Should The United States Government Continue To Act As The World’s Police Department?

By Paul E. Kerson

As of this writing, the United States Government keeps 65,000 Marines in Okinawa, Japan, despite the fact that we last fought there in 1945, 65 years ago. There are similar large scale military installations in Germany, where the last fighting occurred also in 1945, 65 years ago. Current plans for disengagement in Iraq call for 50,000 U.S. Troops to remain there indefinitely. Our current United States Navy is larger than the next 12 largest national navies combined. The U.S. Navy patrols all the commercial sea lanes of the world to make certain that international oceanic trade in all manner of goods is not disrupted by other national navies or by pirates.

Further, our Central Intelligence Agency and its numerous subsidiaries actually are stationed all over the world, and regularly arrest people for attacking United States soldiers and/or installations abroad. These individuals are brought to a federal prison in Guantanamo, Cuba, for pre-trial incarceration, or perhaps unlimited incarceration. This activity may or may not be authorized by our current laws, depending on who is interpreting them. Can we continue to treat the world as one big city, and continue to treat our President as the Mayor? Can we continue to treat the federal prison in Guantanamo, Cuba, as a precinct lock-up? And if we do, should we have a U.S. District Court Judge assigned to Guantanamo, together with public defenders appointed under the Criminal Justice Act (CJA)?

Military expenditures are the single largest chunk of our United States Government’s budget. That budget continues to operate at a multi-trillion dollar deficit.

Are these facts sustainable? Should we continue to provide police services for the entire world? Or, in the alternative, should the entire world be paying us to do so?

This is the fundamental question facing every American voter at this time. There are very good arguments on all sides of this issue.

Continued On Page 13

Response From Our District Attorney, Hon. Richard A. Brown

Dear Paul,

I have your letter of August 26th enclosing a copy of your proposed Bar Bulletin article.

Early on in my tenure as Queens County’s chief law enforcement officer, and in view of the fact that our county is a home to two of our nations busiest airports, we established an Airport Investigations Unit which investigates and prosecutes criminal activity at those locations and interacts with our many federal, state and local law enforcement partners. Following the tragic events of September 11, 2001, we added a Counter Terrorism Unit which, among other things, shares on a daily basis vital information with our colleagues and lends support in coordinating our efforts.

In addition, we have a permanent seat on the Joint Terrorist Task Force and assist in gathering intelligence by conducting targeted debriefings of arrestees from countries that sponsor terrorism. We give particular attention to investigating and prosecuting specific precursor crimes to terrorism including identity theft, money laundering, counterfeit trademarking and the forgery or illegal procurement of identification documents. As a result, we have been able to provide valuable information to both the NYPD’s Intelligence Division and the Joint Terrorist Task Force and work collaboratively with them on significant classified investigations.

Our efforts have not only been successful in keeping our county safe and secure but have contributed as well to our national security.

Warm regards.

Sincerely,

Richard A. Brown
District Attorney

Domestic Violence And Family Law Legislative Update October 6, 2010

By Janet Finn, Deputy Counsel

NEW YORK STATE UNITED COURT SYSTEM

The 2010 New York State Legislative session culminated in the passage of several significant measures with respect to legal representation, domestic violence, child welfare, juvenile justice, child support and matrimonial proceedings, all of which have been signed by the Governor. All are summarized below. Texts and supporting memoranda are available on-line at www.nysenate.gov or www.nysassembly.gov or by calling 1 800 342 9860.

1. Representation of Children and Adults:
   1. Change of term “law guardian” to “attorney for the child” [Laws of 2010, ch. 41]: Consistent with the recommendations of the Matrimonial Commission in its report to the Chief Judge in 2006 and Rule 7.2 of the Rules of the Chief Judge, which was promulgated shortly thereafter, this measure, submitted by the Chief Administrative Judge’s Family Court Advisory and Rules Committee, replaces all statutory references to “law guardian” with the term “attorney for the child.” The use of the term “attorney” more accurately reflects the mandate for client-directed representation and also increases the quality of services provided pursuant to the Family Court Act, the Public Health and the Social Services Law to substitute “attorney” or “counsel” for “law guardian.” Effective: April 14, 2010.

2. Indigent Defense Commission [Laws of 2010, ch. 56; A 9706-c/S 6606-B, Part E]: This measure, part E of the language bill accompanying the Public Protection Budget for Fiscal Year 2010-2011, establishes an Office of Indigent Legal Services within the Executive branch, with responsibility to “monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the County Law.” Its full-time director must be nominated by the Governor for a five-year term and reports to an appointed nine-member Indigent Legal Services Board. The director, who may be removed for cause by a 2/3 vote of the Board, must have had at least five years experience in public defense and have a “demonstrated commitment to the provision of quality public defense representation and to the communities served by public defense providers.” The Board, chaired ex officio by the Chief Judge, must be appointed by the Governor for three-year terms as follows: one each recommended by the President Pro Tempore of the Senate and Speaker of the Assembly, one from a list of at least three from the NYS Bar Association, two from a list of at least four from the NYS Association of Counties, one from a list of at least two from the Chief Administrator of the Courts, one who has at least five years public defense experience and one additional attorney. The Board must evaluate existing indigent legal services programs and determine the “type of indigent legal services...to best serve the interests of persons receiving such services,” must consult with and advise the Office of Indigent Legal Services, must accept, reject or

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**THE DOCKET**

being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th St, Jamaica, New York. More information and any changes will be made available to members via written notice and brochures. Questions? Please call (718) 294-6900.

**PLEASE NOTE:** 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.

### 2010 Fall CLE Seminar & Event Listing

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- Wednesday, December 8: Holiday Party at Floral Terrace
- Friday, December 24: Christmas Eve, Office Closed
- Friday, December 31: New Year’s Eve, Office Closed

**CLE Dates to be Announced**
- Elder Law
- Labor Law

### New Members

| Elana Ades | Hana Kim | Glenn Reichelshein |
| Daniel R. Antonelli | Jeeyoung Kim | Patrick James Reilly |
| Emilie E. Arrau Horta | Richard Joseph La Rosa | Jeremy S. Ribakove |
| George Asllani | Ivory L. Oai | Concetta Maria Rinaldi |
| Hilary Jayne Bauer | Ivan Erik Lee | Yefim Rubinov |
| Nelson Raymond Belen | Joseph David Levy | Peter John Ryan |
| Karen Best | Akram Maged Louis | Mohammad Afif Saleem |
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| Alexandria Jean-Pierre | Allen S. Popper | William Yeung |
| Joseph F. Kasper | Eric Boucle Pisonnault | William Howard Ziff |
| Paul Kilmister | Kristal T. Ragbir |

### Necrology

| David E. Bryan, Jr. | Edward J. Ledogar | Joseph M. Walsh |
| Robert M. Jupiter | Charles F. Rubano | |
| Joseph Francis Lane | Hon. Mark Spies |

**Editor’s Message**

Dear Fellow QCBA Members:
After only 25 years as Associate Editor (or is it 30?), I was recently appointed Editor of the Queens Bar Bulletin. Actually, I was co-Editor one year in the 1980s with a relatively new Law Secretary named Marty Ritholz, now Justice Ritholz.

Our new Queens Bar Bulletin Committee has the most meetings of any Committee in the QCBA. Richard Golden, Stephen Fink, Gary DiLeonardo (a second generation QCBA member) and Manny Herman (a QCBA Golden Jubilator plus 10) and I meet several times per week at 1 p.m. at the Redwood Deli on (where else?) Queens Blvd. and Union Tpke. on the Forest Hills side, not the Kew Gardens side. (For zip code mavens, this is where the 11375 meets the 11415).

We can see at the Redwood discussing all of the articles that are about to appear in the next issue of the Queens Bar Bulletin. When we are not discussing this most pressing issue, we discuss exactly who did what to whom at the Capital of the Known Universe - I refer of course to the Queens County Supreme, Civil and Surrogate’s Courts on Sutphin Blvd., the Queens County Family Court on Jamaica Avenue, the Queens County Criminal Court and Supreme Court Criminal Term in Kew Gardens, and the all important Long Island City Courthouse, especially including its garage.

We discuss the law as it was actually promulgated by the late, great lawgiver of all time, the comedian Lenny Bruce: “In the halls of justice, most of the justice is in the halls.”

We aim to make the Queens Bar Bulletin the best it has ever been - to inform and entertain our readers with recent and/or interesting articles about the law as it pertains to the practice of law and the administration of justice in Queens County, the most international municipal entity since ancient Rome.

So, find us at the Redwood, and give us your articles. What we experience in a day at the Capital of the Known Universe does not occur to lawyers in a normal county in a life time. Your cases, experiences and ideas are anything but ordinary. Write it down and forward it to us so we can all learn together. Our e-mail addresses appear in the box below. Sincerely,

Paul E. Kerson
Editor, Queens Bar Bulletin

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Vice President - Joseph John Risi, Jr.
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**QUEENS BAR BULLETIN**

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**THE QUEENS BAR BULLETIN – OCTOBER 2010**

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**NECROLOGY**

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| Robert M. Jupiter | Charles F. Rubano | |
| Joseph Francis Lane | Hon. Mark Spires | |
BY STEPHEN J. SINGER

Over the many years in which I have been an active participant in the Bar Association I have seen many friends and colleagues come and go, never once contemplating my own leaving. After forty-four years of practice I have decided to call it a day and to venture into a new lifestyle and locale. My wife and I are moving to Florida permanently. We have sold our home here in New York, packed up all of our belongings, advised my law partners of my resignation and we are ready to take advantage of the depressed real estate market on the East Coast. It sounds so easy when you say that it simply and that quickly. I am here to tell you that it is not that easy. Saying “Goodbye” to neighbors, even friends, and certainly relatives, is no big deal. Terminating professional relationships seems to be much more difficult. It is not merely the bond between lawyers who perform the same kind of work, suffer the same slings and arrows from their clientele, and who have weathered similar travails during their long years of service, it is realizing that what we do for such a great part of our lives defines in many ways who we are as individuals. We all sound like lawyers even when we are not “on duty,” as my wife is fond of reminding me.

And being a criminal defense lawyer has always meant defending not only clients, but your right to even practice that type of law in the eyes of almost everyone else we meet. There is rarely a movie, a novel, a stand-up comedy act, or a sitcom, which doesn’t regularly incorporate some form of anti-lawyer joke. Usually, I will admit, there is no substitute for the stress and rigors of a high profile murder case; the sleepless nights, the endless preparation and the tension when the Judge says “Will the defendant rise and face the Jury.” Depending on how I felt about the person I was defending, I would sometimes stand with him, sometimes not, keeping my eyes lowered and preparing to mark the verdict sheet before me. The extreme highs and lows of criminal trial work are some of the reasons why I have always enjoyed this area of the law. Lawyers who are not litigators will never feel that. Lawyers who are litigators and even those who sometimes win significant civil cases, will never feel that. Being responsible for another person’s very existence is huge in every way. And “Yes,” I will miss that.

It sounds corny, but what we do as criminal practitioners keeps the system honest, preserves the civil rights of us all and protects the integrity of the Constitution. It has always made me feel different from other lawyers … more proud … perhaps without good reason … feeling as though I knew something that none of the others knew because they had not done what I

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Chanwoo Lee

BY STEPHEN J. SINGER

The first seminar will be held on October 19, 2010, from 6-9 p.m. This event, which offers a FREE ethics CLE, will begin with a wine and cheese reception hosted by Stephen P. Younger, President of the New York State Bar Association and the Hon. Fern Fisher, Deputy Chief Administrative Judge of New York City courts. (Our thanks also go to Judge Fisher for helping QCBA publicize this event). The seminar will focus on training lawyers to provide pro bono legal advice and limited representation for unrepresented litigants in the Queens County, Civil, Family and Supreme Courts.

The second Seminar, scheduled for November 4, 2010, from 6-9 p.m at the QCBA, will focus on consumer debt. And on November 16, 2010, our third National Pro Bono Week seminar (also held from 6-9 p.m at QCBA) will focus on uncontested divorce volunteers. I urge each of you to attend this seminar, because of the significant statutory changes in Domestic Relations and Family Law that will take effect on October 12, 2010, regarding No Fault, maintenance, child support and counsel fees.

We also urge you to bring a local colleague to these events. One of the goals during my year as president of the QCBA is to attract younger attorneys to the QCBA. Pro bono trainings are an excellent way to recruit new members and new volunteers. The series is also a great opportunity for newly admitted attorneys to network, learn new skills, and expand their areas of practice while serving the public. It is a win-win situation for us, as lawyers, and for the community.

Finally, in the spirit of National Pro Bono Week, I want to recognize David Siegal, Kendyl Hanks and Jonathan Pressment of the law firm of Haynes and Boone, LLP for their pro bono representation of the five County Bar Associations’ lawsuit against New York City. As you know, in May of this year, QCBA, along with the city’s other four County Bar Associations, initiated a lawsuit against Mayor Michael Bloomberg, the City of New York and John Feinblatt, the Mayor’s Criminal Justice Coordinator, for their unilateral attempt to modify the New York City’s Indigent Defense Plan. From the inception of this lawsuit, HB has worked tirelessly to represent the five County Bar Associations without any payment — because they are committed to Pro Bono Publico.

Can we, as public-spirited lawyers, do less?

Sincerely,

Chanwoo Lee, President Queens County Bar Association

The Queens County Bar Association Annual Dinner and Installation

New President: Ms. Chan Woo Lee
May 6, 2010 Terrace on the Park 6:00PM-10:00PM

“Blessed are they who maintain justice, who constantly do what is right.”
(Psalm 106:3)

Loving God,
We thank You for the annual gathering of the Queens County Bar Association this evening, especially as they install the new president, Chan Woo Lee, and the other officers and managers unto leadership and service to the over 2,000 members of this organization, who serve the most ethnically diverse population in the world.

And how appropriate and historic it is that Chan Woo becomes the first Asian American, and the 3rd woman president of the Queens County Bar Association.

As we break bread together, bless the meal we are about to eat and. As we partake of the abundance before us, may we realize how fortunate we are and not take this for granted. Help us to realize that You do not bless us only for ourselves, but so that we can bless and serve others.

Let our conversations be seasoned with grace, may old and new friendships be forged and strengthened, may a good time be had by all.

We lift up all the members of the Queens County Bar Association and their family and friends, and we ask that we may all act justly, love mercy, and walk humbly with You, our God. (Micah 6:8). We give You all glory, honor, power, and praise, and we pray all these things in Your Name.

Amen

Rev. Eun Joo Kim
Staff Chaplain at New York Hospital Queens
Since 1936, there has been a “Sparrow” walking the halls, and appearing in Court, in the “Halls of Justice” of Queens County and the Metropolitan area. My father, Sidney G. Sparrow, became a legend in his own time – as a skilled, charismatic, popular defense attorney (as well as an artist, poet, athlete, etc.)

Now, after “only” 53 years at the Bar, I too, shall “fade away” (not quite equaling Sid’s 65+ years. Born and raised in Brooklyn, gaining degrees at Columbia College (55’) and Law School (57’), I moved to Queens County after my marriage to Marcia in April, 1957 – barely two months before taking the Bar Exam. I enlisted in the army for a tour of 6 months active (a very cold basic training at Fort Dix) and 6 years of active reserve. During that tumultuous time (the Cuban Missile Crisis, the Berlin Wall, and war in Laos presaging Vietnam), we became the parents of Laurie (1960) and David (1964). I had also started practice in 1957, resumed in 1958 after service and a cross country trip of 6 weeks. (In those days, a motel room in South Dakota cost $4.00 a night!)

The practice of law in the late 50’s was very different! Our offices were on Catalpa Avenue in Ridgewood (opposite the “Felony Court”, and in Court Square, Long Island City, near the County Court and Court of Special Sessions, predecessors to Supreme Court Criminal Term and the Criminal Court. We made daily trips from Ridgewood to Long Island City, often triple parking with the help of a well liked and well rewarded minion of the Law.

We handled thousands of cases, ranging from shoplifting and intoxicated driving, to major murder cases (such as People v. Winston Moseley, the killer of Kitty Genovese in 1964, People v. Joseph Baldi, and many bizarre and interesting cases). The Moseley case alone would take a book to describe the unique twists and turns (such as finding .22 Caliber bullets in each of 6 “stab wounds” in an exhumed victim’s body; or the relationship that developed in Creedmoor between two separate parents, each acquitted of killing their own children, based on a verdict of insanity).

By 1961, the Courts, consolidated, had moved to Kew Gardens, and we followed that year into the Silver Tower, where we remain to this day.

Through the years, Marcia and I did extensive traveling – to exotic locations such as the Soviet Union, China, India, Alaska, a photo Safari in East Africa, Egypt, Morocco, Iceland, much of Europe, Israel, Australia – New Zealand, South America, Alaska, Antarctica – and, the most beautiful of all, our own United States of America!

In my time I became a Certified Scuba Diver (many a tale to tell), a licensed Pilot, and a nationally ranked Handball player (I played, for years, in National Handball Tournaments).

My son David, a Harvard graduate, is a journalist. He lives in Manhattan with his...
In the end, Judge John Caverly made his decision based not upon the expert testimony but on the young age of the two defendants. Life imprisonment was the eventual sentence. Although Richard Loeb died in prison, Nathan Leopold was released in March of 1938. Darrow went on to even greater fame in the so-called Scopes "Monkey trial." Perhaps this was truly the greatest trial of the 20th Century. The book is well written for lawyers and non-lawyers.

**CONTEMPT OF COURT:**
by Mark Corrigan & Leroy Phillips, Jr.

Here is a story you probably did not know but should. I bet you did not know in the history of the United States Supreme Court there has been only one trial before it. That was the case of United States v. Joseph Shipp, et al., decided May 24, 1939.

In 1906 Chattanooga, Tennessee was, by Southern standards, a relatively liberal city as to race relations. However, the city was still a racially divided one. It was in January of that year that a white woman by the name of Nevada Taylor was allegedly raped on her way home from work. While she did not get a good view of her attacker, there was some indication that the man might have been a "Negro" (that was the "p.c." word at the time).

Investigation by the police and Sheriff Joseph F. Shipp eventually led them to a "Negro" by the name of Ed Johnson. While he had numerous alibi witnesses indicating he was working at a local bar at the time of the rape that did seem to matter. Soon he was charged with the crime which was punishable by death. Quickly the word of the crime spread through the city. Almost immediately a white lynch mob formed outside the local jail - even though Johnson was not there. Somehow the mob was dispersed. It only took a week or so for the trial to begin. The local Criminal Court Judge (Samuel D. McReynolds) had appointed three white lawyers to represent Johnson. They did what appears to have been their best having had limited resources and only a few days to investigate and prepare. The all white jury quickly convicted Johnson. This was after one juror had actually stood up during the trial and openly threatened the defendant. After the conviction, Johnson’s attorneys had him waive his right to an appeal. They told Johnson that, unless he did this, the mob would probablylynch him. This way he could die properly at the hands of the State.

It was at that point that two local black attorneys, Noah Parden and his partner, Styles L. Hutchins entered the case. At that time there were not a lot of black lawyers in Chattanooga. The few that were in private practice basically handled only a black clientele. Parden and Hutchins are generally seen as the "heroes" of the Civil Rights movement.

The lawyers immediately brought a writ of habeas corpus in Federal Court. They also secured a stay of the execution. A full hearing was soon held before the Federal Court, but the writ was denied. However, a further stay was granted so that an application could be made to the United States Supreme Court. Parden and Hutchins, with the help of local Washington, D.C. attorney, made that application to the Supreme Court. Luckily it was Justice John Marshall Harlan who received the request. At the time Justice Harlan was the senior member of what was known as the "Fulcher Court." He was famous for his dissent in *Plessy v. Ferguson* ("separate but equal"). Justice Harlan signed the stay of execution pending review by the full Court.

The reaction to this back in Chattanooga was outrage by the white community. Just hours later a mob appeared at the jail. Johnson was taken from his cell and lynched. There was virtually no effort by local authorities including Sheriff Shipp to stop the lynching.

Justice Harlan and every member of the Court were incensed. It was decided by the Justices (and then President Theodore Roosevelt’s Justice Department) that a hearing would be held as to whether Sheriff Shipp and others (including possible members of the mob) would be held in contempt. The only "trial" ever held in the Supreme Court (actually tried before a "Commissioner") led to the conviction of Sheriff Shipp and several others. He was sentenced to 90 days in jail.

This surprisingly little known episode in American judicial history is worth of your attention.

**P.S.** Take a few minutes. Did you know that New York State has had two lynchings - one white and one black. On June 2, 1892, Robert Lewis (alias Jackson) was lynched in Port Jervis, Orange County for assaulting a white woman. It is believed that this real event formed the basis for "The Monster" in Stephen Crane’s (best known for Red Badge of Courage) Tales of Whilomvillie.
BY HOWARD L. WIEDER

Since the October Term is the first term in the United States Supreme Court’s year, it is fitting that I begin the review of books with a marvelous, two volume book, written in riveting style on the nation’s highest court by DAVID G. SAVAGE, journalist for The Los Angeles Times. MR. SAVAGE is probably one of the top five analysts and commentators of the Supreme Court. He knows the history of the Court, its decisions, Justices, and his new 2-volume book, published by CQ Press this year, is written beautifully.

In my effort to get lawyers to write better, I include three books on film. A good screenwriter tells a compelling story. In my duties as Law Secretary to JUSTICE CHARLES J. MARKEY, I spent time reading motion papers, where lawyers spend precious time reminding me of basic facts, but do not go into the facts in a concise fashion, and preferably one that is well-written. Some lawyers write as though bored or are an emotion. You need to tell the Court of what happened to your client. Convince the Court. Remember that JUSTICE LOUIS BRANDEIS of the U.S. Supreme Court [its first Jewish Justice] reserved for himself the writing of the facts of each opinion, that there is no such thing as good writing - “only good re-writing,” he declared! What better way to get lawyers to write better and to describe the narrative of their cases in a coherent way than referring them to books on film writing. I discuss three excellent books on film and film-writing.

GUIDE TO THE U.S. SUPREME COURT [FIFTH EDITION] By DAVID G. SAVAGE

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Named or Unnamed: A Neat Question

The Civil Rights Statute, 42 U.S.C. Sec. 1983, is one of the most frequently found denizens of the Federal Court System, particularly the United States District Courts and Courts of Appeal. The act and statute was enacted after the Civil War and during Reconstruction to control lawless and brutal Ku Klux Klan activity against recently freed slaves. Since that time, that statute has been extended to two or three significant areas. These areas include police brutality and beatings, where excessive force is used in making an arrest. Further, it includes false arrest cases; and thirdly, it includes prisoner’s rights cases, where beatings are inflicted and bodily harm caused to pre-trial detainees and inmates in correctional facilities, or where they are deprived by deliberate indifference of adequate and proper medical care. Often, an arrestee or inmate will not know the names or identities of the person who have caused him great and grievous bodily harm and injury. The inmate or arrestee may file a complaint, not knowing the names of the police officers or corrections officers, and refer to them as “John Doe” defendants.

The question arises therefore, and it is a neat one: is using the term “John Doe” or unnamed defendant a permitted and permissible legal practice? There has been a great deal of case law resolving and interpreting admissible legal practice? There has been some case law resolving and interpreting this issue is Wakefield v. Thompson. In Wakefield, plaintiff Timothy Wakefield appealed the District Court’s dismissal of his Sec. 1983 action against “John Doe,” a correctional officer at the San Quentin Prison. Mr. Wakefield alleged that the “John Doe” officer violated his 42nd Amendment rights by refusing to provide him with prescription psychotropic medication. Upon his release from prison, Plaintiff Wakefield asserted that “John Doe” exhibited deliberate indifference to his serious medical needs (Wakefield suffered from an organic delusional disorder.). According to Wakefield’s allegations, he met with a doctor shortly before he was released from San Quentin and the doctor wrote Wakefield a prescription for two weeks worth of Navane to be filled by prison officials and dispensed upon Wakefield’s release from prison. On the day of his release, Wakefield asked “John Doe,” the officer handling the release procedure, for his two-week supply of Navane and “John Doe” replied that “there wasn’t any medication available.” Despite Wakefield’s protests concerning his need for the medicine, “Doe” refused even to call the prison medical staff to check on Wakefield’s prescription. When Wakefield was released from San Quentin Prison without the medicine to control his mental illness, he suffered a relapse that led to a violent outburst and his subsequent arrest.

The District Court dismissed Wakefield’s Civil Rights action, stating that “Doe Defendants” are not favored in the 9th Circuit and accordingly the “Doe Defendants” were dismissed. Wakefield appealed the dismissal in favor of the defendant “John Doe.” The court analyzed the case by applying the holding in Gillespie v. Civiletti. The court stated that the District Court’s conclusion that dismissal of the “defendant John Doe” was required, under Gillespie, was incorrect since the Gillespie Court stated, that although there was a general rule that “John Doe” defendants are not favored, where the identity of the defendant is not known prior to the filing of a Complaint, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities or that the Complaint would be dismissed on other grounds. The 9th Circuit also noted that it had concluded in Gillespie that the District Court’s dismissal of the Complaint against the “John Doe” defendant was in error. The 9th Circuit is clear in its holding that the use of “John Doe” defendants is fully allowed and permissible as long as, through discovery, the correct identity of the “John Doe” defendant can be found.

The United States Court of Appeals for the 10th Circuit in Roper v. Grajinn reached a similar conclusion. In Roper, a pro se detainee brought a Sec. 1983 Civil Rights Action against a detention facility and several other defendants for alleged injuries from forcible administration of insulin to the defendant while he was in pre-trial detention. The court stated that the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover the identities or that the Complaint would be dismissed on other grounds. The 9th Circuit also noted that it had concluded in Gillespie that the District Court’s dismissal of the Complaint against the “John Doe” defendant was in error. The 9th Circuit is clear in its holding that the use of “John Doe” defendants is fully allowed and permissible as long as, through discovery, the correct identity of the “John Doe” defendant can be found.
Imagine this simple fact pattern. Peter Plaintiff lives in Queens County, the Defendant, Dan Defendant resides in Queens County and the Plaintiff’s counsel has an office in Bronx County. In addition, it should be noted that all of the Defendant’s witnesses reside in Queens County and the Plaintiff is the Defendant’s sole witness. For the convenience of Plaintiff’s attorneys, the action is brought to the Supreme Court; Bronx County. At this point we note that the Defendant’s attorney wants to have the case tried in the Supreme Court; Queens County. What should the Defendant’s attorney do and when should he do it?

Before answering this question, we should digress briefly and recall some rules which govern the issue of venue. They are straight forward and are noted as follows:

Actions against a municipality - the location of the County except the City of New York where venue is the County within the City of New York in which the cause of action arose (CPLR §504). The same rule applies to Public Authorities (CPLR §505)

Actions affection title to real property - County where the property is situated (CPLR §507).

Action to uncover a chattel - County in which any part of the subject of the action is situated at the time of the commencement of the action (CPLR §508).

Venue based upon resident (CPLR §503) which is the subject of this article.

Now, back to the question as to what the Defendant should do. It is simple. All that the Defendant need do is serve Plaintiff with a written demand that the action be tried in a County which the Defendant specifies as proper. Here is a sample of such a demand.

This notice may be served with the answer - or before the answer is submitted (CPLR §511). What happens next is critical. Unless the Plaintiff consents to the request for change of venue, within five (5) days after such service by the Defendant, the Defendant “...may move to change the place of trial within fifteen (15) days after service of the demand.” (CPLR §511(b)). This motion should be made returnable in the county specified in Defendant’s demand for a change of venue. The question of what to do and when to do it has been addressed, but there is more.

What can the Plaintiff do if he believes that the venue is correct? Within five (5) days of receipt of the Defendant’s demand for a change of venue, the Plaintiff, if an objector, must file an objection to the demand for a change of venue, MUST serve an affidavit showing either that the county specified by the Defendant is improper or that the county designated by the Plaintiff is proper. If the Plaintiff serves a response to the demand for a change in a timely fashion, where should the Defendant then make his motion? If the Defendant did not respond to the Demand for a Change of Venue, the Defendant can make the motion in the county specified by the Defendant. If the Defendant did respond, then the Defendant must make the motion for a change of venue in the county designated by the Plaintiff (CPLR §511(b)). See the Second Department 2006 decision of United Jewish Appeal etc. v. Young Men’s and Women’s Hebrew Association, Inc. Etc. 817 N.Y.S. 2d 352, 30 A.D. 3rd 504 (2nd Dept., 2006).

The motion for a change of venue is simple and straightforward. The following is a suggested form for such motion:

It is obvious that the rights and remedies as to the issue of venue are fully spelled out in Article 5 of the CPLR. As a practical matter, the first thing that Defendant’s counsel should do upon receipt of a complaint is to verify the correctness of the venue selected by the Plaintiff. If counsel for the Defendant is not satisfied with the venue selected by the Plaintiff and believes it to be incorrect, counsel should PROMPTLY move for a change of venue relying upon Article 5 of the CPLR.

*Editor’s Note: Paul S. Goldstein is a Past President (94-95) of the Queens County Bar Association and in private practice.

What Are “The Best Interests Of The Child”

Of Artificial Insemination?

In Perry v. Schwarzenegger, 2010 WL 3025614 (N.D. Cal. August 4, 2010), U.S. District Judge Vaughn Walker held that California’s ban on same-sex marriage violated the 14th Amendment to the U.S. Constitution.

Judge Walker held that California’s controversial law, known as Proposition Eight, violated the principles of equal protection. Walker wrote, “To the extent that Proposition Eight existed in 1950, it is not only unconstitutional, it is a denial of the equal protection rights guaranteed by the Constitution.”

Walker also wrote, “Proposition Eight seeks to deny a fundamental right to the same-sex couple in issue.”

Walker’s decision was upheld by the U.S. Supreme Court, which stated that Proposition Eight violated the 14th Amendment to the U.S. Constitution.

But what exactly are the “best interests” of the child conceived by artificial insemination?

This is a cutting edge technical, medical, social, religious, governmental, political, and legal question. How should it be answered?

In custody and visitation disputes involving a child conceived by artificial insemination, should the child’s lawyer seek out the Sperm Donor Father? Does this further complicate an already messy situation? However, does failure to contact the Sperm Donor Father harm the “best interests” of the child? The stunning performance by Mia Wasikowska, Josh Hutcherson and Mark Ruffalo in “The Kids Are All Right” would indicate that children of artificial insemination are most interested in knowing their Sperm Donor Father.

As time goes on, artificial insemination will be more and more popular, and more and more of our fellow citizens will have this technology as their origin. Artificial insemination was a work of science fiction less than two generations ago. How shall children who were conceived in this way cope with this fact?

In studying how the writers, directors, and actors of “The Kids Are All Right?” dealt with this topic, we can begin to have some insight.

There are two scenes in the movie which are particularly compelling. Upon reaching her 18th birthday, Joni calls the previously anonymous Sperm Donor Father. The Director shows us the facial expression of Joni speaking on her cell phone. The next scene shows the Sperm Donor Father smiling on his cell phone. The look of shock, surprise, and awe on each of their faces is unforgettable.

In the second scene from the movie, 15 year older Laser is sitting in the front of his newly found Sperm Donor Father’s pick-up truck. Laser asks his Sperm Donor Father why he donated sperm. The Sperm Donor Father replies that he thought he was helping someone who could not have children otherwise and that “he needed the money at the time, $60, which would be $90 today.” The horrified look on young Laser’s face told us volumes about the emotional impact of sperm donation on the person who is the product of it. “But I would do it again,” says the Sperm Donor Father. The look on Laser’s face is one of only partial relief. The viewer can see the wheels turning in the young teenager’s head - is this what my existence means? Someone who needs $60?

One comes away from the movie with the strong feeling that the law must no longer consider sperm donation as in the same category as blood donation. While donating blood saves lives, donating sperm creates life. This is an entirely different kind of donation. Somehow the law must mature to recognize this fact.

In Debra H. v. Janice R., 14 N.Y.3d 576 (May 4, 2010), the New York State Court of Appeals concluded that a civil union under Vermont law between two women entitled both women to possible visitation and/or custody of an artificially inseminated child created by one of them. The Court of Appeals remanded the case to the New York County Supreme Court “for a best-interest hearing in accordance with this opinion.”

However, the Court of Appeals was silent as to whether or not the child’s Law Guardian should contact the child’s Sperm Donor Father in connection with this
Estate Tax Planning in the Year of No Estate Tax

BY ANN-MARGARET CARROZZA & HOWARD M. ESTERCES

Contrary to many of our 2009 predications, the Federal estate tax did, in fact, expire on December 31, 2009. It is scheduled to reappear in 2011 with a reduced exemption of $1.0 million and higher rates. There is a possibility that the 2009 exemption level of $3.5 million will be enacted during 2010 with retroactive applicability to January 1, 2010. However, it isn’t clear whether the courts will uphold imposition of an estate tax retroactively; and the provisions of future legislation are uncertain. Given the still fragile state of the economic recovery, the re imposition of some form of Federal estate tax is almost certain.

How then should an estate planner advise clients during this period (however brief) of no Federal estate tax? Should we advise them to wait and see? Hire a food taster? Instead, we can and should get down to the imperative business of estate planning.

Way back in the year 2002, the Federal and New York State estate tax thresholds were both $1.0 million. The most basic concern of estate tax planners back then was to prevent the inadvertent loss of this exemption. This occurred under simplistic Wills that left everything outright to a surviving spouse. The unlimited marital deduction under the Internal Revenue Code provides that there is no estate tax liability on transfers to a surviving spouse. If for example, a couple had an estate of $1.5 million and the husband died in 2002 with a simple will, his wife received everything free of estate tax. But, because there was no tax liability upon the first death, there was no opportunity to use his exemption. It died with him. Later that year, upon the death of the surviving spouse, the children could only use her exemption of $1.0 million – thus exposing $500,000 to both Federal and New York State estate taxes.

To prevent the loss of the first exemption, estate planners created a so-called Credit Shelter Trust for the first spouse to die which would receive a portion of the estate thereby preventing the over-utilization of the marital deduction.

There were several formulas used to fund this trust. The most common was the following:

I give my Trustee, hereinafter named, the maximum amount that can pass free of Federal estate tax …” Well, for a couple in 2002 with a $2.0 million estate, the result was for $1.0 million to go into the Credit Shelter Trust upon the first death and the surviving spouse kept the remaining $1.0 million. Upon her death, the children received everything free of any estate tax. By 2009, the Federal exemption increased to $3.5 million, but the New York exemption remained at $1.0 million.

Fast forward to the present – Those documents have dramatically different results. Now, the “maximum amount that can pass free of Federal estate tax” is unlimited. Therefore, for someone dying in 2010, all of the first decedent’s separate assets will go into the trust. Depending upon how assets are titled, this could leave the surviving spouse with nothing! The survivor could pursue elective share rights, but this is an incomplete and inefficient solution. Moreover, funding the Credit Shelter Trust with more than $1.0 will trigger an immediate New York State estate tax consequence. This is because New York State has a $1.0 million exemption.

Our Surrogates Courts will also be burdened with determining the intent of decedents who die in 2010 with formula provisions in their wills based on a nonexistent Federal estate tax. As a New York Assemblywoman, Ann-Margaret Carrozza, one of the authors of this article, introduced legislation to prevent — Continued On Page 14

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PHOTO CORNER

Guy Vitacco, Sr. being presented with the Froessel Award from Hon. Sidney Strauss.

Pres-Elect Richard Cutierrez, Vice Pres Joseph Risi, Jr., Treasurer Joseph DeFelice and Secretary Joseph Carola, III being installed.

Mark Welisky presenting Hilary Gingold with the NYSBA 2010 President’s ProBono Service Award.

Photos by Walter Karling
Members of Board being installed.

Hon. Martin Ritholtz delivering the benediction.

Outgoing President Guy Vitacco, Jr.

Guy Vitacco with family.


Hon. Martin Ritholtz delivering the benediction.

Installing Officer Hon. Randall Eng with President Chanwoo Lee.

Master of Ceremonies Hon. Sidney Strauss.

Outgoing President Guy Vitacco, Jr.

Hon. Sid Strauss, Chanwoo Lee and Steve Singer.

Guy Vitacco, Jr. and Chanwoo Lee.

Guest Speaker NYC Comptroller John Liu.


Mona Haas, George Nicholas and Diane Vitacco.

Photos by Walter Karling
Books at the Bar
Continued From Page 6
Guantánamo and habeas corpus
Roper v. Simmons (2005)—on death penalty and juveniles
GUIDE TO THE U.S. SUPREME COURT [FIFTH EDITION] covers the Court's entire history; its operations; its power in relation to other branches of government; major decisions affecting the other branches, the states, individual rights and liberties; and biographies of the justices.
Appendices provide additional information on the Court such as the Judiciary Acts of 1789 and 1925 and a list of Acts of Congress found by the Court to be unconstitutional. A general name and subject index speeds research, and a case index quickly guides readers to all decisions discussed in the GUIDE TO THE U.S. SUPREME COURT.

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Demonstrates how cases get to the Court
New content on individual rights
New chapter on the Second Amendment

DAVID G. SAVAGE is a leading observer and commentator of the United States Supreme Court and covers the High Court for The Los Angeles Times.

Il. Writing Drama: A Comprehensive Guide for Playwrights and Screenwriters by Yves Lavandier

If you have the time and money to buy one book to help you write better then I must encourage you to purchase WRITING DRAMA by YVES Lavandier.

YVES LAVANDIER has written a sharp, engrossing account of how to write drama. It is a book well suited not only for playwrights and screenplay writers, but for lawyers. The book is entertaining. YVES LAVANDIER makes his points by citing numerous works from film, and he explains situations for those persons who are not acquainted with his examples.

The English translation of this excellent book is available only at the publisher's website of www.clown-enfant.com. That fact is unfortunate, and it is almost criminally that the book is not sold at www.amazon.com, or at the Drama Bookshop in New York or Barnes & Noble. The book costs 38 Euros, and, considering that the Euro has weakened considerably in the last few months, I urge you to buy it now.

YVES LAVANDIER writes:  "If the story is well written, it will affect the professional, as much as the amateur, the spectator who knows the rules of drama as much as the spectator who does not [reference omitted]. This is why drama, when it takes the trouble to make itself accessible to all and bases its appeal on what we all have in common, is such a democratic medium. It is also why [actor Charlie Chaplin - - whose language moreover is so visual - - is the most universal of dramatic artists. He is, as [director Cocteau put it, the esperanto of laughter."

YVES LAVANDIER, WRITING DRAMA, p. 140.

YVES LAVANDIER was born on April 2, 1959. After taking a degree in civil engineering, he studied film at Columbia University in Manhattan between 1983-1985 with renown filmmakers including Milos Forman and Brad Dourif. During those two years, wrote and directed several shorts. He returned to France in 1985, directed a further short (LE SCORPION), and embarked on a scriptwriting career primarily for television. He is the creator of an English teaching sitcom called Cousin William. In addition to his career as a screenwriter, he began to experiment with writing throughout Europe and published a treatise on the subject: Writing Drama. For the occasion he founded his own publishing and production company, LE CLOWN & L’ENFANT. Writing Drama is now considered a bible amongst European screenwriters and playwrights, and YVES LAVANDIER is a renown script consultant. In August and September 2000, he shot his first feature film as writer-director. Yves Lavandier is married with four children.

Iii. Film Theory and Criticism by Leo Braudy and Marshall Cohen

Since publication of the first edition in 1974, LEO BRAUDY and MARSHALL COHEN’S FILM THEORY AND CRITICISM remains one of the most authoritative anthologies about film. Now in its seventh edition, this landmark text continues to offer outstanding coverage of more than a century of thought and writing about the movies. Incorporating classic texts by pioneers in film theory including Rudolf Arnheim, Siegfried Kracauer and André Bazin, and cutting-edge essays by such contemporary film scholars as David Bordwell, Tania Modleski, Thomas Schatz and Richard Dyer.

Building upon the wide range of selections and the extensive historical coverage that marked previous editions, this new compilation stretches from the earliest attempts to define the cinema to the most recent efforts to place film in the contexts of psychology, sociology, and philosophy, and to explore issues of gender and race. Reorganized into eight sections, each comprising the major fields of critical controversy and analysis, this new edition features re-formatted introductions and biographical headnotes that place the readings in context, making the text more accessible than ever to students, film enthusiasts, and general readers alike.

A wide-ranging critical and historical survey of film, FILM THEORY AND CRITICISM remains the leading text for undergraduate courses in film theory. FILM THEORY AND CRITICISM is also ideal for graduate courses in film theory and criticism. Leo Braudy is University Professor and Bing Professor of English at the University of Southern California. Among other books, he is author of Native Informant: Essays on Film, Fiction, and Popular Culture (Oxford University Press, 1991), The Frenzy of Renown: Fame and Its History (OUP, 1986), and most recently, From Chivalry to Terrorism: War and the Change of the Modern Imagination (OUP, 2003). Marshall Cohen is University Professor Emeritus and Dean Emeritus of the College of Letters, Arts, and Sciences at the University of Southern California. He is co-editor, with Roger Copeland, of What Is Dance? Readings in Theory and Criticism (OUP, 1983) and founding editor of Philosophy and Public Affairs.

IV. How to Read a Film: Movies, Media, and Beyond [Fourth Edition] by James Monaco

Richard Gilman referred to JAMES MONACO’S HOW TO READ A FILM as "a well-written book of its kind." Film critic Janet Maslin in The New York Times Book Review marveled at James Monaco’s ability to collect "an enormous amount of information and assemble it in an exhilaratingly simple and systematic way."

Now, JAMES MONACO offers a special anniversary edition of his classic work, featuring a new preface and several new sections, including an "Essential Library: One Hundred Books About Film and Media You Should Read" and "One Hundred Films You Should See." As in previous editions, Monaco once again looks at film from many vantage points, as both art and craft, sensibility and science, tradition and technology. After examining film’s close relation to other narrative media such as painting, photography, television, and even music, the book discusses the elements necessary to understand how films convey meaning, and, more importantly, how we can be discerning viewers of both film and its criticism.

Building upon the wide range of selections and the extensive historical coverage that marked previous editions, this new compilation stretches from the earliest attempts to define the cinema to the most recent efforts to place film in the contexts of psychology, sociology, and philosophy, and to explore issues of gender and race. Reorganized into eight sections, each comprising the major fields of critical controversy and analysis, this new edition features re-formatted introductions and biographical headnotes that place the readings in context, making the text more accessible than ever to students, film enthusiasts, and general readers alike.

With hundreds of illustrative black-and-white film stills and diagrams, HOW TO READ A FILM is an indispensable addi-
tion to the library of everyone who loves the cinema and wants to understand it better.

JAMES MONACO, an American film critic and author, has written twelve books, including The New Wave: Tautiat, Godard, Chabrol, Rohmer, Rivette (1976), How To Read A Film (1977) and American Film Now (1979), and edited four others. He has written for several leading publications, including The New York Times, The Village Voice, and The Christian Science Monitor.

HOWARD L. WIENDER is the writer of both “THE CULTURE CORNER” and the “BOOKS AT THE BAR” columns, appearing regularly in THE QUEENS BAR BULLETIN, and is JUSTICE CHARLES J. MARKEY’S PRINCIPAL LAW CLERK in Supreme Court, Queens County, Long Island City, New York._

A Note of Gratitude
BY CORRY L. MCFARLAND*

As we are sure you are all aware, the Queens Foreclosure Conference Project, a program of the Queens Volunteer Lawyers Project, Inc., has been working closely with the Queens Supreme Court Office of the Residential Foreclosure Part to assist Queens' residents in danger of losing their homes to foreclosure. Below is a thank you letter to Referee Leonard N. Florio in gratitude for his efforts.

Referee Florio:
These proceedings would lack closure if we did not express our gratitude.

Your firmness and professionalism have brought to us this positive end.

You were determined to have documentation to substantiate verbalizations that we did not qualify.

This was the turning point to our success.

We bless you and wish good things come your way as you continue to execute your daily duties in your current capacity.

With heartfelt gratitude from: Jones* and Family
*Redacted

*Corry L. McFarland is the Foreclosure Prevention Coordinator for the Queens Volunteer Lawyers Project
that rather than dismissing the claim, the court should have ordered disclosure of "Officer Doe's" identity by other defendants, and served and served the complaint to identify the officer through discovery. The court concluded that Munz then should have been permitted to amend his complaint, and moved to dismiss the defendant, explaining that dismissal is proper only when it appears that the true identity of the defendant cannot be learned through discovery or through the court's intervention.

Munz adds another sub-rule to this "John Doe" topic by stating that "John Doe" defendants are permitted when there are sufficient facts concerning them so that their identity can be learned through discovery, through the court's intervention, or by requesting other named defendants to disclose the identity of "John Doe."

Maclin v. Paulson4 follows Roper, Munz, Gillespie, and Wakefield. Maclin was a Civil Rights action brought by a state prisoner against the Chief of Police, Deputy Sheriff, arresting officers, and jail physician. The United States District Court for the Northern District of Indiana dismissed the complaint, and the plaintiff appealed.

The Maclin court had occasion to consider whether the District Court erred in dismissing the force claims because the defendant was unnamed. The court held that there were sufficient facts connected with the acts of "John Doe" as to make the pro se officer "Doe" capable of being identified, and that under these circumstances it was improper for the court to dismiss the claim at such an early juncture. The court noted that "Doe" allegedly grasped the plaintiff's handcuffs by the chain, lifted his arms upward, and inflicted "excruciating pain" to Munz's arms and wrists. The court went on to state that rather than dismissing the claim, the court should have ordered disclosure of "Officer Doe's" identity by other defendants, and served the complaint to identify the officer through discovery. The court concluded that Munz then should have been permitted to amend his complaint, and moved to dismiss the defendant, explaining that dismissal is proper only when it appears that the true identity of the defendant cannot be learned through discovery or through the court's intervention.

Munz,v. Part5 reached a similar conclusion. In Munz, a citizen filed a pro se Civil Rights complaint against police officers and named several defendants for improper interconnection in search and seizure. The United States District Court for the Northern District of Iowa dismissed the complaint, and the plaintiff appealed.

The Munz court had occasion to consider whether the District Court erred in dismissing the force claims because the defendant was unnamed. The court held that there were sufficient facts connected with the acts of "John Doe" as to make the defendant "Doe" capable of being identified, and that under these circumstances it was improper for the court to dismiss the claim at such an early juncture. The court noted that "Doe" allegedly grasped the plaintiff's handcuffs by the chain, lifted his arms upward, and inflicted "excruciating pain" to Munz's arms and wrists. The court went on to state that rather than dismissing the claim, the court should have ordered disclosure of "Officer Doe's" identity by other defendants, and served the complaint to identify the officer through discovery. The court concluded that Munz then should have been permitted to amend his complaint, and moved to dismiss the defendant, explaining that dismissal is proper only when it appears that the true identity of the defendant cannot be learned through discovery or through the court's intervention.

Further, at the current time, we do not face foreign national armies out to conquer our country. There is no Nazi Germany, our military is not a red out of the Soviet Union or the former Eastern bloc. However, we do face a rag tag band of lunatics who have no national base, and loosely call themselves Al Qaeda. Al Qaeda is variously said to be located in Afghanistan, Iraq (originally false), Yemen and numerous other countries. Some say they have "sleepers" cells in the United States. Is that anybody? Can we fight an enemy like this with a conventional Army, Navy and Air Force? What does this mean for the current problem merely amount to whether or not the threat is assigned to the Justice Dept. or the Defense Dept. Is this already Washington C.O.D. "in houseball"?

To answer this question, the Queens Bar Bulletin sent a draft of this article in advance to our learned Queens County District Attorney's Office and the fiscal law enforcement officer, Hon. Richard Brown, our District Attorney. We reprint his most informative response adjacent to this article. It appears that in 2010, because of "LaGuardia and Kennedy Airports, our Queens County District Attorney's Office and NYPD are just as important to national defense as the military." What does this mean for the current gross imbalance between our federal, state and city tax burdens? Readers' responses are invited. These will be published in our next issue.
Sparrow Leaves The Nest
Continued From Page 4 ——
wife Darcy, and children, Matthew (11) and Isabella (6).
Our daughter Laurie, a Brooklyn Law graduate, was an Assistant District Attorney in the Bronx for 17 years. When she experienced kidney failure, I donated her a kidney in 1990. With my kidney, she made us proud grandparents of Dallas and Cody. Tragically, we lost our Laurie in 2003. After a rocky period for all of us, the boys, with the love of Dad, James Palumbo (known as an excellent criminal lawyer in the city) and Marcia and me, are thriving. 17-year-old Dallas is a High School Senior and looking at colleges, and Cody, 14, has just started Bronx High School for Science (we are exceedingly proud of him).
Well, life has been busy, exciting, uplifting and unbelievable at times. We are ready to move on — after a hip replacement this past June, I am calling it a career after 53 years — and hope to remain as vibrant and active as I have been all my life.
I want to thank all my friends of the Bench and the Bar, and Steve, Ken and Maria, and their special friendship. And with that, I will say goodbye and good health to you all.

Saying “Goodbye” Continued From Page 3 ——

How do I say “Goodbye” to being who I am? I don't know that I can ever stop being that person, that criminal lawyer, that die hard bar association supporter. I don't even know if I want to. And “Yes,” I probably will come back to visit, although I can remember how I felt as an undergrad when alumni returned to campus and tried to relive their times there … they always looked foolish, out of place, stumped for what to say now that they had moved on. Will I come back? I guess there is that magnetic draw back? I guess there is that magnetic draw.

But it was “all good,” as the kids say nowadays, even when I got home at 9:45 at night and had to get up at 5:30 because I was summing up that next morning. And I will miss it.

How do I say “Goodbye” to being who I am? I don't know that I can ever stop being that person, that criminal lawyer, that die hard bar association supporter. I don't even know if I want to. And “Yes,” I probably will come back to visit, although I can remember how I felt as an undergrad when alumni returned to campus and tried to relive their times there … they always looked foolish, out of place, stumped for what to say now that they had moved on. Will I come back? I guess there is that magnetic draw that mandates at least one return visit. Will there be more “Saturday Morning” pieces? We will have to see. But I will miss you all tremendously, and I wish for all of you the pleasure I have had from just being a country lawyer from Queens.

Estate Tax Planning
Continued From Page 9 ——
spouses from being inadvertently disinherited. The bill, A.9857-a provides that wills, trusts, and beneficiary forms with formula credit shelter provisions executed before 2010 by persons who die in 2010 when the Federal estate tax is not in effect will be construed based on estate tax laws applicable to decedents who die on December 31, 2009. A similar provision will apply to the generation shipping transfer tax. This bill was signed into law this Summer.
Although the new legislation applies to persons who have not changed their wills and other testamentary documents, the better approach is to review these documents with competent estate planning counsel. Many persons may wish to provide specifically how their wealth will pass if there is no estate tax at death, and to otherwise use one of the alternatives below.

One approach for many older estate plans would be to change the Credit Shelter Trust funding to a disclaimer mechanism. This would provide that all assets pass to the surviving spouse with the exception of whatever amount he or she chooses to disclaim into the trust. The Internal Revenue Code § 2518 allows nine (9) months from the date of death for a disclaimer to be made. This gives us the advantage of making a decision in light of the Federal and New York State tax laws as they exist at that time.
Another possible approach is to provide that amounts of up to $1 million pass to a credit shelter trust, with any balance passing to the spouse. Provisions for a spousal disclaimer to the credit shelter trust would also be included.

Still another possibility might be to leave the entire estate to a QTIP trust, under which only the surviving spouse will be entitled to income for life and to discretionary principal distributions. If estate tax is reinstated retroactively, the executor can elect a marital deduction for part of the trust. The part of the QTIP for which a marital deduction is not elected will pass free of estate tax in the survivor's estate.

As a further variation, $1 million might pass to a credit shelter trust and the balance to a QTIP trust for the spouse. If there is a Federal estate tax at death, the executor can elect a marital deduction for all or part of the QTIP. If there is no Federal estate tax at death, the executor might still elect a QTIP marital deduction for New York purposes. The Will might also provide that the part of the QTIP trust for which a marital deduction is not elected is added to the credit shelter trust.

These are some of many possibilities. It is important to discuss how the client wishes to dispose of his estate if there is no estate tax or if there is an estate tax. Both possibilities may be drafted into the will. Attorneys should be aware of a plan’s impact on New York estate tax, as well as on modified carry over basis, which is part of estate tax repeal.

Ann Margaret Carrozza, Esq. is an estate planning and elder law attorney with offices in Bayside and Port Jefferson.
Howard M. Esterecs, Esq. is Of Counsel to Meltzer, Lippe, Goldstein & Breitstone, LLP in Mineola, Long Island.
Domestic Violence And Family Law

Continued From Page 1 –

modify the Office’s allocation of funds and programs. The measure also incorporates an annual report to the Governor, Legislature and Judiciary.

The measure also amends the State Finance Law to provide that the Indigent Legal Services Fund must be used to fund the Office of Indigent Legal Services, to assist counties and New York City to improve the quality of Article 18-B representation and to assist the State with respect to authorized counsel under Judiciary Law §35. State funds provided to localities may not supplant existing funds and “any ‘district of effort’ is required.

Effective: June 15, 2010.

II. CHILD WELFARE MEASURES

1. Termination of parental rights of incarcerated parents [Laws of 2010, ch. 113]: This measure amends Social Services Law §384-b to add an explicit requirement to “court rulings” that agencies must file termination of parental rights petitions for children who have spent 15 of the past 22 months in foster care, supervised visitation or residential placement. The measure requires the court to consider

• whether the parent’s continued involvement in a reasonable position to help make plans for the child’s future and to maintain relationship between the child and the family.

• where the agency “has not documented a supervision plan in keeping with the child’s best interests and would, therefore, not be appropriate permanency options.

This measure, which is part of the Fiscal Year 2010-2011 New York State budget, incorporates and expands provisions of the Children’s Safety and Rules Committee’s proposal to establish a supervised kinship guardianship assistance agreement with taking advantage of the oppor- tunity to authorize use of audio- or video-conferencing technology in order to permit parents in foster care to receive residential drug treatment in the child’s best interests and would, therefore, not be appropriate permanency options.

The measure also amends the Article 18-B program to explicitly permit the Family Court jurisdiction of the Family Court to and to maintain relationship between the child and the family. Effective: June 15, 2010.

2. Subsidiized kinship guardianship (Laws of 2010, ch. 342, §21): The measure amends Family Court §1055-b and 1089-a to permit the Family Court to order subsi- dized guardianship at or after the conclusion of a child protective or permanency hearing. This option would be available in child protective cases in which the court finds that the child has a “strong attach- ment” to a relative guardian. The “strong attach- ment” consultation has been held with the child (including ascertaining the position of a child over fourteen and obtaining con- sent of a child over eighteen) and that the child has lived with the relative监护人的home must have undergone the “each parent” with “either parent,” phrase “in the child’s eighteenth birthday to a social serv- ices department must file a report of a foreign death record to be released to consenting regis- teration status.

Effective: July 15, 2010.

4. Restoration of parental rights [Laws of 2010, ch. 343]: This measure is part of legislation enacted in California in 2005 and Washington in 2007. The Family Court Advisory and Rules Committee measure amends the statutes regarding termination of parental rights to allow the Family Court, in narrowly defined circumstances, to modify decisional orders concerning guardianship and custody of children and to reinstate parental rights. A petition to restore parental rights would be permitted to be filed by any relative of the child. Without the permission of the New York State Department of Health, rather than a local registrar, must file a birth certificate, provided that there is no other birth certificate other than a birth certificate issued by the authority of birth. The birth certificate must be filed upon proof that the child “is a child” resides in New York State at the time of birth and is not simply an IR-3, visa or a successor immigrant visa, sufficient. Grandfathering in reports of foreign adoptions made to local registrars, the measure provides that the “any existing certificates of birth data shall continue to be effective” and requires that reports made to local registrars and supervisors of registration registry statutes [Public Health Law §§4138-c and 4138-d] to enable information to access non-identifying information about an adoptee’s birth parent must have signed consents. It further elimi- nates the ability of a biological sibling to access non-identifying information about an adoptee’s birth parent.

The measure also amends the Article 18-B program to explicitly permit the Family Court and to maintain relationship between the child and the family. Effective: June 15, 2010.

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Domestic Violence And Family Law

Continued From Page 15

motions before the Family Court that would allow them to act as a single entity to foster care. In such cases, the Family Court would be required to find that the youth has no reasonable alternative to foster care, that the youth does not attend an appropriate educational or vocational program and that such return is in the youth’s best interests. The local department of social services would remain in the child’s reentry unless the Court finds that the consent had been unreasonably withheld. Effective: Nov. 10, 2011.

6. Abandoned infants [Laws of 2010, ch. 446]: This measure amends Penal Law §260.00 to provide that a person is not guilty of “deposited witness” (a Class D felony or a Class E felony) for “abandonment or body of a child when “(a) with the intent that the child be safe from physical injury and cared for in an appropriate man- as an “incompetent or physically disabled person,” or in a suitable location and the person who leaves the child promptly noti- fies an appropriate person of the child’s location; and (c) the child is not more than thirty days old.” The measure is consistent with amendments made to Penal Law §260.10, enlarging the welfare of a child, a Class A misde- meanor. By repealing the affirmative defense contained in the “abandoned Infant Protection Act [Laws of 2000, ch. 156; Penal Law §§260.03 and 260.15], therefore, these amendments make these factors elements of the crime and also increase the ages of the abandoned chil- dren covered from five to thirty days old. Effective: Aug. 30, 2010.


III. JUVENILE JUSTICE AND RELEVANT CRIMINAL LAW MEASURES

1. Sexual contact [Laws of 2010, ch. 193]: This measure amends sections 130.00(3) and 260.31(2) of the Penal Law to remove the marital exemption from the definitions of “sexual contact” and to add “commission of sexual contact by the actor upon any part of the victim, clothed or unclothed.” The latter change enables charges to be brought of endangering the welfare of a vulnerable elderly, incompet- ent or physically disabled person, a Class E felony, as well as sexual abuse in all three degrees (a Class D felony or a Class A or B misdemeanor, respectively), instead of simply Class B misde- meanor of public lewdness [Penal Law §245.00]. Effective: Oct. 13, 2010.

2. Orders of protection for designated witnesses [Laws of 2010, ch. 421]: This measure, similar to a measure proposed by the Family Court Advisory and Rules Committee, is modeled on the application of law 1 to Family Court Act §352.3 to provide that upon issuance of an adjudgment in con- tempt of dismissal under Family Court Act §240-a(3) by a family court judge under Family Court Act §352.2, the Family Court may issue an order of protection prohibiting the respondent from intimidat- ing or attempting to intimidate any design- nated witness specifically named in the order. As a prerequisite, the Court must make a finding that the respondent “did previously engage in conduct that was likely to cause the witness to be intimi- date or attempt to intimidate such witness...” [Note: the new provisions pro- tecting designated witnesses apply as well to non-court witnesses.] The Supplementary Court Act §304.2(2) authorizes temporary orders of protection, which may be issued any time after a juvenile is taken into custody or is the subject of an appearance ticket or after a petition has been filed, to contain any of the conditions enumerated in Family Court Act §352.3. Effective: Nov. 28, 2010.

3. School bullying [Laws of 2010, ch. 482]: This measure, known as the Dignity for All Students Act §240-a, amends Article 2 to the Education Law to protect public school students from discrimination and harassment by students and school staff at school property and at school functions on the grounds of “actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, mental or physical disability, genetic information, pregnancy, sex, sexual orientation, gender identity, gender expression, or age.” This measure amends New York Education Law §255 and adds “gender identity” and “gender expression” to the list of characteristics protected against discrimination and harassment. The measure mandates that all school districts, with the approval of their boards of education, adopt anti-harassment policies. The policies must include definitions for terms such as “harassment,” “intimidation,” and “bullying.” The policies must also contain procedures for reporting, investigating, and responding to incidents of harassment. Effective: Jan. 1, 2012 (rules or regulations to be promulgated in advance of that date).

4. Juvenile Sex Trafficking: Safe Harbor Act Amendments [Laws of 2010, ch. 58, Part G]: The NYS budget contained an appropriation to the Safe Harbor Act [Laws of 2008, ch. 569], which, inter alia, authorized the Family Court, where an accused or adjudicated juvenile delinquent or PINS may have been a victim of sex trafficking, to release the juvenile prior to disposition to an available short-term safe house and, if the courts finds the juvenile to be the victim of sex trafficking, to have the juvenile as a disposition with the local department of social services to reside in an available long-term safe house. Effective: April 1, 2010.

IV. DOMESTIC VIOLENCE MEASURES

1. Electronic and facsimile transmis- sion of orders of protection for service [Laws of 2010, ch. 261]: This measure amends Family Court Act §153-b and Domestic Violence Law §155 to authorize courts to permit orders of protection, temporary orders of protection and “any associated papers that may be served simultaneously” to be transmitted by facsimile, telephone, facsimile transmission, email, electronic transmission, or any other similar electronic means to police, protective order officers, other law enforcement, the courts, and the parties, provided that the order of protection is properly authenticated and that the parties, literally, explicitly consent to their performance of their official duties. Effective: May 5, 2010.

5. Strangulation [Laws of 2010, ch.405]: This measure amends the Penal Law, the Criminal Procedure law and the Family Court Act to create new crimes of strangulation and to include the new crimes in the list of family offenses for which criminal and Family Courts exercise concurrent jurisdiction. The new crime of strangulation provides a basis for criminal obstruction of breathing or blood circulation, a Class A misdemeanor, to criminal strangulation in the first and second degrees, Class C and D violent felonies. It is a valid affirm- ative defense if a strangulation proce- dure was performed for a valid medical or dental purpose. Effective: November 11, 2010.

6. Orders of Protection: Non-contem- poraneous evidence of domestic violence [Laws of 2010, ch.341]: Overruling a line of appellate cases, this measure amends the Family Court Act and Domestic Relations Law to provide that a court may order the service of orders of protection for service by facsimile so that they can provide proof of service when a party has not signed their signature page when served. An order for service by facsimile must be accompanied by a statement that the service was made by facsimile and that the order of protection was served simultaneously.” Effective: August 13, 2010 (applies to OP’s pending and entered after that date).

7. Extensions of orders of protection [Laws of 2010, ch. 325]: This bill author- izes the court to extend an order of protection for a “reasonable period” of time upon a showing of good cause (instead of the current standard of “good cause”) or for the term “remaining one household or family” in Election Law §§1-306 to include those within the “intimate relationship” definition enacted by Laws of 2008, ch. 326. Additionally, the scope of the statute is enlarged to include domestic violence victims who fled their homes to escape emotional harm, in addition to those who fled to escape physical harm to themselves or members of their families or households. Effective: April 14, 2010.

8. Confidentiality of Election Records of Domestic Violence Victims [Laws of 2010, ch. 73]: This measure permits a vic- tim of domestic violence to request that the Supreme Court of the county in which the victim is registered to vote for an order to keep the victim’s election registration confidential. A victim of domestic violence is defined similarly to Family Court Act §812 to encompass a person abused by a “family or household mem- ber” who is currently a member; a person abused by a non-partner or non-spouse, a person with whom the victim has a child in common, a person to whom the victim is related by consanguinity or affini- ty, a person related to the victim by an intimate relationship” with the victim. Domestic violence is defined to include an act or acts that resulted in actual physical or emotional injury or created a substantial risk of physical or emotional harm to the victim or the victim’s child and that involved commission of a violent felony, as defined in Penal Law §70.02, disorderly con- duct, harassment in the first or second degree, aggravated harassment in the second degree, stalking in the fourth degree, domestic mischief, menac- ing in the second or third degree, reckless endangerment, assault in the third degree or an attempted assault. Upon granting of such an order, the records must be kept separate from other records and not be made available for inspection or copying except by election officials when such records are necessary to carry out their official duties. Effective: May 5, 2010.

9. Service of referrals and violations of Orders of Protection [Laws of 2010, ch. 446]: This Family Court Advisory and Rules Committee measure amends Family Court Act §153-b to provide litigants with the same options of paper or electronic service of officer service for modified orders and for petitions alleging violations of orders of protection as they have for original orders and accompanying pleadings. The legislation was enacted in 2007, as well as requirements of the federal Violence Against Women Act, it further clarifies that such service must be
Best Interests Of The Child

Continued From Page 8

“best interests hearing.”

Artificial Insemination is such a new phenomenon in human history that it cuts completely across the law and customs of nations, states and organized religions. Following is a sample of views on this topic:

New York Domestic Relations Law (DRL), Section 73, is entitled “Legitimacy of Children Born by Artificial Insemination.” Section 73(1) provides that:

“Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”

Our New York State Legislature has left unanswered whether the “best interests of the child” standard of DRL Section 240 is violated when the Sperm Donor Father remains unknown to the child.

Oregon Revised Statutes, Section 109.219, provides that the Sperm Donor Father “shall have no right, obligation, or interest with respect to a child born as a result of the artificial insemination; and (2) a child born as a result of the artificial insemination shall have no right, obligation, or interest with respect to such donor.”

The Oregon State Legislature clearly has not seen “The Kids are All Right.”

Connecticut Statutes, Section 45a-773, provides that all artificially inseminated children must be registered with a Connecticut Probate Court.

Connecticut Statutes, Section 45a-775, provides that the donor of sperm or eggs “shall not have any right or interest in any child born as a result of artificial insemination.”

Connecticut Statutes, Section 45a-777, provides that a child conceived through artificial insemination cannot inherit an estate from his Sperm Donor Father.

The Connecticut State Legislature also apparently did not see “The Kids are All Right.”

The secular Muslim Nation of Turkey has banned artificial insemination entirely. Further, Turkey has made it a crime for a Turkish woman to be artificially inseminated in a foreign country. See www.pri.org/world/turkey.

Rabbi Elliot N. Dorff, in an article entitled “Artificial Insemination in Jewish Law,” summarizes Judaism’s view on this topic:

“By and large, rabbis who have ruled on these matters thus far have maintained that for the purposes of this commandment, (be fruitful and multiply), the father is the man who provides the semen. That would make a man who impregnates his wife through artificial insemination the father of his biological offspring. Even in a man who impregnates his wife through artificial insemination the father of his child in Jewish law, and it would also make a semen donor the father of any children born through the use of his semen.”

See www.myjewishlearning.com/ beliefs/issues/ Bioethics/fertility.

The Roman Catholic Church’s teaching on artificial insemination has been set forth by Martin L. Cook in the publication of the Jesuit’s Markkula Center for Applied Ethics of Santa Clara University. Mr. Cook summarizes the Church’s position as follows:

“(The Church) opposed all technologically interventions into the process of human reproduction. More specifically, the document condemned artificial insemination and embryo transfer, in vitro fertilization, and surrogate motherhood under all circumstances. It all opposed experimentation on all embryos when such experiments were not of direct therapeutic benefit to the fetus, and amniocentesis (a procedure used to detect fetal defects) when done for the purpose of deciding whether or not to abort the fetus.”

See www.ux2.de/publications/tv.html.

The Rev. Edward Schneider, writing on ‘artificial insemination” for the Evangelical Lutheran Church in America, states his view as follows:

“More serious from an ethical standpoint is the moral assessment of the role played by the donor. Though not explicitly dealt with in the ethical considerations discussed above, that discussion does bear implicitly on the donor’s responsibility for his actions. The donor clearly exercises his procreative powers apart from any marital bond or commitment. He remains anonymously hidden from both the mother and the child, refusing his responsibility as a father. His function remains that of a sperm salesman, failing to take full responsibility for his biological offspring. Even though it may be argued that he does what he does as an act of love to provide a child for a childless couple, nevertheless love can never oblige one to perform an action which by its nature violates the fundamental unity of the personal and biological dimensions of sexual intercourse within the covenant of marriage.”

See www.elca.org (What We Believe - Social - Issues/Journal-of-Lutheran-Ethics.)

The science of artificial insemination has placed humanity on the precipice of a brand new world.

The U.S. District Court for the Northern District of California, the New York State Court of Appeals, the Legislatures of New York, Oregon and Connecticut, Rabbi Elliot N. Dorff, the Roman Catholic Church, and Rev. Edward Schneider, cannot provide us with answers, or even any semblance of answers.

The writers, directors, producers and actors of the film “The Kids are All Right” have come closest to asking the right questions in the scenes they so movingly presented between and among two teenagers conceived through artificial insemination in their first meetings with their Sperm Donor Father.

In the Old Testament, King Solomon was asked to decide the custody of a child whose parents were disputed. His solution has given rise to the phrase “The Wisdom of Solomon.” See First Kings, 3:16-28. Each one of our Supreme Court Matrimonial Term Justices and Family Court Judges must act as King Solomon every day as they decide disputed child custody and child visitation cases.

It is hoped that this article will advance the law on this subject and help us to continue our common humanity in light of the science and popularity of artificial insemination.

BY GEORGE J. NASHAK JR.*

Question #1 - If a party is a member of the Federal Employees Civil Service Retirement System, should that party’s pension for the purposes of equitable distribution be reduced in an amount equivalent to Social Security benefits?

Your answer -

Question #2 - In order to obtain an upward modification of child support from a court order entered on consent of the parties, is it required to demonstrate an unanticipated and unreasonable change in circumstances?

Your answer -

Question #3 - When is it necessary to demonstrate an unanticipated and unreasonable change of circumstances, in order to obtain an increase in child support?

Your answer -

Question #4 - True or false, a family offense must be established by a fair preponderance of the evidence?

Your answer -

George J. Nashak Jr.

Question #5 - Are a physician’s office records admissible in evidence as business records under CPLR 4518(a)?

Your answer -

Question #6 - True or false, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor’s opinion and expert proof?

Your answer -

Question #7 - If one spouse transfers marital assets into custody accounts for the parties’ children, without the consent of the other spouse, is the other spouse entitled to an equitable share of the transferred funds?

Your answer -

Question #8 - In calculating child support in accordance with the CSSA, do you deduct FICA taxes from all of the income of the parties?

Your answer -

Question #9 - Can a client waive the rule that in matrimonial cases an attorney must send the client itemized bills at least every 60 days?

Your answer -

Question #10 - Was it error for the Supreme Court to order a parent to pay for the college education of a child who at the time of the order was seven years of age?

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 partner in the firm of Ramo, Nashak & Brown.

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V. CHILD SUPPORT AND MATRIMONIAL MONIES:

1. “Low Income Support Obligation and Performance Improvement Act”: modification of child support orders [NYS OTDA bill; Laws of 2010, ch. 182]:

a. Modifications of child support orders, judgments and stipulations: Incorporating a proposal made by the Family Court Advisory and Rules Committee, this bill, submitted to the New York State Office of Temporary and Disability Assistance, resolves the disparity between public and private child support orders. The measure provides a new method for calculating temporary maintenance, replacing the existing “percentage of income” formula with a modified guidelines calculation. Under present law, in Title IV-D cases, including both cases of custodial parents on public assistance whose rights are assigned to the appropriate department of social services and custodial parents who have requested child support services, child support petitioners may obtain a complete review of child support orders by objecting to the periodic cost of living adjustments [Tompkins County Support Collection Unit on behalf of Linda S. Chamberlin et al., 42 N.Y.2d 210, 213 (1977)]. Unless litigants specifically opt out in an agreement, all litigants standing to apply for a modification by using either of two new standards: the passage of three years or a 15% change in the gross income of either party subsequent to the date of the original or modified order. The substantial change of circumstances threshold would remain as an alternative ground for standing to apply for a modification.

All child support orders must contain a notice of the right to apply for a modification upon the passage of three years or a 15% change in income or substantial change in circumstances.

Finally, in cases where the custodial parent is on public assistance, where a respondent is directed by the Family Court to participate in a work program and such program generates the obligor’s child support payments, the Support Collection Unit is barred from reconsidering a request whether the dependent health coverage is available and the date the employee qualifies to receive them.

b. Employer obligations: The measure requires that the employer provide periodic guidance to the child support order pursuant to Family Court §440.

c. Retroactive child support: The measure provides that retroactive support is payable and enforceable through an income withholding order pursuant to Family Court §440.

d. Incarceration of child support obligors: The measure provides that the incarceration of a support obligor does not preclude a finding of a substantial change in circumstances that would permit an application to modify a child support order provided that such incarceration is neither the result of non-payment of a child support order nor an offense against the custodial parent or child who is the subject of the order or judgment.

e. Participation in work programs: Except in cases in which support obligations are in receipt of SSI or Social Security disability assistance, the Court may order support obligors to seek employment, or to participate in training programs, such as employment counseling or other programs designed to lead to employment.

Effective: Oct. 13, 2010 (90 days after Governor’s July 15, 2010 veto signifying modification provisions applicable to modified orders and written stipulations and agreements entered on or after Oct. 13, 2010)


2. No-fault divorce [Laws of 2010, ch. 384]: This measure allows a spouse to obtain a divorce unilaterally by adding “irretrievable breakdown” for at least six months to existing grounds for dissolution. The litigants, custody and visitation issues must be resolved and incorporated into the divorce judgment prior to the divorce being granted.


3. Temporary and final post-marital maintenance [Laws of 2010, ch. 371]: This measure amends the Domestic Relations Law by expanding the factors to be utilized in determining a payment of temporary or final post-marital maintenance. The measure makes current Domestic Relations Law §236B(5) applicable only to matrimonial cases regarding standing to seek child support and Domestic Relations Law §236B(6) applicable only to final maintenance awards. It sets no formula for final maintenance but adds the following factors to the existing list of final maintenance considerations:

• need of a party to incur educational or training expenses,
• “inhibit a party’s earning capacity or ability to obtain meaningful employment,” including, but not limited to, domestic violence as defined in Social Services Law §459-a,
• “care of children, stepchildren, adult disabled children or stepchildren, elderly parents or in-laws that ‘inhibit a party’s earning capacity or ability to obtain meaningful employment,’”
• “inequality of contributions of party seeking temporary maintenance to the ‘career or career potential’ of the other party,” and
• “any other factor which the court shall determine is just and proper.”

In all cases, the length of the marriage must be considered in determining the duration of the temporary order. A temporary order automatically terminates upon the earlier of the expiration of a final order or death of either party. Significantly, the Court must set forth the factors considered and reasons for its decision in a written order, a requirement that may not be waived by either of the parties.

d. Varniances from the temporary maintenance formula: The Court must always consider all factors in determining temporary maintenance, but unless it finds it to be “unjust or inappropriate” and thereby adjusts it based upon a consideration of all of the above factors, the measure requires that no more than a 30% deviation from the presumptive guidelines amount prior to entry of a temporary maintenance order.

Where, after the effective date of the provision, the parties present a stipulation or agreement for incorporation into an order, the agreement must specify that the parties have been informed of the presumptive amount and that the agreement either excludes it or provides for an adjustment for any variance. A difference between the presumptive guideline amount and the amount ordered prior to the effective date of the measure must be attributed to circumstances justifying modification.

e. Law Revision Commission Study: The measure directs the Law Revision Commission to prepare a comprehensive review of the Domestic Relations Law concerning divorce upon the parties and of the effectiveness of maintenance laws in “ensuring that the economic consequences of divorce are fairly and equitably shared by the divorcing couple.” The Law Revision Commission’s preliminary report and recommendations are due May 30, 2011 (nine months after effective date of the statute) and a final report and recommendations are due by December 31, 2011.

Effective: temporary and final maintenance provisions effective September 12, 2010 (applicable only to matrimonial actions commenced on or after that date); Law Revision Commission study and court rules provisions effective (Continued on page 19)
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Question #1 - If a party is a member of the Federal Employees Civil Service Retirement System, should that party’s pension for the purposes of equitable distribution be reduced in an amount equivalent to Social Security benefits?

Question #2 - In order to obtain an upward modification of child support from a court order entered on consent of the parties, is it required to demonstrate an unanticipated and unreasonable change in circumstances?
Answer - No, the parties seeking the increase need only demonstrate a change in circumstances sufficient to warrant a modification. Matter of Jewett v. Monfoletto 2010 NY Slip Op 02953 (2nd Dep’t).

Question #3 - When is it necessary to demonstrate an unanticipated and unreasonable change of circumstances, in order to obtain an increase in child support?
Answer - When modifying a settlement or separation agreement incorporated into a judgment, including pendente lite. Both parties must file affidavits detailing their arrangements with child support arrange-

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5. Pension exemption from automatic order legislation. The legislature amends Domestic Relations Law §236B(2)(b)(2) to exempt transfers of assets into custodial accounts for the parties’ children, judgment, including pendente lite. Both parties must file affidavits detailing their arrangements with child support arrange-

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Question #10 - Was it error for the Supreme Court to order a parent to pay for the college education of a child who at the time of the order was seven years of age?

Five additional bills relevant to Family Court and family law were vetoed by the Governor: Office of the Child Advocate (A 3233-b, Veto Memo #6819), Revised Interstate Compact on Juveniles (S 8279, Veto Memo #7637), penalties for release of sealed records (A 11338, Veto Memo #6787), Department of State and Credentialing program (A 10180, Veto Memo #7674) and notice of changes in foster care placements (A 6418, Veto Memo #13).


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Question #7 - If a spouse transfers marital assets into custodial accounts for the parties’ children, without the consent of the other spouse, is the other spouse entitled to an equitable share of the transferred funds?
Answer - Yes, Berova v. Hendler 896 N.Y.S.2d 144 (2nd Dep’t, 2010).


Question #5 - Is a physician’s office records admissible in evidence as business records under CPLR 4518(a)?

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