges far more time to construct their decisions, they are far more unpredictable than as they were before the statute became effective. The statute has been criticized inasmuch as the application of the guidelines, based upon an automatic, mathematical calculation, basically creates a shift in resources, rather than the prior goal of tiding over the more needy party.”

We commented that the cases regarding temporary maintenance were very “fact intensive”, and that it will be hard to find two cases presenting precisely the same facts, relative to the parties’ incomes, assets, needs, ages, health, marriage duration, number and ages of children, type of residence, or whether the parties are still residing together, among others. Also, in view of the vastly varying fact patterns and the substantial number of matrimonial judges making decisions throughout the State, we opined that the value of any one Supreme Court decision, as a precedent, will be minimal, since not binding upon judges of coordinate jurisdiction. The conclusion was that “by next year we should have some guidance from the Appellate Division.” But we really don’t. The only decision of note came from the First Department, in KAHRABA v. KAHRABA, 93 A.D.3d 194, 938 N.Y.S.2d 513 (February 7, 2012). In that case, the Supreme Court wound up making an award of unallocated temporary maintenance and child support plus requiring the husband to pay the mortgage on the marital residence. The Appellate Division acknowledged that the new law reflected a substantial change from the previous decision, as follows:

“The decision makes clear that the

[Continued On Page 15]
The Queens Bar Association has been certified by the NYS Continuing Legal Education Board as an Accredited Legal Education Provider in the State of New York.

PLEASE NOTE:
The CLE dates listed below are subject to change and will be made available to members via written notice and brochures. Questions? Please call (718) 291-4500.

CLE Seminar & Event Listing

December 2012
- Tuesday, December 4: Till Death or Divorce Do Us Part
- Wednesday, December 5: Advanced Criminal Law Series - Pt 2
- Tuesday, December 11: Lexis/Nexis Seminar 4:00 - 5:00 pm
- Thursday, December 13: Holiday Party at Douglaston Manor
- Monday, December 24: Christmas Holiday - Office Closed
- Tuesday, December 25: Christmas Day - Office Closed
- Monday, December 31: New Year's Holiday - Office Closed

January 2013
- Tuesday, January 1: New Year's Day - Office Closed
- Monday, January 21: Martin Luther King, Jr. Day - Office Closed
- Wednesday, January 30: Family Law Seminar

February 2013
- Tuesday, February 12: Lincoln's Birthday - Office Closed
- Monday, February 18: President's Day - Office Closed
- Wednesday, February 20: Ethics Seminar

March 2013
- Monday, March 11: Condominium/Cooperative Seminar
- Wednesday, March 13: CPLR & Evidence Update
- Thursday, March 14: Cancer Screening - in front of Civil Court
- Wednesday, March 20: Military/Veteran's Law Seminar
- Friday, March 29: Good Friday - Office Closed

April 2013
- Monday, April 8: Judiciary, Past Presidents & Golden Jubilarian Night
- Wednesday, April 10: Civil Court Seminar
- Wednesday, April 17: Equitable Distribution Update

May 2013
- Thursday, May 2: Annual Dinner & Installation of Officers
- Monday, May 27: Memorial Day - Office Closed

CLE Dates to be Announced
- Elder Law
- Insurance
- Juvenile Justice
- Real Property
- Supreme Court & Torts Section
- Worker’s Compensation

New Members

David Abraham
Kathleen J. Antenor Cruz
Brian Barnwell
Aveet A. Basnyat
Shirley Boutin
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Micael L. Cserhalmi
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Tyne R. Modica
Constantina Papagorgiou
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Necrology

Hon. Lawrence V. Cullen
Bernard R. McConville

Poetry Corner

WAIVERS

A waiver’s a tool,
to expedite and to ease,
and waivers are assorted -
among them, are these:

To avoid some disputes,
one can waive jurisdiction:
To return to your home state,
you can waive extradition.

Before a grand jury there’s
a waiver of immunity,
without which you could testify
with relative impunity.

If evidence is bulky,
you can waive its production,
and a waiver of indictment,
accompanies a plea reduction.

And some flexible judges
give the rules less adherence
and allow, for some parties,
a waiver of appearance.

But the most interesting waiver -
by the neophyte lawyer,
who nervously arraigned
his client - his employer:

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of the
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THE QUEENS BAR BULLETIN – DECEMBER 2012 - JANUARY 2013

THE DOCKET...
HAPPY NEW YEAR!
Before looking ahead to 2013, I wish to thank all our members and supporters for attending the Holiday Party which was held, with great success, at the Douglaston Manor. This year’s party was co-hosted by the Brandeis Association, Hellenic Lawyers Association, Latino Lawyers Association of Queens County, Mason’s Mason Black Bar Association, Queens County Women’s Bar Association and St. John’s Law School Alumni Association of Queens County. I thank all your members for your friendship and support.

I wish to especially thank all the hard work of Committee Members, Jay M. Abrahams, Jeffrey Boyar, Hilary Gingold, Maureen Heitner, Mona Haas, George Nicholas and Sasha and Janice, our devoted staff.

Our thanks to our sponsors, Sterling National Bank and the Law Offices of Pyrros & Seres LLP for their support of all our Association’s events, by our members and guests were presented to Forestdale, Inc., a non-profit foster care agency, in support of their operation.

I am proud to be a member of the Queens County Bar Association. Our members have unselfishly donated their time and expertise to provide services to our communities affected by Hurricane Sandy. My heartfelt thanks go to Mark Weilky and his entire staff for their tireless commitment to promote and provide pro bono services and representation for the less privileged.

Our Association tirelessly and diligently seeking to provide our membership with enhanced membership benefits, in an effort to support our Continuing Legal Education and Programs which we offer. I hope all of our members take the opportunity to also benefit from special programs and discounts which we are continuously expanding upon.

Recently we have added special programs affiliated with LexisNexis, Unishippers, Brooks Brothers, Esquires123.com and WB Mason.

Please continue to check your emails and visit our website @ www.OCBA.org to view upcoming events, register for CLE programs and take advantage of special discounts offered to our members by accessing the links provided on our website. I urge all our members to please consider sharing your knowledge and experience to serve as a Mentor Volunteer. The Queens County Bar Association offers a Mentor Volunteer Program where members can call on other, more experienced members in an area of law they are not familiar with or that need assistance with.

Our Association diligently seeks to further develop a large group of working knowledgeable attorneys, who are willing to answer legal questions from time to time, for new attorneys, established practitioners or law students in need of direction and guidance. The simple willingness to answer a few questions or give your advice truly makes a difference.

Your participation in this wonderful program would be greatly appreciated. It is not whether we can, it is whether we will.

Please use the New Year as an opportunity to become actively involved in the Queens County Bar Association and consider donating your skills and expertise, as attorneys, in providing pro bono services to the less privileged. Be a voice to help shape and improve our profession.

It remains Our Mission to cultivate professional, competence, development, education, cooperation, collegiality and diversity amongst our members. Let us all strive to assist and guide each other for the betterment of our Bar.

I thank all our members for your support. I urge each of you to continue supporting your own Specialty Bar Associations and becoming involved in the Queens County Bar Association. We seek a diverse Bar Association for Queens County, as diversity is strength not a weakness. We encourage and desire as wide a participation as possible for all attorneys in Queens. I look forward to working with you in the New Year.

Should you have any suggestions or comments, please do not hesitate to contact me by calling the Queens County Bar Association at (718) 291-4500 or by email at josephrisi.ess@gmail.com.

May we all enjoy and prosper in our wonderful Profession of Law.

Sincerely,

Joseph Risi
President
Queens County Bar Association

In Memoriam: Hon. Lawrence V. Cullen, Judge NYS Court Claims (Retired), Justice Elect NYS Supreme Court

BY HON. ROBERT J. GREGO, JR.

My dear friend and colleague Hon. Lawrence V. Cullen, Larry to one and all, passed away on Sunday, November 25, 2012, after a long and valiant battle with myelodysplastic syndrome, a belated casualty of the Vietnam War where he served multiple tours of duty as a wounded combat veteran of the First Marine Air Wing. At Dunagun he was taken prisoner by the Vietnamese. Larry had no acquaintances. He either knew you or someone who knew you. If he met you and liked you then you were one of his legion of friends and he would do anything for you. He was a proud son of the Woodside Irish clan whose ranks include many brave Americans who served, were injured, suffered and died for their beloved USA.

Larry was defined by his quick razor wit; his big, kind and brave heart; his intelligence; his common sense; his loyalty; his sense of humor; his endless storytelling (all mostly true) and his impeccably custom tailored suits. His chambers were impressively decorated. In that room I would greet him as Cardinal Cullen. His silver hair and well trimmed beard enhanced his regal image even as he developed a devoted fan club among fellow Marines to lower the music so that he could rest. They rather impolitely declined and, in fact, turned the music louder. Never one to negotiate from a sly grin and twinkling eyes as he passed a fellow Marine or bit of bag pipe music and after only a few minutes the stereo system, bought multiple albums of IRISH music, was in full effect.

I felt it was a daunting task, the most difficult, to write this obituary. I was so afraid of expressing a true leprechaun with a dash of fun loving mischief and “divilment”. I’ll never forget his sly grin and twinkling eyes as he passed a deadbeat father or an unfair landlord or client who never paid a dollar. Larry was a true Marine nevertheless. She stood by his side in every battle he waged against illness from beginning to end. He loved, respected and adored her, Margaret.

Together Margaret and Larry produced a daughter, Anya and a son, Patrick, high school students at Dominican Academy and Xavier, both very accomplished and deeply proud of them and literally beamed when he spoke of them. Happily they embody the best traits of their parents and are well on their way to becoming outstanding young adults. They are both scholar athletes and possess of exceptional personal and professional good character. Larry loved to watch them, verbally spar and match wits. Larry was blessed to have Margaret, Anya and Patrick at his side at all times and Larry’s spirit will never leave them. They were his family and his foxtail buddies.

I and all his many friends were lucky to call Larry our friend. He will be missed but never forgotten. I know he’s in heaven now at the best bar enjoying a cool Tom Collins and a Havana cigar with Neil O’Brien, Tom Flaherty, Joseph Mason, Joe Dorsa, Al Lerner and Tim Flaherty. Larry’s heaven looks a lot like Key West. And oh the stories.

In Memoriam: Hon. Lawrence V. Cullen

BY HON. PETER J. KELLY

When I confided in several people that I had been asked to speak about Larry’s career as an attorney and judge, and that I felt it was a daunting task, the most common response I received was “Just speak from your Heart.” That is very good advice.

The problem remains, however, as to how you can do so when your heart is broken.

To describe Larry as an attorney and judge is - on the one hand - a seemingly impossible task. What words could I find that would adequately express Larry’s unique qualities and characteristics? It seemed similar to the task of attempting to describe a color to a person who never had the ability to see. What words could possibly be adequate?

On the other hand, an equally valid thought came to mind: What, in fact, actually needs to be said?

The mere mention of the name Larry Cullen to another person invariably causes an immediate and identical response: a huge smile, a knowing look, and inevitably the response: “Larry, what a great guy!”

Larry became an attorney later in life and his practice was largely devoted to Guardianship, Trusts and Estates, and Real Estate. While his practice was financially successful and Larry had a keen business mind, his primary goal as an attorney was to help others. His most obvious achievements, and most numerous stories, were not of his affluent clients or the lucrative business deals he closed, but of those victims of injustice that he obtained justice for.

My personal favorite was of a client who defended in a criminal action who he defended in a criminal action who was accused of a misdemeanor. The sole complaining witness was a police officer. Now, everyone knows Larry was an ex-marine and a “law and order” guy. But he absolutely despised liars and hypocrines and he knew the officer was not being 100% truthful regarding what he had seen. His client was offered a fine

(Continued on page 14)
The case did not settle, despite your best efforts. There have been several conferences with the Court’s Law Secretary and numerous telephone calls with the attorneys on the other side.

The case has been marked “ready” several times, and adjourned. This time, it looks like jury selection is actually going to happen, much to everyone’s surprise.

The cards are drawn from the wheel, and clipped to the board. You are given the carbonized copy of the form each juror filled out with the most limited background information.

Ah ha! You have your I-phone. You can Google each prospective juror to see what turns up. You can also look on Linked In, Twitter, Facebook, Bebo and Tagged. Why, in a few seconds, you can have more information about each prospective juror than any carbonized form will ever tell you.

But should you do it?

New York City Bar Association (NYCBA) Formal Opinion 2012-2 suggests that you have an obligation to your client to do so. But the same opinion suggests that electronic research about prospective jurors is also unethical if the prospective juror knows electronically or otherwise that you have “contacted” any website where his or her name appears.

In the November-December 2012 most recent issue of the New York State Bar Association Journal, Robert B. Gibson and Jesse D. Capell address this question in their leading article, “Researching Jurors on the Internet – Ethical Implications”.

Gibson and Capell’s Conclusion is this:

“Pre-trial Internet research of prospective jurors is becoming an integral component of the trial preparation process. Trial attorneys would be well advised to apply this practice whenever possible because it may increase the likelihood of a favorable outcome. But before undertaking this research, attorneys must be familiar with the local rules governing this practice. They must also determine whether jurors will receive a notification from the website if another user views their profiles.”

It is respectfully submitted that this “Conclusion” needs a Reality Check, as follows:

1. The trial attorney does not know who is on the jury panel until the cards come out of the wheel and are clipped to the board. If you whip out your I-phone and start googling, or e-mailing an off-site associate, the juror will see you doing it, and thus know all about it, putting the trial attorney in violation of NYCBA Formal Opinion 2012-2. This is not a good way to win, or to survive the complaint which is sure to follow.

2. Gibson and Capell’s Conclusion completely ignores the First Rule of Law that Governs All Others: He or she is the Judge and you are not. You absolutely do not get to make the decision as to exactly how jury selection is conducted. Each judge does it slightly differently from every other. You MUST approach the Bench with your adversary in tow, and ask the Judge presiding at the trial whether he or she will permit electronic research on jurors, and to what extent, and for how long, and whether in their presence or not.

3. Our tradition of Due Process and Equal Protection must survive the Electronic Age. A wise judicial ruling will insure that both sides have an equal opportunity and equal time to electronically research each juror. Alternatively, a wise Judge might rule that neither side is permitted to do so.

4. Under no circumstances will our traditions be satisfied if one side is all wired up and the other side is not.

Gadgetry must never obscure who we are – the custodians of the fairest justice system devised. People stand on line at Kennedy Airport to live under traditions be satisfied if one side is all wired up and the other side is not.

“Conclusion” needs a Reality Check.
Charles Dickens raised the social conscience in the 19th century to the radical idea that children should have lawyers to represent them in court. One hundred years later, Kathryn McDonald, the Administrative Judge of the New York City Family Court from 1986 until 1995, observed, “the rich kids all had lawyers, and the poor kids had nobody. I decided that I wanted to become a lawyer and represent children.”

Counsel to represent children in Family Court continued in the 1960’s, citing the “landmark provisions” of the Family Court Act of 1962. Dickens didn’t live to see it, but children were finally given attorneys. After 50 years of Family Court, it can still be argued that the treatment of children in court has not yet been fully resolved to the satisfaction of Charles Dickens.

The historical journey to find a place to properly house the Queens Family Court continued in the 1960’s. The plan to move to the Parsons Boulevard library building, after the library vacated, was almost “junked by the City Bureau of the Budget” in 1967 in favor of building a brand new building built to be a Family Court. There was a recommendation to “look into the feasibility of a new building rather than remodeling the present building.” It was suggested that at a lower cost the old library could be demolished and an adequate Family Court could be constructed on the city owned property. The remodeling was estimated to cost 3.9 million.

Leo Dikman, Esq. the chairman of the family law committee of the Queens County Bar Association, and Judge Peter M. Horn, Queens Family Court, both disagreed with the proposal of the City Family Court, speaking on the city owned property. The remodeling was estimated to cost 3.9 million.

Leo Dikman, Esq. the chairman of the family law committee of the Queens County Bar Association, and Judge Peter M. Horn, Queens Family Court, both disagreed with the proposal of the City Bureau of the Budget. Judge Horn thought “new plans will mean a new delay.” The chairman of the family law committee, Leo Dikman, said the “remodeled building would suffice for the next 15 years... a newer building would mean a delay of at least seven years... the family law committee feels the library can and must be adapted for the proper resources provided to effect the proper results.”

The historical lesson gleaned from Judge Kelley’s tribulations of that day is that sometimes, try that they might, it just isn’t possible for a Judge to obey the law. Mr. Dickens could not have made this up — however, given such brilliant raw material, Dickens could have created with such gems. Just try to imagine the fiction Mr. Dickens could have tumbled over Judges arduously laboring to obey laws — day after day — without the proper resources provided to effect those very laws. The premise sounds like a Dickens tale. We can only ponder how Mr. Dickens’ fictional Judge Kelley reacted to such stresses in the daily grind.

As our story continues, however, we find that Leo Dikman, Esq., as well as the entire community to be serviced by the Family Court, does continue to wait — except for Judge Horn, and only because he retired from the bench in 1968.

As the wait continued, one of those quirks of history happened. On June 1, 1969, New York State put into effect a new law requiring a separate child abuse part in each Family Court. In New York City, only Manhattan was reorganized so as to comply with the new statute. It came to be that all child abuse cases in the City Of New York were handled by one Judge sitting in Manhattan.

Judge Florence Kelley, “the head Judge of the New York City Family Court,” speaking of the new law requiring a child abuse part in each Family Court, acknowledged the law was such that there ought to be a child abuse part in Queens, however, she said, “I can’t put one there” — referring to Queens.

Conditions at the Union Hall building were too desperate to allow for child abuse matters to be heard. The four Queens offices in the building shared one office which was 20 x 30 feet. There was one room, used as a combination nursery and chambers, for a woman judge sitting in Queens — women judges did not share the main chambers because of the proximity of the men’s washroom. The lunch meal for the girls in detention was prepared about five feet from their bathroom facilities. The litigants waited for their cases to be called in corridors without air conditioning nor room for chairs. There were confidential files being kept in the public hallways because there was no room in any of the offices. Last but not least, security was a problem in that all adults and juveniles in custody had to be escorted through these same public corridors.

The trip from Queens to Lafayette street is the hardest. Close your eyes and try to visualize Dickens barrister entering the subway at Jamaica center for the long journey to Lafayette Street. Think about what he might be wearing. Imagine the effect of the subway on the white wig; the effect of the subway on the black robe... contemplate the dangers the black robe might present on the subway trip.

Judge Kelley stressed that the new child abuse part law “wasn’t drawn up for lawyers — but for the children,” however, she had concerns that setting up a part in Queens would subject youngsters to “inhuman physical surroundings.” Judge Kelley insisted, nonetheless, that “despite
The Evolution of Elevation
A quarter-century of New York’s ‘Scaffold Law’

HON. GEORGE M. HEYMANN

One of the most prominent statutes that comes into play with respect to worker-related injuries is section 240(1) of the Labor Law (“LL”) which is commonly referred to as the “Scaffold Law.”

Enacted in 1921, it “descended from the 1885 ‘Act for the protection of life scaffold,’” and limits the specific type of job that was a workman’s risk.12 (Emphasis added) The Court further stated that in considering all the devices listed, the Legislature contemplated hazards “involving the force of gravity ‘because of a difference between the elevation level of the required work and a lower level of the materials or load being hoisted or secured.’”13 Determining that the hazards incurred were “special hazards” the Court “believe[d] that the Legislature has seen fit to give the worker the exceptional protection that section 240(1) provides.”14

In this case, Rocovich, a construction worker, was removing and repairing the insulated covering on recessed pipes on the roof of defendant’s building. In the course of the work, plaintiff and three other co-workers, Rodriguez was “distinguished this case because the plaintiff’s injuries did not flow directly from the application of the force of gravity to an object or person.” Here, the “makeshift ‘scaffold’ served the objective of the statute by preventing the plaintiff from falling down the shaft - a device that did not malfunction and was not defective in its design.”21 The harm suffered by Ross was not one contemplated by the statute and it would not even if the device used was inadequate, defectively designed or malfunctioned.

In Rodriguez v. Margaret Tietz Center for Nursing Care, Inc., the Court of Appeals in a hasty per curium decision, dismissed plaintiff’s cause of action based on LL 240(1) as follows:

plaintiff in this case was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law §240(1). In placing a 120-pound beam onto the ground from seven inches above his head with the assistance of three other co-workers, Rodriguez was not faced with the special elevation risks contemplated by the statute. (Citing Ross v. Curtis-Palmer Hydro-Electric Co., supra, and Rocovich v. Consolidated Edison Co., supra.)”

In 1995, the Court of Appeals rendered

(Continued on page 8)
MARITAL QUIZ

BY GEORGE J. NASHAK JR.*

Question #1 - May the court award child support in accordance with the CSSA Guidelines and order the payer spouse to pay the mortgage on the marital home where the child resides?

Your answer -

Question #2 - Can the refusal to file a joint income tax return be found to be marital waste?

Your answer -

Question #3 - Are siblings permitted to commence a proceeding to seek visitation with a whole or half brother or sister?

Your answer -

Question #4 - In question #3, if the petitioner is a minor, is his or her attorney authorized to file the petition for his or her client?

Your answer -

Question #5 - Is a substantial reduction in father’s visitation with the parties’ child a substantial change of circumstances warranting an increase in child support?

Your answer -

Question #6 - May the court award temporary maintenance in accordance with the formula set forth in DRL §236(B)(5-a) and direct the payment of carrying charges on the marital home?

Your answer -

Question #7 - Can the trial court award appellate counsel fees?

Your answer -

Question #8 - Is the trial court permitted to order a lump sum distributive award, if all of the marital assets are non-liquid?

Your answer -

Question #9 - When the court orders a distributive award in installments, what rate of interest should it order?

Your answer -

Question #10 - The wife obtains an annulment based upon husband’s bigamy. During their purported marriage, the husband satisfies a criminal judgment for failure to pay child support to his first wife, whom he remarried. Is the wife who obtains the annulment entitled to be reimbursed by husband for 50% of the criminal judgment he paid to the first wife?

Your answer -

*Editor’s Note: Mr. Nashak is a Past President of our Association and Vice-Chair of our Family Law Committee. He is a member of the firm of Ramo Nashak Brown & Garibaldi LLP

ANSWERS APPEAR ON PAGE 14

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Dr. N.G. Berrill, Director

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a decision that reaffirmed the limitations of seeking relief under the “scaffolding law” by injured workers. Misserritti v. Mark IV Construction Co., Inc.,26 written by Judge Caparrelli, continued the theme stated in Rodriguez, supra, that an injury resulting from hazards that are not elevation related constitutes “other types of hazards” that are not compensable under the statute even if proximately caused by the absence of *** [a] required safety device.”27 The Court concluded that the wife of the decedent was not an elevation-related risk subject to the statute.28

[Continued on page 8]
NYC's Scaffold Law (Continued from page 8)

Misserti, supra, by holding that a worker is not categorically barred from recovery under LL §240(1) where he or she "sustained injuries capable of being described as 'falling'" and "injuries resulting from falling object whose base stands at the same level as the worker."57 In Wilinski v. 334 East 52nd, HDFC, supra, Judge Ciparick, expressing a concern that the category of injuries that warrant the special protection of Labor Law §240(1) has evolved over the last two decades centering on the employer's failure to provide adequate protection to reasonably prevent serious injury, the defendant's failure to provide workers with adequate protection from reasonably preventable gravity-related accidents will result in liability.58 (Emphasis added)

Explaining the Court's progression of the cases discussed above, it was pointed out that while rejecting Misserti's "categorical exclusion" of injuries resulting from falling objects on the same level as the injured worker, it declared to adopt the 'same level' rule, which ignores the nuances of an appropriate height differential.60 Relying on Runner, supra, the Court held that it is not "the precise characterization of the device employed" or whether it was the fall of the worker or an object falling on the worker which determines the injury.61 The Court rejected a defendant's failure to provide adequate safety devices to prevent accidents caused by a "physically significant elevation differential."62 Wilinski was injured during the demolition of the brick walls of a vacant warehouse. After previous demolition of the floor and ceiling of the warehouse, pipes were placed on a pallet that lay on the concrete floor. The saw and its stand sat on a wood pallet that lay on the concrete floor. Wilinski was not precluded from recovery as structures.66 The Court of Appeals stated that "courts must take into account the practical differences between 'the usual and ordinary dangers of a construction site' and the 'special elevation risks' which are associated with the kind of elevated tasks the parties were engaged in.67 According to Runner, supra, a temporary platform must be "constructed with a commonsense approach to the realities of the workplace at issue."68 In Runner, supra, the Court held that the device employed was not one of the kinds of structures "indicated in section 240(1)" and that the failure to use, or the adequacy of, one of the enumerated devices, a question of fact remained as to whether the task the plaintiff was performing created a gravity-related risk encompassed in the scaffold law. Defendants moved for summary judgment claiming this was not true high manufacturing steel wall marrow. The plaintiff asserted that his task of filling the dumpster and rearranging the content therein as it filled up required him to stand on the 8-inch ledge at the top of the dumpster. The Court held that neither side was entitled to summary judgment. Based on the record before the Court, it [could not] say at this time whether or not a failure to secure the crates before removing the crane was a violation of the statute. With respect to the object falling from the top of the dumpster, the plaintiff averred that it was a violation of the statute. The Court held that the failure to use, or the adequacy of, one of the enumerated devices, a question of fact remained as to whether the task the plaintiff was performing created an elevation-related risk of the kind these devices are intended to prevent.

At the time of this writing, the last case decided by the Second Department, in this Appeals was Dahl v. Holland Ladder & Mfg. Co.69 As bring, supra, the plaintiff's duties involved "cleaning." In this case, the plaintiff was required to clean a 7-foot tall wall and ceiling. The plaintiff averred that he was required to clean a 7-foot tall wall and ceiling. The plaintiff averred that his project contained a numbered tag that required him to stand on the 8-inch ledge at the top of the dumpster. The plaintiff averred that his job required him to clean a 7-foot tall wall and ceiling. The plaintiff averred that his project contained a numbered tag that required him to stand on the 8-inch ledge at the top of the dumpster. The Court held that the failure to use, or the adequacy of, one of the enumerated devices, a question of fact remained as to whether the task the plaintiff was performing created an elevation-related risk of the kind these devices are intended to prevent.

In rejecting the defendants' argument, the Court held that the elevation differential was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force. Notwithstanding that there was a "potential causal connection between the two elevation differentials," there was not de minimus as a result of that force.
Recent Decisions From Our Highest Appellate Courts 2012
October 23, 2013

Joseph Risi making the introductions.

President Joseph Risi presenting Judge Ciparick with a plaque from QCBA recognizing her years of service on the bench.

J. Gardiner Pieper discussing civil cases from the NY Court of Appeals.

Paul Shechtman speaking about criminal cases in the NY Court of Appeals.

Spiros Tsimbinos reviewing recent developments in the US Supreme Court.

Hon. A. Gail Prudenti reminiscing about her friendship with Hon. Ciparick.

Hon. Judith S. Kaye paying tribute to Judge Ciparick and time on the bench.


Hon. Robert S. Smith talking about times on the bench with Judge Ciparick.

Peter Lane, President-Catholic Lawyers Guild, Donna Furey, President-Queens Women’s Bar Assn, Michael Hartofilis, 1st Vice-President-Hellenic Lawyers Assn, Hon. Bernice Siegel, Chairperson-Brandeis Assn, Joseph Risi, President-QCBA, Hon. Carmen Beauchamp Ciparick, Associate Judge, New York Court of Appeals, Hon. Randall Eng, Presiding Justice of the Appellate Division, Second Department, Spiros Tsimbinos, Program Chair and Gary Mirel, Treasurer-Latino Lawyers Assn of Queens County.

Photos by Walter Karling
Recent Decisions From Our Highest Appellate Courts 2012
October 23, 2013

Photos by Walter Karling

Hon. Allen Beldock, Chanwoo Lee, Emilio Gonzalez and Tom Graham in background

Hon. Carmen Beauchamp Ciparick, Spiros Tsombinos, Joseph Risi and Hon. Judith Kaye

Hon. Randall Eng discussing his memories of Judge Ciparick

Hon. Carmen Beauchamp Ciparick thanking QCBA and everyone who are celebrating her retirement

Bernie Vishnick, Tom Principe, Hon. Randy Eng, Chanwoo Lee and Hon. Morton Povman

Hon. Carol Stokinger, Spiros Tsombinos, Hon. Judith Kaye and Hon. Carmen Ciparick


Photos by Walter Karling
them; [and] that he chose for no good rea-
son not to do so.82

On September 14, 2012, the Appellate Divi-
sion, Second Department, affirmed the judg-
ment of dismissal (of dismis-
sal) as a matter of law by demonstrat-
ing that the plaintiff’s decedent was not exposed to an elevation related hazard inasmuch as, at the time the decedent was struck by a bun-
ner of forms (citing, on a flatbed truck at the same level as the bun-
dle of forms, the weight of the hamper was not estab-
lished that “[t]he absence of proof of a direct con-
tractual connection with the owner or gen-
eral contractor weighs against finding that Miron was delegated any authority by the owner to direct or control the work done by the contractor.”90

Plaintiff moved for partial summary judgment against Miron under LL §240(1). Miron contends that “the fall of the hamper from the forklift simply did not involve an elevation related hazard inasmuch as, at the time of injury, the object was on the ground and not elevated by the forklift.”91 In Rivera v. Fairway Equities LLC,92 plaintiff was injured at a construction site when a forklift fell from a flatbed truck at the same level as the bundle of forms. The court found that “the absence of proof of a direct con-
tractual connection with the owner or general con-
tactor weighs against finding that Miron was delegated any authority by the owner to direct or control the work done by the contractor.”93

The court held that “in light of the heavy weight of the hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or Labor Law §240(1) device to prevent the hamper from fall-
ing off the ground while held in the air by the forklift.”94 The court held that “in light of the heavy weight of the hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or Labor Law §240(1) device to prevent the hamper from falling off the ground while held in the air by the forklift.”94

The court held that “in light of the heavy weight of the hamper, the obvious force it generated in the three to four foot fall from the forks of the forklift, and the absence of any brace or Labor Law §240(1) device to prevent the hamper from falling off the ground while held in the air by the forklift.”94

Otherwise, virtually every accident experienced by featuring the object falling is a violation of the statute (i.e.: “failure to provide protective devices and that said violation was a contributing or proximate cause for the worker’s injury.”95

To make the case a violation of the statute, there must be a violation of the statute (i.e.: “failure to provide protective devices and that said violation was a contributing or proximate cause for the worker’s injury.”95

CONCLUSION

Thus, we end where we began: Labor Law §240(1) has been continued to be a statute that will yield differences of opinions between the courts at all levels regarding the nature of a worker’s tasks that fall within the statute; the devices, if any, provided and used by the worker; the nature and degree of the ele-
vation and height differentials, vis a vis the worker and the distance he or she falls or that which an object falls and injures the worker; and, now, whether foreseeability must be an element to be considered.

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v
Fifty Years of Family Court

(Continued from page 5)

the surroundings, the Queens courthouse is “one of my best operations.” She did not provide an explanation as to why Queens was best nor how the children involved in other proceedings could be subject to the “inhuman physical surroundings.”

As a result of the new law and the publicity surrounding the case, Judge Kelley reported that there had been an “outpouring” of child abuse cases. She estimated there were about five times more cases reported in 1969 than in 1968 the year prior to the act.10

There were 111 child abuse petitions filed in July of 1969 — one month after the law was enacted. In 1972, the number of child abuse complaints in New York State had increased by 6,700 percent over the period from January 1 to July 31, 1969.11

As our story moves on, the seventies and eighties saw the continuation of the Family Court’s efforts to protect children. The lead author of the study, Dr. Kristine A. Campbell, a professor of pediatrics at the University of Utah said “as a pediatrician... I need them. But we have to look at other systems that can really create a safety net for these children.” Dr. Campbell said “I don’t believe CPS has outlived its usefulness, ... The problem is that someone needs to continue working with these families ... CPS deals with acute issues. We don’t know how to deal with what remains.12 DeCampbell’s study appeared in the October, 2007, issue of the Archives of Pediatrics and Adolescent Medicine.13

The new law in 1969 which mandated the special abuse part, also expanded the people who might originate child abuse proceedings to include doctors, nurses and other hospital personnel as well as welfare workers and teachers. It also added to the old definition of an abused child. Prior to 1969, an abused child was a child under 16 who had serious physical or mental injury inflicted upon him by other than accidental means. The 1969 law heralded a new era in the child abuse field as the abused child was now also a youngster under the age of 18.14

In 1993, the Family Court also continued to wrestle, on a daily basis, with the question of what is a family. Many child support and child custody laws had to be written, rewritten and reinterpreted to accommodate the very modern game of musical chairs of consecutive and even concurrent sexual partners we now accept as a manner by which a new generation is being born. Now if a man becomes a father to two children in the same month and year by way of sexual relationships with two different women, contemporaneously, we address protecting the children by determining child support orders and seating at the Thanksgiving table by ways of custody orders. This may or may not be the kind of protection of children that Dickens was seeking. It is too late to ask him. We can, however, ask ourselves, Is it “wonderful” that we have child support laws to help us sort out how to finance the children of the first, second or even third relationship? Is it “wonderful” to have Custody laws to help us determine where the kids should eat Thanksgiving dinner? And, of the final jarring question, first posed by Judge Kelley, “Wouldn’t it be wonderful if all cases were handled like these?”15

A few days later, on June 28, 1972, The New York Times reported in the metropolitan briefs column that Mayor John Lindsay had officially opened the “new” Queens Family Court, housed at 988 Avenue and Parsons Boulevard — in a building formerly occupied by the Queens Borough Public Library, which had vacated the building back in 1966 — and the Mayor told the Judges attending the ceremonies that he was awaiting a report from a study commission on how much their $31,790.00 salaries should be raised.16

The girls’ ascent onto school playing fields, including school tennis courts commenced changes that would be seen thereafter in all the other courts — including the Family Court. As women arrived as regular players in the operation of the Family Court, they found institutional and of course, legal and societal resistance to these further changes in the way in which the Family Court functioned daily.17

The Family Court also continues to evolve, on a daily basis, with the question of what is a family. Many child support and child custody laws have had to be written, rewritten and reinterpreted to accommodate the very modern game of musical chairs of consecutive and even concurrent sexual partners we now accept as a manner by which a new generation is being born. Now if a man becomes a father to two children in the same month and year by way of sexual relationships with two different women, contemporaneously, we address protecting the children by determining child support orders and seating at the Thanksgiving table by ways of custody orders. This may or may not be the kind of protection of children that Dickens was seeking. It is too late to ask him. We can, however, ask ourselves, Is it “wonderful” that we have child support laws to help us sort out how to finance the children of the first, second or even third relationship? Is it “wonderful” to have Custody laws to help us determine where the kids should eat Thanksgiving dinner? And, of the final jarring question, first posed by Judge Kelley, “Wouldn’t it be wonderful if all cases were handled like these?”18

And what parents have been told by CPS is “it scares us because it means we’re still not filing in July of 1969 — one month after the law was enacted. In 1972, the number of child abuse complaints in New York State had increased by 6,700 percent over the period from January 1 to July 31, 1969.11

Family Court has also shown itself, time and time again, to be flexible, culturally diverse and adaptive to ecological and economical conditions — after some trials and tribulations.22 The laws that came to be in the Family Court have changed the family more than Dickens could foresee, and definitely much more than the any possible effect of the cancellation of Father Knows Best.

Next: A Family Court Super Star!

Meryl Kovi regularly practices before the Family Court. She wants to thank Briana Hart and Julia Gilman, Stony Brook University students, for their help in researching this article.

2 Sobie, Merrill. The Family Court A Short History, March 2003, http://www.courts.state.ny.us/history/family
4 id.
5 id.
7 id.
8 id.
9 id.
10 id.
11 id.
13 id.
14 id.
16 id.
17 Supra, Ferguson
18 Supra, Ferguson
21 Supra, Ferguson, Quoting Judge Florence Kelley, 1968.

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ADVETIRE EXCLUSIVELY TO THE LEGAL PROFESSION
Eulogy by Kevin Sampson
(Continued from page 3)

that if he could convince people that his rice pudding was any good then he could convince people of anything!

Larry attended Fordham University, then law school at City University of New York, and was admitted to the bar in 1991. Soon afterward, as his Uncle John was not feeling well and needed assistance at his home, Larry called me and asked me to go with him and meet the female doctor interviewing for the position. In February, 1994, Larry married that lovely woman. It did not escape me that Larry never called again to go with him to visit his Uncle John.

Margaret Cullen was the love of his life and fulfilled all his dreams. As his nephew Frank so eloquently said last night, “It was her devotion to him that allowed Larry to be so devoted to us.” Larry and Margaret were together for eighteen years and were blessed with two children. First, Anya appeared on the scene and a couple of years later, Patrick came along. Often, and as recently as last Tuesday, he told me how proud he was of you both - your intel- ligence, your independence, your ability to deal with adversity, your desire to remain altar servers, and the kindness and love you show your mother. You were always in his heart. As you would think, he had high expectations for the both of you and he was so very proud of how frequently you exceeded those high expectations.

Larry was a man of immense faith and a leader here at St. Andrew’s parish. He was generous with his time and talents and readily realized weekly Mass and assisted the parish school. He was instrumental in bringing the Knights of the Holy Sepulchre to the parish and served on the board of the Holy Cross, the highest rank attainable by a lay person. The Knights are responsible for the building of schools and hospitals and maintaining the Church in the Holy Land. Being a member was part of who he was, a lover of history with practical bene- fits to those in need.

Larry’s life was the fulfillment of the American dream. He knew what it was to live at the Flushing YMCA and, conversely, to design and own a lovely Tudor home on the other side of Flushing. He had a marvelous mind and a great vocabulary and, on his worst day, could finish the NY Times crossword puzzle. Larry was a man with opinions who would speak his mind. He was a loving man who had a passion for life. He loved his Roman Catholic religion, his Irish heritage, his Marine Corps. He loved being a man of the law. And above all, he loved his beautiful wife and attended children. As Anya reminded me, Larry would never say “good bye” but would always say “so long.” He was loved and cherished by everyone and no one ever missed.

To my Friend Lawrence:
May the road rise to meet you,
May the wind be always at your back,
May the sun shine warm upon your face,
And the rain fall softly upon your fields
And until we meet again,
May God hold you in the palm of his hand.

Eulogy by PJ Kelly
(Continued from page 3)

of about $150.00 which the client was inclined to accept. Larry counseled the client to reject the offer and insist on trial. When the client protested that, if they were unsuccessful, the fine would be greater and that he could not afford it, Larry responded “Don’t worry, if somehow we lose, I’ll pay it.” When I asked Larry what he would have done if jail time had resulted he broke into a laugh and said “Yeah, that would have been a problem.” But he immediately turned serious and said “But I knew the guy was lying.” Luckily his client was acquitted. Larry got his records expunged and all was fine. But to me, that incident was indicative of how Larry practiced law and lived his life. Trust and Honesty were the hallmarks of his career.

It was not by accident that Larry was continuously appointed as a Guardian- at-Law and Guardian Ad Litem by Attorney and Court Examiner. These are roles that require vigilant representa- tion of persons incapable of protect- ing the interests of counsel or others who were - sup- posedly fulfilling this role. Larry’s background and life experi- ences uniquely suited him for these roles. Working from the time he was 13, in different jobs with widely vari- ous ranges of responsibilities, enabled Larry to gain the trust and confidence of wards who were victims of various societal ills and, as a result, were natu- rally hesitant of others. Yet, he was also able to easily navigate the offices and offices of the city’s most presti- gious law firms and turn those attor- neys, even if first adversaries, into friends.

That was just the way the world worked for Larry: His common sense approach to problems, his ability to treat everyone equally, and his prac- tical knowledge of many fields enabled him to achieve solutions that served his clients and other counsel well. His decency, forthrightness and good nature enabled a person to chock a cord in everyone.

He also viewed his time as a mem- ber of the Queens County Bar’s Judiciary Committee as a stellar part of his career. Larry saw his role as a defender of candidates from unwar- ranted attacks; especially those com- ing from people from “outside of Queens.” Many judges sitting here today owe Larry a huge debt of grati- tude for his efforts in spearheading the charitable and educational endeavors who were victims of various societal ills and, as a result, were natu- rally resistant of others. Yet, he was also able to easily navigate the offices and offices of the city’s most presti- gious law firms and turn those attor- neys, even if first adversaries, into friends.

Yet, regardless of all of his successes as an attorney, Larry was BORN to be a judge. Apart from time spent with Yom Kippur, Passover and Purim, Larry was happiest when he was at the courthouse utilizing his talents in the Guardianship Part.

A more perfect match of a person’s talents and temperament with a job’s requirements would be impossible to find. He could disarm the most vexa- tious litigant or adversary with his grace and charm, he could relate any strange fac- tual circumstance of a case to a similar

Question #1 - May the court award child support in accordance with the CSSA Guidelines and order the payer spouse to pay the mortgage on the marital home where the child resides?
Answer: No, this is an award of a double shelter allowance for the child. Harris v. Harris 2012 NY Slip Op 5389 (2nd Dept.).

Question #2 - Can the referee to fail to receive a joint income tax return be found to be marital waste?
Answer: Yes, Levitt v. Levitt 2012 NY Slip Op 5393 (2nd Dept.).

Question #3 - Are siblings permitted to commence a proceeding to seek visitation with a whole or half brother or sister?

Question #4 - In question #3, if the peti- tioner is a minor, is his or her attorney authorized to file the petition for his or her client?

Question #5 - Is a substantial reduction in father’s visitation with the parties’ child a substantial change of circumstances warranting an increase in child support?
Answer: Yes, since the amount of money that the parent is required to spend on the child was significantly reduced. McCormick v. McCormick 2012 NY Slip Op 5530 (2nd Dept.).

Question #6 - May the court award temporary maintenance in accordance with the formula set forth in DRL §236(B)(5-a) and direct the payment of carrying charges on the marital home?
Answer: No, Woodford v. Woodford 2012 NY Slip Op 7993 (2nd Dept.).

Question #7 - Can the trial court award appellate counsel fees?
Answer: Yes, Franco v. Franco 2012 NY Slip Op 5721 (2nd Dept.).

Question #8 - Is the trial court permitted to order a lump sum distributive award, if all of the marital assets are non-litig?
Answer: No, the trial court must order the distributive award in installments. Iarocci v. Iarocci 2012 NY Slip Op 6191 (2nd Dept.).

Question #9 - When the court orders a distributive award in installments, what rate of interest should it order?
Answer: The legal rate, 9%. Iarocci v. Iarocci 2012 NY Slip Op 6191 (2nd Dept.).

Question #10 - The wife obtains an annulment based upon husband’s bigamy. During their purported marriage, the hus- band satisfies a criminal judgment for failure to pay child support to his first wife who was not remarried. Is the wife who obtains the annulment entitled to be reimbursed by husband for 50% of the criminal judgment he paid to the first wife?
Answer: Yes, Levenstein v. Levenstein 2012 NY Slip Op 7090 (2nd Dept.).
income to be considered initially, up to the then State's maximum income. This is no surprise, since that is precisely what the statute says. But the husband had argued that cash flow or net income should be the basis of the amount ($500,000) and the wife was charged with $60,000. The result was that the motion was remanded for reconsideration, inasmuch as the court did not discuss whether it was appropriate to exclude those in play relative to the husband’s income above the then $500,000 cap (now $524,000).

In the discussion, the court did rule that the statute was intended by the legislature to make the award as just and equitable as feasible.

While there have been several carefully considered and well written decisions on this topic, during the year, one seems particularly worthy of comment.

**E.L.J. v. L.L., 950 N.Y.S. 2d 628 (Supreme Court, Monroe County, March 2, 2012)**

This lengthy decision is one of many, which establish the inappropriateness of applying the much criticized “presumptive” temporary maintenance guidelines. Here that was held to be unjust and inappropriate, and that notwithstanding the attempt to stream -line and that the “sheer size” of the award or the mine that the award is “unjust or inappropriate” to disturb the presumptive award calculations, this court concluded that the two decisions and motions.

After a detailed discussion of the facts that were available, the court concluded that the statutory presumptive guidelines should be some amount of temporary maintenance paid. The wife emphasized that the child support agreement was a substantial deviation from the guidelines which were $17,000 to $19,000 lower than the guideline amount. The parties’ computations of the “presumptive amount” varied, but were both within the $17,000 to $19,000 range.

The parties’ computations of the “presumptive amount” varied, but were both within the $17,000 to $19,000 range. The court calculated that under the presumptive amount, the wife would be entitled to temporary maintenance, the wife would reside with him full time, pursuant to the decision, it remained a mystery as to why the house was bought in both party’s names, including housing. Accordingly, just tacking the mortgage payments onto the husband’s obligation was a deviation from the statutory scheme. While the court said that may well have been appropriate, such a conclusion had to be supported and explained within a discussion not found in the decision.

**CHANGES IN QUEENS MATRIMONIAL PRACTICE**

Last month a representation from the Family Law Committee met with Judge Weinstein and discussed changes that was going to be made starting in January, 2013. As a result a notice was sent to the Family Law Committee members by E-MAIL, advising them of the changes.

In order to inform other members of the Bar Association, who may have either missed the E-MAIL or who are not members of the committee, it was decided that the entire notice should be re-printed here, and it follows:

Our Administrative Judge, Jeremy S. Weinstein, recently invited a small group of representatives of the Bar to discuss changes that were going to come into place starting in January. In particular, there was a discussion of the need to update some common errors that were being made.

** Jeans Bar Bulletin – October 2008**

**Family Law Update (Continued from page 1)**

for calculation purposes. The numbers were intended to provide the necessary funds to cover his own expenses. The court believed that it was never the intent of the legislature that the “presumptive award” would shift to an independent basis upon which to modify the presumptive award, this court held that the catch-all factor, “(q) any other factors and considerations that the court may find to be just and proper,” allows the court to make a blanket rejection of the calculation because it is simply too much money. Yet, the parties agreed that the personal financial resourcelf shift, in and of itself, is not a basis for the court to re-write the tenet of the statute.” In considering the enumerated factors, the court correctly observed that “Most of the statutory factors are irrelevant at this stage because the court has few undisputed facts on which to advance a judgment. There is little evidence of the standard amount of the forum in the year of the marriage.” The lack of evidence of numerous other factors was recounted, and the court observed that the parties have criticized the legislature’s use of these criteria at such an early stage of the case.

After a detailed discussion of the facts that were available, the court concluded that the legislature’s presumptive guidelines were not appropriate to the case. The legislature has established the presumptions. We wait with interest. The court held that the catch-all factor, “(q) any other factors and considerations that the court may find to be just and proper,” allows the court to make a blanket rejection of the calculation because it is simply too much money. Yet, the parties agreed that the personal financial resource shift, in and of itself, is not a basis for the court to re-write the tenet of the statute.”

**DRAFTING ALERT!**

**THE QUEENS BAR BULLETIN – OCTOBER 2008**


There are important lessons to be learned from this decision. The drafter of the agreement should have considered the fact that the court held that the catch-all factor, “(q) any other factors and considerations that the court may find to be just and proper,” allows the court to make a blanket rejection of the calculation because it is simply too much money. Yet, the parties agreed that the personal financial resource shift, in and of itself, is not a basis for the court to re-write the tenet of the statute.”

The court calculated that under the presumptive amount, the wife would be entitled to temporary maintenance, the wife would reside with him full time, pursuant to the decision, it remained a mystery as to why the house was bought in both party’s names, including housing. Accordingly, just tacking the mortgage payments onto the husband’s obligation was a deviation from the statutory scheme. While the court said that may well have been appropriate, such a conclusion had to be supported and explained within a discussion not found in the decision.

**UNANSWERED QUESTION**


In this decision, a wife, whose mother had given her a $150,000 gift, put the money into her own checking account and used it to buy the parties’ marital residence. Despite the fact that the house was bought in both parties’ names, as tenants by the entirety, the Court found that the transfer of one-third of that separate property to the husband, and accordingly, gave the wife credit for the full amount of separate property, compared to the acquisition of that asset. There are many decisions going the same way. The unanswered question (based upon the decision only) in this case is procedural. The decision itself did not state if credit was raised in a pre-trial motion that was decided in the wife’s favor. But the decision reports that the W died, and her executrix mother was “substituted as the plaintiff.” If there had not been a final divorce by the time the wife died (and there is no suggestion that the action had gone that far), then why would the executor have any decision making not moot? It is well established that upon death a divorce action abates. Moreover, the husband would then be entitle to the benefit of the survivorship right, assuming a tenancy by the entirety or joint tenancy. Until the divorce is finalized there can be no equitable distribution. According to, upon reading the decision, it remained a mystery as to why this appeal was allowed to go to a decision, after the wife’s death. We called the attorney for the wife, and the wife’s attorney said that although there is no mention of it in the decision, the parties were in fact divorced, based upon a settlement agreement which left the division of property, the survivorship rights, etc. and here the court could easily have afforded the H relief, interpreting the facts of the case as “unforeseen and unreasonable and unanticipated change of circumstances.” Here, the only relief given was to reduce the child support arrears by $1,680 based upon the face of a decision – not much of a result after the husband’s payment for the motion and a full appeal!

**CHANGES IN QUEENS MATRIMONIAL PRACTICE**

Last month a representation from the Family Law Committee met with Judge Weinstein and discussed changes that were going to be made starting in January, 2013. As a result a notice was sent to the Family Law Committee members by E-MAIL, advising them of the changes.

In order to inform other members of the Bar Association, who may have either missed the E-MAIL or who are not members of the committee, it was decided that the entire notice should be re-printed here, and it follows:

Our Administrative Judge, Jeremy S. Weinstein, recently invited a small group of representatives of the Bar to discuss changes that were going to come into place starting in January. In particular, there was a discussion of the need to update some common errors that were being made.

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Brown and Joseph J. Esposito will continue to operate the law firm of the inventory of Hon. Thomas D. Raffaele will be taken over by Hon. Leslie J. Purification. Judge Raffaele will preside over what is being called the New York Regional Market Authority, which will continue all P.C.’s which have not previously been scheduled before the matrimonial judges, thus freeing their time and hopefully, and being able to prepare the P.C. process more meaningful and productive. It is going to be expected that we lawyers refrain from coming to the P.C.’s to more or less preclude any waiting game. By being yet completed Net Worth Statements or produced basic financial records, and expecting to have a schedule imposed at the P.C., which is going to be expected, the P.C.’s, which will be able to be scheduled sooner, and with staggered appearance times, will result in early agreements or orders for various issues, including support, parental access, or other matters. The court is not limited by the absence of any underlying motion, although it will be expected that pleadings are served, seeking various forms of relief. Temporary orders will be made to afford temporary relief or partial relief in various areas, without long waiting times. But this means we have to be ready to cooperate with and prepare for the P.C.s.

Initial, the P.C.’s will be conducted upon the filing of an R.J.I. requesting that relief or the filing of any pendente lite motions on Tuesday, Wednesday, Thursday mornings, with attendance by attorneys and clients being mandatory. It is expected that complaints and answers will have been served and filed, and not just being available at the P.C. Moreover, various other documents are expected to be filed and copied made available, as more specifically set forth in the Part Rules. The Preliminary Conference Order form will have to be filled out, as usual, and should be done insofar as possible before the conference begins. To facilitate this process the Preliminary Conference Order will be mailed along with the Order directing the Preliminary Conference. One adjournment may be made as a result of the P.C. appearance. But the plan is to have all preliminary orders, by agreement or court direction, made by the end of the second week, thereafter the case will be assigned a Completion date, and preliminary order date before one of the matrimonial judges.

Requests for adjournments must be made only by E-Mail to QSMAPPC@courts.state.ny.us. A copy of the new Part Rules, while subject to change, is attached.

**CAPL Annual Update**

Metropolitan Transportation Authority are governed by Public Authorities Law § 1276, which states that the limitations period is one year. That seems clear enough. The Uniform Act which will conduct all P.C.’s which have not previously been scheduled before the matrimonial judges, thus freeing their time and hopefully, and being able to prepare the P.C. process more meaningful and productive. It is going to be expected that we lawyers refrain from coming to the P.C.’s to more or less preclude any waiting game. By being yet completed Net Worth Statements or produced basic financial records, and expecting to have a schedule imposed at the P.C., which is going to be expected, the P.C.’s, which will be able to be scheduled sooner, and with staggered appearance times, will result in early agreements or orders for various issues, including support, parental access, or other matters. The court is not limited by the absence of any underlying motion, although it will be expected that pleadings are served, seeking various forms of relief. Temporary orders will be made to afford temporary relief or partial relief in various areas, without long waiting times. But this means we have to be ready to cooperate with and prepare for the P.C.s.

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**MARRITAL PRELIMINARY CONFERENCE PART- Part Rules**

Preliminary conferences shall be held on Tuesday, Wednesday and Thursday each week.

Preliminary conferences will be conducted within forty-five (45) days after assignment of the action.

**CALENDAR**

Calendar call is at 9:30 a.m., unless the matter is scheduled at a time certain. Please be prompt for all appearances. Defaults will be taken at 12:30 p.m.

**APPEARANCES**

Unless otherwise directed by the Marital Preliminary Conference Part (MPCP) the appearances of Counsel, Plaintiff and Defendant and/or GRV at all Preliminary Conference court appearances. Counsel are to submit two business cards to the MPCP.

**PLEADINGS**

Prior to the Preliminary Conference, all pleadings (Verified Complaint, Answer, Notice of Appearance, Affidavit of Service) must be properly filed with the Office of the County Clerk. Courtesy copies of all pleadings are to be provided to the MPCP at the Preliminary Conference.

**DOCUMENTS**

Fully completed and acknowledged Net Worth Statements with required documents, including parties’ recent pay stubs and W-2s, Attorney’s Retainer Statements and Temporary Maintenance Guidelines, Worksheets, are to be properly filed with the Office of the County Clerk ten (10) days prior to the Preliminary Conference date. Courtesy copies of all documents, including any pending motions or orders to show cause and prior and current Court orders from any and all courts, are to be provided to the MPCP at the Preliminary Conference.

**PRELIMINARY CONFERENCE ORDER**

Prior to the call of the Preliminary Conference calendar, counsel and/or self-represented parties MUST complete the proposed Preliminary Conference Order to the MPCP at the first appearance.

**ADJOURNMENTS**

Adjournments may be granted on a limited basis upon request to the MPCP. The MPCP will not grant adjournments of the forty-five (45) day period unless good cause is shown.

Communication with the MPCP will be limited to email at only at QSMAPPC@courts.state.ny.us.

**INTERPRETERS**

Notification of Court Interpreter Services shall be made to the MPCP not less than five (5) business days prior to the first court appearance by email at QSMAPPC@courts.state.ny.us.

At the time of calendar call or check in, Counsel and/or Parties shall remain the MPCP that Court Interpreter Services are needed.
has been brought into conformity, with the amendment of Public Authorities Law § 666-b to replace the notice of intention to sue requirement with a notice of claim, to be filed within the time limits of GML § 50-e, i.e., 90 days of the accrual of the claim. The Triborough Bridge and Tunnel Authority, with the amendment of PAL § 569-a.

And now, back to the usual traversal of case law:

Appellate Practice

Siegfried Strauss, Inc. v East 149th Real Estate, Inc.

2012 NY Slip Op 07048 (October 23, 2012)

Paul v Cooper, 100 A.3d 1550, __ N.Y.S.3d __ (4th Dept., 2012)

Smith v Town of Colonie, 100 A.3d 1132, 952 N.Y.S.2d 2923 (3rd Dept., 2012)

The Court adopted this approach in a case where the notice of claim requirement was required to file a certificate with the secretary of state designating the secretary as such an agent, and providing the name and address of the person or officer to whom the secretary of state is to send the notices received. The filing procedure was that the secretary of state must state the applicable time limit for service of the notice of claim, and if that time is later amended, there must be a new filing stating the newly amended time limit. The court held that this is necessary, in view of the provision of the new CPLR 217-a harmonizing all such time periods with the 90-day requirement in GML § 50-e. Any failure of a public corporation to file with the secretary of state does not invalidate service of the notice of claim on the secretary. As noted above, the notice of claim requirement is required to publish on the departmental website a list of the entities entitled to notices of claim, with the address of the entity and any relevant information necessary to contact the entity. To repeat, however, the listing might well contain errors, estoppel on the grounds of such errors is not generally available, and a prudent practitioner would do well to check the actual statutorily provisions concerning notices of claim on public entities. Of the provisions and entities mentioned above, for example, the Nassau County Bridge Authority

...
This case involved a zoning challenge to a hospital modernization project, which Supreme Court rejected in August of 2011. The court also denied the petitioners’ application for a preliminary injunction. Nonetheless, the petitioners did not renew their application for an injunction. By the time the matter reached a decision before the First Department, in May of 2012, a substantial amount of the work was complete, and the court found that it had not been done in bad faith and could not readily be undone. Hence, the court granted the motion as moot. The doctrine did not apply, and the appeal was dismissed as moot.

This was done in the face of a strong dissent, both on the mootness issue and the merits. The majority stated that while it “would adopt the dissent’s cogent analysis of the zoning issue” on the merits, the parties here merely stated that “[t]here is still no explicit approval by the Board” and argued in favor of injunctive relief from the Appellate Division.

The Court chose not to determine the question of the applicability of the timeliness issue. In each case (Nash), the employee pursued the employee that she had the right to seek resolution of the limitations issue would be for the arbitrator. The Court chose not to determine the validity of that assumption, choosing instead to address New York law first. CPLR 7503(b) specifies that a petition to stay arbitration, seeking to bar the respondent’s counterclaims as untimely, New York law in that context was unclear.

The question then, by Judge Smith, disagreed with both choices in the majority’s analysis. He would have addressed the threshold issue of the applicability of the New York law. Moreover, he found that the partnership agree-
patient privilege, such an exception can be implied from the investigatory duties imposed on the Medical Review Board. Where an inmate dies in a correctional hospital, the Board is statutorily entitled to inspect the medical records. The Legislature could not have intended that the death of an inmate who happened to die in a non-correctional facility would be investigated less thoroughly than that of an inmate who died in a correctional hospital, merely because the non-correctional facility, or someone acting as the inmate’s personal representative, would not waive the privilege. Moreover, the Board is expressly granted other powers which affect the interests guarded by the physician-patient privilege. Specifically, the Board is entitled to the report of any autopsy, and may even order its own, additional, autopsy. The effect of these powers shows that the protection of the records kept by a non-correctional facility, where those kept by a correctional facility would not be protected, would not serve the interests protected by the privilege as a whole.

Finally, the Court held that HIPAA did not prevent disclosure of the records. The HIPAA Privacy Rule allows disclosure of records required by law, including administrative subpoenas such as the one here.

## Judgments


Not for the first time, the Court of Appeals reminds contract draftsmen to be wary of liquidated-damages clauses. If the contract disputes here can be simply interest-bearing bank account. The contract recognized that in the event of a Purchaser’s default, the exact sum of damages would be difficult to compute, and so the down payment and accrued interest would be retained by the escrow agent as liquidated damages, with that amount being Seller’s sole remedy and Purchaser’s sole obligation. Purchaser did default, and after a settlement Seller was awarded the escrowed payment, accrued bank interest, and another $200K in statutory interest. The Appellate Division viewed the question as one of discretion, holding that the award of interest was “improvident,” and deleted the award of interest. The Court of Appeals affirmed, not as a matter of discretion. In contract cases, CPLR 5001(a) requires the payment of interest from accrual of the cause of action to the date of the verdict. Court of Appeals case law makes clear that the purpose is to compensate the wronged party for the loss of use of its money, whether or not the breaching party has obtained a benefit from it.

The terms of their contract, the Seller and Purchaser here had in effect opted out of the statutory interest scheme. The contract provided for the retention of the down payment and interest as the parties’ “sole remedy” and “sole obligation.” It specified that after the escrow agent paid over the retained sum, the parties were to have “no further rights” against each other. Parties are allowed to specify their own methods of computing damages, so long as public policy is not involved, and so the remedy the parties here established as exclusive must be enforced.

The Court adverted to Manufacturer’s & Traders Trust Co. v. Reliance Ins. Co., an interpleader action where was the success- ful claimant sought interest from the unsuccessful ones. The Court held that the unsuccessful claimants had no obligation to pay statutory interest, since they had not received the winner’s money and no money judgment was entered against them. The Court there expressed dismay that the parties had not provided for “meaningful” interest on the escrowed money, with the result that the successful claimant lost the use of its funds for four years with little or no compensation in the form of interest.

The Court here repeated its concern, noting that if the parties really intended for the bank interest on the escrow to be sufficient, they could have said so and avoided this litigation (or, at least, the appellate portion of it). The language they used, of course, eventually reached the same result.

The Court overruled a dissent, by Judge Graffeo, joined by Judge Pigott, which would not have read the contract language as ruling out statutory interest. The dissent also pointed out that when Purchaser refused to consent to Seller’s demand that the escrow agent be allowed to release the down payment and accrued interest, “effectively restrained” Seller’s access to its money. The dissent viewed this as a separate wrong, subject to statutory interest regardless of the contract language.

David H. Rosen served in the Supreme Court, Queens County, as Principal Law Clerk to Justice Arthur W. Loschmann from 1980 to 2000, and as Court Attorney/Referee from 2001 to 2010. He is now in private practice. Any comments may be addressed to davrosvenes@gmail.com
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