Matrimonial Law

Surrogacy in New York: **Boon or Bane?**

SHUTTERSTOCK, RAFAL PYTEL

BY HARRIET NEWMAN COHEN AND KRISTEN E. MARINACCIO

New York, like many other states, enacted legislation prohibiting surrogacy agreements following the heartbreaking drama of Baby M. Three decades later, New York is one of just four states[1] that still bans surrogacy agreements—however, that soon may change. This article will discuss the proposed legislation known as the "Child-Parent Security Act of 2017" (CPSA) which would lift the ban on surrogacy agreements in New York. It will explore the subtle and not so subtle benefits and burdens that may ensue if the legislation is passed.

Surrogacy Terminology

It is necessary to distinguish among various types of surrogacy. When a surrogate is also the egg donor, it is called a traditional (or genetic) surrogacy. A traditional surrogacy involves artificial insemination using the surrogate's egg(s) and the sperm of the intended father (or sperm donor). The use of the surrogate's egg(s) creates a genetic relationship between the child and the surrogate. If the surrogate is not the egg donor, there is no genetic relationship to the child, and it is called a gestational surrogacy. Gestational surrogacy involves implanting embryos created with the egg(s) of the intended mother (or egg donor) which have been fertilized with the sperm of the intended father (or sperm donor).

If a surrogate, whether traditional or gestational, receives compensation for her reproductive care and is also reimbursed her reasonable direct expenses, it is considered a compensated or commercial surrogacy. If the surrogate only receives compensation for her reasonable direct expenses, it is considered uncompensated or altruistic surrogacy.

As it stands now, New York prohibits surrogacy contracts, whether traditional or gestational, compensated or **uncompensated**.

Baby M's Influence

In the mid-1980's, before Baby M, many states including New York were considering enacting legislation to regulate surrogacy agreements.[2] By early 1987, a bill was pending in the New York Legislature.[3] That same year, just across state lines, in New Jersey, an emotional legal battle was being waged against a traditional surrogate, Mary Beth Whitehead, when she refused to surrender "Baby M" to the intended parents, Elizabeth and William Stern.[4] The dramatic media coverage of the Baby M case, which included images of the police forcibly removing the baby from Ms. Whitehead's arms, quickly caught the public's attention.[5] By June, 1987, facing fierce opposition from feminist and religious lobby groups, a seemingly antithetical coalition, the pending bill in New York was withdrawn.[6]

In 1988, the New York State Task Force on Life and the Law unanimously concluded that New York should discourage traditional and gestational surrogacy agreements.[7] In 1992, the New York State Legislature adopted that recommendation, declaring all surrogacy agreements void and unenforceable.[8]

The Law Today

As it stands now, New York prohibits surrogacy contracts, whether traditional or gestational, compensated or uncompensated.

Intended parents and surrogates (including their spouses) are subject to a $500 fine for participating in a compensated surrogacy contract.[9] Third parties who assist in the formation of a compensated surrogacy contract and receive compensation are subject to a civil penalty of up to $10,000 and forfeiture of fees received. If the third party was previously subject to the civil penalty, he or she runs the risk of felony charges for a second offense. There are no fines or criminal sanctions associated with an uncompensated surrogacy arrangement, however, uncompensated surrogacy agreements, like compensated surrogacy agreements, are unenforceable, leaving both intended parents and surrogates without redress when an agreement goes awry.

There is no presumption that an intended parent is the legal parent of a child born through surrogacy in New York. The presumption is that the birth mother, meaning the surrogate, is the legal mother of a child born in New York—regardless of genetics.[10] Thus, a surrogate, without a genetic relationship to the child, may attempt to claim custody as the legal mother.[11] Even where there is no such claim, the intended parents must go through the judicial system to establish parentage. Non-genetically related intended parents must go through a formal adoption process.

For genetically-related intended parents, the process is a bit different. A genetically-related intended father may establish paternity, either during the surrogate's pregnancy or after the birth, through statutory acknowledgement or a filiation proceeding.[12] A genetically-related intended mother, however, must wait until after the child's birth to establish parentage either through formal adoption[13] or by way of a declaratory judgment under CPLR §3001.[14] Delays in determinations of parentage are common, which can create a plethora of issues, including those relating to health insurance and inheritance rights.

Legalizing Commercial Surrogacy: CPSA

The CPSA, if passed, would repeal New York's 26-year surrogacy ban and permit gestational surrogacy contracts,[15] so long as certain requirements are met. The bill does not cover traditional (genetic) surrogacy. Under the proposed legislation, a surrogate (variously referred to in the Act as "surrogate," "gestational carrier" and "gestating parent") must: (1) be 21 years old, (2) not provide the egg, (3) complete a medical evaluation with a health care practitioner relating to the anticipated pregnancy, (4) consult with independent legal counsel of her own choosing and her spouse, if applicable, which may be paid for by the intended parent, and (5) obtain a health insurance policy that extends throughout the pregnancy and for eight weeks post birth, covering major medical treatments and hospitalization, which also may be paid for by the intended parent.

An intended parent may be a single adult person, adult spouses, or any two adults who are intimate partners. The intended parent must undergo a legal consultation regarding the terms of the contract and » Page 13

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Divorce **Without** Destruction

BY CHAIM STEINBERGER

Die-hard litigators who have only one tool in their toolbox often believe that the way to achieve the best results for their clients is to be as aggressive and confrontational as possible. Clients buy into this narrative because by the time they involve lawyers they have already concluded that the other party is unreasonable. Clients mistakenly believe that in order to win the other party must lose. Moreover, the fear, anger and pain of the dispute restrict parties' creativity and result in psychological tunnel vision, leaving them unable to visualize or create other acceptable options. As a result, too many pursue (intentionally or inadvertently) a scorched-earth strategy that destroys what might be their most precious things–their children, businesses and family relations.

Game Theory

Aside from the benefits of avoiding permanent injury to children, using game theory and advanced negotiation techniques can often achieve better financial and emotional results for the clients. Lawyers can be part of the healing rather than the destroying, doing well as they do good.

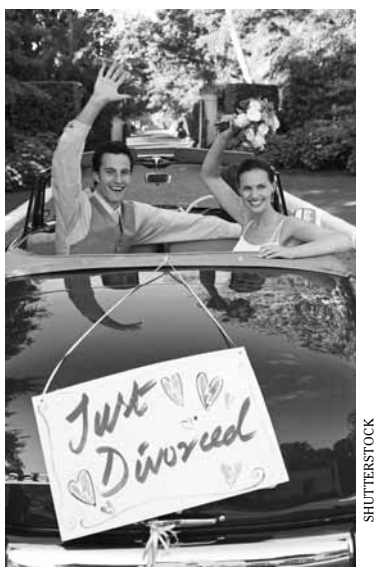
Game theory teaches that adversaries achieve better results by developing trust and working collaboratively, than they ever could by remaining distrustful, oppositional adversaries. As adversaries each party must protect themselves against the possible double-cross by the other. As a result, the parties can only agree to what is a "pareto optimal" solution—a solution in which any unilateral deviation by a party will hurt the deviating party more than it advantages them. These solutions are akin to the "lowest common denominator," often not the very best solution for either of the parties but only the best solution that leaves them both protected. If the parties can, however, create some measure of trust and collaboration they can often find solutions that leave them *both* better off. The techniques outlined below foster just such results.

"Win-Win" Techniques

In their seminal book *Getting to Yes: Negotiating Agreement Without Giving In*, Professors Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project develop techniques for achieving the seemingly impossible "win-win" resolutions in which both competing sides win at the same time. They recommend that negotiators be "hard on the problem, but soft on the people." That is, negotiators should thoroughly and critically analyze the positions of both of the parties, but do so without personally attacking either of them which could destroy any hope of a future working relationship between them.

Instead of using "positional bargaining" where each side conclusively states their demands, the professors recommend "principled" negotiation in which the parties negotiate around core values. So for example, parties may agree that they both want to be fair. They may agree that they both want to do right. They will likely both agree that they want to protect their children. Just expressing such common core values reminds the parties of the interests that unite them.

The parties can then discuss aspects of fairness, of what is right, or of how to protect the children. Because the discussion is centered around fairness rather than demands, neither party feels attacked or becomes defensive. Parties can now hear and acknowledge the validity of the points made by the other, without feeling vulnerable or giving up their own deeply-held positions. This allows each party to feel heard and validated, a major step in fostering the trust that is necessary for a collaborative result. Unlike in the typical brute-force negotiations–negotiations in which the parties negotiate based on who has the better legal argument, the more aggressive or intransigent lawyer, or who is willing to spend more on legal fees–from which the parties walk away feeling worse about one another, these techniques create trust and understanding between the parties, making them more willing to work collaboratively in the future and perhaps even giving them the tools with which to resolve their own future disputes. Often a magical moment occurs in which what was a "me-against-you" problem becomes a "we have a problem; how can we find a solution that works for the both of us." Using creativity and empathy the lawyers and parties can then put their heads together to find win-win resolutions that would be impossible when the parties distrust one another.



SHUTTERSTOCK

Game theory teaches that **adversaries achieve better results by developing trust** and working collaboratively, than they ever could by remaining distrustful, **oppositional adversaries**.

Another powerful technique is to focus on the parties' interests instead of their positions. Instead of accepting the parties' positions as absolutes, the negotiator delves into the reasons why each position is important to the party. Though asking basic questions when the answer seems obvious might make one feel a bit daft, it is surprising how often the seemingly obvious motivation is not the party's actual motivation. The other difficulty of this technique is that after asking for the reasons behind the party's position, the person asking must be quiet, not talk, and actually listen to the answer–a skill difficult for many, lawyers included. » Page 12

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Beyond Broken Bones: Recognizing Psychological Harm When Applying 'Grave Risk of Harm' Standard

BY VALENTINA SHAKNES

The Hague Convention on Civil Aspects of International Child Abduction (the "Hague Convention") requires all signatory states to promptly return a child "wrongfully" removed to a foreign country by one parent without the consent of the other parent. The Convention, however, expressly allows not to return a child to her home country if doing so would expose the child to a "grave risk of physical or psychological harm."

This "grave risk of harm" defense often arises against the backdrop of domestic violence, when one parent flees the home country with the child, claiming domestic abuse by the other parent. Many courts and practitioners, however, remain seemingly unaware of the growing scientific consensus regarding the severe and long-lasting psychological harm to children exposed to domestic abuse, and require evidence of the child sustaining bruises or broken bones at the hands of the abusive parent.

The plain language of the Hague Convention, as well as its stated intent, demand a better understanding of the many forms domestic abuse can take and the severe harm it causes to children exposed to it, even in the absence of any physical injuries. To require proof of physical injuries in order to establish the grave risk of harm exception is contrary to the plain language and the goals of the Hague Convention, and unnecessarily exposes children to great harm.

A Modern Approach to the 'Grave Risk of Harm' Defense

The Hague Convention is a multilateral treaty, to which the United States and over 80 other countries are signatories. It is designed to protect children internationally from the harmful effects of their wrongful removal by establishing an expedited process for the courts or administrative agencies of the country to which the child is removed to return the child back to the home country. The Convention is not a mechanism for custody disputes and, in that expedited proceeding, custody issues are not to be addressed. Rather, the fundamental purpose of the Convention is to ensure that custodial issues are decided by the country of the child's habitual residence, by promptly returning the child, rather than by the country to which the child was abducted by a parent. *See* Elisa Perez-Vera, Explanatory Report: Hague Conference on Private Int'l Law, in 3 Acts and Documents of the Fourteenth Session 426, ¶ 19 (the "Explanatory Report").

The drafters of the Convention recognized, however, that there are circumstances where the return may be inappropriate. Thus, Article 13(b) » Page 12

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Prenup Tutorial:
A Survey of Recent Case Law

BY ARLENE G. DUBIN AND REBECCA A. PROVDER

Prenuptial agreements remain in high demand. While basic parameters for prenuptial agreements are relatively well known, recent case law offers important insights and critical reminders about this practice area. This article will highlight significant takeaways for family lawyers and other practitioners to consider regarding prenuptial agreements.

Lesson 1: Public Policy In Favor of Prenuptial Agreements

Case law continues to underscore New York's strong public policy in favor of prenuptial agreements. The legal system encourages individuals to reach their own agreements through contracts. Courts give great deference to duly executed prenuptial agreements and generally uphold them.

Consequently, individuals can rely on prenuptial agreements as a mechanism to limit issues in the event of divorce and prescribe rights upon death. Instead of being constricted by default statutes, through prenuptial agreements, couples have the flexibility to modify or override the law that otherwise would apply in accordance with their specific goals and desires.

It remains very difficult to set aside a validly executed prenuptial agreement. There are only limited grounds on which to vacate or set aside a prenuptial agreement, including duress, fraud, overreaching, and unconscionability. A prenuptial agreement is presumed to be valid unless and until the challenging party satisfies a high burden of proof to set it aside.

Lesson 2: Duress

There is a common misperception that a prenuptial agreement is invalid if it is not executed sufficiently in advance of the wedding date. Case law, however, continues to hold that the execution of a prenuptial agreement close to the wedding date does not in and of itself render the agreement unenforceable.

Case law continues to **underscore New York's strong public policy** in favor of prenuptial agreements.

For example, in *Ku v. Huey Min Lee*, 151 A.D.3d 1040 (2d Dept. 2017), the wife moved to set aside a prenuptial agreement on the basis of overreaching and duress. In support of her duress claim, the wife alleged that the prenuptial agreement was executed ten days before the wedding. The court denied her motion and found that she failed to meet her burden of establishing a basis to set aside the agreement.

Mere threats to cancel a wedding are also insufficient to set aside a prenuptial agreement. In *Cohen v. Cohen*, 93 A.D.3d 506 (1st Dept. 2012), the wife moved to vacate or set aside the parties' prenuptial agreement on the basis that she was pregnant at the time she signed the prenuptial agreement, she was not represented by counsel, and her husband threatened to cancel the wedding if she did not sign the prenuptial agreement. The court nevertheless found that these circumstances did not amount to duress and upheld the parties' prenuptial agreement. Similarly, in *Hof v. Hof*, 131 A.D.3d 579 (2d Dept. 2015), the court found that the husband's threats to cancel a wedding if his wife did not sign the prenuptial agreement did not establish duress.

Lesson 3: Fraud

The favorable outlook regarding prenuptial agreements has certain limits. Where one party fraudulently induces the other to enter into a prenuptial agreement, the contract will be set aside.

For instance, in *Karg v. Karn*, 129 A.D.3d 620 (1st Dept. 2015), the appellate court affirmed the lower court's finding that a prenuptial agreement was invalid on the basis of fraud. In *Karg*, the agreement was written in German, the wife lacked proficiency in German, and the agreement was not translated into English prior to signing. In addition, the wife was presented with the prenuptial agreement for the first time upon her signing and was deprived of the opportunity to consult with a lawyer. Further, the court credited the wife's testimony that her husband told her that she was simply signing an agreement that waived all claims to his father's wealth and assets and did not find credible the testimony of the husband and his parents.

Lesson 4: Overreaching

Smith v. Smith, 129 A.D.3d 934 (2d Dept. 2015), is a helpful illustration regarding what type of activity constitutes overreaching. In *Smith*, the appellate court affirmed the decision of the lower court in finding that the terms of the parties' prenuptial agreement were manifestly unfair as a result of the husband's overreaching. In reaching this determination, the court focused on the extent and magnitude of the rights waived and the significant disparity in the parties' wealth. While these factors alone typically are insufficient to invalidate a prenuptial agreement, there were additional considerations, such as that the husband presented the agreement to his wife a mere two days before the wedding, the husband presented the agreement as a "take it or leave it" offer, and the wife had already moved into the home with her children.

Lesson 5: Unconscionability

As recounted in *Taha v. Elzmetity*, 157 A.D.3d 744 (2d Dept. 2018), a prenuptial agreement "is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense."

Taha offers important insights into what renders a prenuptial agreement unconscionable. In

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When Matrimonial **Attorneys** Become Divorce **Mediators**

BY JORDAN E. TRAGER

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The practice of divorce mediation in New York State is largely unregulated, having never adopted the Model Standards of Practice for Family and Divorce Mediation. As a result, there are no standard rules for the practice of mediation in New York State. Nor is there a specific certification stating who may act in the capacity of divorce mediator, although as part of a statewide alternative dispute resolution program of the New York State Unified Court System, matrimonial attorneys wishing to participate as mediators must complete a 40-hour course requirement, according to Part 146 of the Rules of the Chief Administrative Judge. Many matrimonial attorneys will take on divorce mediation cases and agree to act in the capacity of divorce mediator. Sometimes, the attorneys are trained and experienced in divorce mediation, whereas other times they are not. Results may vary based upon the mediator's understanding of how divorce mediation should be conducted.

The role of a matrimonial attorney in representing a litigant differs greatly from the role of a divorce mediator in a number of ways. Foremost, a matrimonial attorney only represents one client, whereas a divorce mediator acts as a neutral for both parties. Matrimonial attorneys who mediate are held to a higher standard than other mediators. While the legal and ethical rules regarding attorneys acting as mediators are still somewhat unclear, they pertain to largely to issues of confidentiality and conflict of interest.

Litigation v. Mediation

Generally, matrimonial attorneys seek to obtain the best result for their client, whether that means getting the largest financial settlement possible or obtaining full custody of the children. Litigators often view the divorce process as a legal problem to be resolved with the court system, judges, attorneys for the parties, attorneys for the children, business valuators, forensic evaluations of the parties and the children, and so forth. The culmination of the legal process in most litigation matters often ends with a legal settlement between the parties and their attorneys. In some cases, the parties' legal matter can result in a trial, during which time both parties will be permitted to make opening and closing statements, present evidence and call witnesses to testify on their behalf, cross examine the other party, challenge the other party's evidence and witnesses, and so forth. Trials follow the rules of procedure and evidence, after which the judge renders a final decision, directing how the parties' finances are to be distributed, as well as a parenting schedule that both parties and the children must follow.

Divorce mediators, on the other hand, follow a process based upon the guiding principal of self-determination. Mediators view divorce less through the lens of a legal problem and more as a situation the parties find themselves in which requires a solution with the assistance of the mediator. The mediator conducts the mediation sessions in an impartial manner, provides the parties with sufficient knowledge and information of the law, facilitates communication between the parties, helps establish empathy between the parties, and assists the parties in understanding their own needs and interests. The mediator relies upon the ability of the parties themselves to voluntarily participate in the mediation process, to make their own decisions, and to construct their own divorce agreement with the support and guidance of the mediator. Mediators seek a win-win for the parties and, in the case of children, a win-win-win for all.

> **Mediators view divorce less through the lens of a legal problem** and more as a situation the parties find themselves in which **requires a solution** with the assistance of the mediator.

Case Law Seeks to Clarify

The first serious look by the New York State courts at the role of matrimonial attorneys who act in the capacity of divorce mediators was in the matter of *Bauerle v. Bauerle*, 206 A.D. 25 937, 616 N.Y.S.2d 275 (4th Dept. 1994). In that matter, the parties had a meeting preliminary to a prospective mediation with an associate attorney of a law firm who was also a trained mediator, which lasted approximately two hours. During the meeting, the attorney explained the mediation process to the parties. They discussed the Child Support Standards Act, the assets and liabilities of the parties, the income of the parties, issues of custody, visitation, child support, spousal maintenance, marital property, and equitable distribution.

Ultimately, the parties decided to forgo mediation and one of the parties retained the law firm as his attorney in the divorce action. The other party then moved to disqualify the law firm. The attorney conceded that if he had started mediation with the parties he may not subsequently represent either spouse in the divorce action but that, since he never started mediation with the parties, neither he nor his law firm was disqualified from representing either one of the parties. The lower court ruled that there was no prior attorney-client relationship between the law firm and the other spouse, since mediation never commenced and there was no disclosure of confidential information.

An appeal was filed and the Appellate Court reversed, finding that "the initial orientation session constituted an integral first step in the mediation process" and that the "preliminary orientation session is materially indistinguishable from the initial consultation with an attorney whereupon information is disclosed in confidence by a prospective client who later decides not to retain the attorney [and therefore] the attorney is disqualified from representing the spouse of that prospective client." The court further held that "there is no need to establish that confidential information was disclosed." Further, since the parties discussed issues pertaining to custody, visitation, marital property, equitable distribution, child support, and spousal maintenance, the court concluded that "information relevant and material to the divorce action was obtained by, or imparted to, [the attorney], during that initial session."

The Appellate Court further held that "because the parties are encouraged to be candid and to disclose fully their circumstances and positions in mediation, disclosures that are relevant to the subject of mediation or litigation made in the context of mediation are deemed confidential even though the adversary party is not present."

In its decision, the court failed to distinguish between the role played by a divorce mediator who is also an attorney, versus that of a matrimonial attorney, on the basis that much of the same information conveyed to a mediator would ordinarily be of a confidential nature if it had been conveyed to an attorney. Noticeably absent from its decision is the language of New York State Civil Practice Law and Rules Article 45, which covers the inadmissibility of confidential communications, and which does not explicitly mention a privilege of confidentiality between parties and mediator.

Approximately 10 years later, the New York State courts once again examined the role of matrimonial attorneys who act in the capacity of divorce mediator, in the matter of *J.R.M. v. P.A.M.,* 5 Misc.3d 1003, 798 N.Y.S.2d 710 (Fam. Ct., Nassau County, 2004). In that matter, a matrimonial attorney represented both parties in a negotiated settlement agreement. Subsequently, the law firm sought to represent one of the parties in a family court proceeding, and the other party sought to disqualify the attorney and his law firm, on the basis that the attorney was given confidential and privileged information that was provided during mediation at the time the settlement was negotiated, which the attorney denied. The court disqualified the law firm, on the basis that the attorney previously rendered "mediation" services to the par-

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The classic example of this principle involves two people fighting over an orange. Unable to agree and having grown impatient, one pulls out a knife, slices the orange in half and walks off with half. Having walked away, the party peels the half-orange and throws away the peel to eat the fruit. The second peels the remaining half, throws away the fruit and uses the peel to bake a cake. How frustrating for those with a bird's eye view to know that each could have had the whole orange–one the whole fruit and the other the whole peel. Because it hadn't occurred to either of them to ask why the other wanted the orange, their "positions" were diametrically opposed, though their "interests" in actuality were not. Because of the way the dispute was positioned, it seemed that one could "win" only if the other "lost." At the least, each had to "settle" for one-half of what they wanted in order to reach the only "fair" result they imagined. In actuality, however, neither had to give up anything; they each could have received 100 percent of what they wanted and they both could have "won" without ever making the other one "lose."

Like with the orange, so often uncovering the reasons behind parties' stated positions allows creative, empathetic lawyers to find win-win resolutions in which both sides win. A parent might demand the family home but really only want to remain in the school district with the special-needs program for the parties' child. Or it may not be the specific home a parent wants but only proximity to certain special friends or family members. Each of these motivations opens myriad choices that can fulfill the party's interest, one of which might satisfy the other party's interest as well and making a win-win resolution possible. A father's stated position may arise from his fear that his relationship with the children will be impaired. Acknowledging his legitimate concerns and providing assurances and guarantees may go a long way in reestablishing the shattered trust between them, which might then make it possible for the parties to craft an out-of-the-box resolution that is right for them and that can benefit them and their families for years to come.

Be Calm, Cool and Collected

Like litigation itself, these techniques require solid, thorough preparation, lots of patience and a cool and collected demeanor. The lawyer must know the client's case and all of its relevant, even picayune but emotionally persuasive, details. The litigator's theory of the case demonstrating why justice demands a ruling in the client's favor, is used here to demonstrate the fairness of a particular position. The facts, the law (and the fairness it represents), the closing argument and the advocacy are all put in play, but in a safe, respectful collegial environment, one that makes the parties feel heard and understood so that they can be amenable to fashioning a resolution that works best for themselves and their family. As Sun-tzu advocates, a true pacifist must be the most accomplished warrior.

By listening carefully and respectfully, being genuine and forthright, agreeing with valid concerns and accommodating them when they can reasonably and fairly be accommodated, a good negotiator can avoid further traumatizing the parties' relationship and obtain better results for the client. By creating an atmosphere of rapport and even trust, the parties can discover or create resolutions that benefit both of them in ways that no adversarial win could. Achieving such a better resolution allows the parties to heal and move on, without the emotional negativity, recriminations and ill will that often linger long after the final appeal is decided and the adversarial battle is supposed to be over. Moreover, in addition to the better settlement terms, the parties will be better positioned to work together in good faith on joint issues like those involving their children. They will give their children the greatest gift divorcing parents can give children–permission to love the other parent and a willingness to work together to raise their children in a loving, cooperative manner.

Broken Bones

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of the Hague Convention provides that "the judicial or administrative authority of the requested state is not bound to order the return of the child if [the party opposing repatriation] establishes that… there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

The Explanatory Report explained that defenses to the return, including the grave risk of harm defense, "derive from a consideration of the interests of the child.…[T]he interest of the child in not being removed from its habitual residence…gives way before the primary interest of any person in not being exposed to physical or psychological danger…." Explanatory Report at ¶ 29.

Many cases addressing the grave risk of harm exception arise in the context of domestic abuse, with the abused parent fleeing with the child from the abusive parent. The U.S. courts generally agree that in such cases the parent opposing the return of the child must demonstrate that the child—not the parent who fled with the child—would be exposed to a grave risk of harm upon return. Moreover, the International Child Abduction Remedies Act (I.C.A.R.A.), through which the Hague Convention is implemented in the United States, requires that grave risk of harm be proven by "clear and convincing evidence." 22 U.S.C. § 9003(e)(2)(A).

> The plain language of the Hague Convention, as well as its stated intent, demand a better understanding of the many forms domestic abuse take and the severe harm it causes to children exposed to it, even in the absence of physical injury.

Evolution of "Physical Harm" Definition

Perhaps in view of this restrictive standard, and in part due to our underdeveloped understanding of child psychology at the time, in the earlier years of the Hague Convention the U.S. courts presented with the grave risk of harm defense concentrated solely on the presence of physical harm, requiring proof of physical abuse of the child that resulted in demonstrable physical injuries to establish the exception. *See, e.g., Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995).

Needless to say, our understanding of what causes psychological harm to children has evolved greatly since then. In fact, there is presently a near universal consensus among psychologists and psychiatrists that domestic abuse—physical or psychological—has far-reaching traumatic effects on children *regardless* of whether children are direct victims of such abuse, witness the abuse or are otherwise exposed to it by becoming aware of the violence. Jill R. McTavish, *Children's exposure to intimate partner violence: An overview*, Int'l Rev. Psychiatry, at 5 (2016); NIJ Study, at 27-28.

The traumatic effects may be physical, psychological, behavioral and neurobiological, and include depression, anxiety disorders, post-traumatic stress disorder and developmental delays. *See* Bonnie E. Carlson, *Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention,* 1 J. Trauma, Violence & Abuse 321, 328 (2000); Jeffrey L. Edleson, *Measuring Children's Exposure to Domestic Violence: The Development and Testing of the Child Exposure to Domestic Violence (CEDV) Scale,* 30 J. Child & Youth Servs. Rev 502, 503 (2008).

These effects are more severe in young children; they are magnified when the violence is directed at the child's primary caregiver, such as her mother, and magnified even further when the perpetrator is a parent or a "significant figure" in the child's life. H. Lien Bragg, Office on Child Abuse and Neglect, U.S. Dep't of Health and Human Services, *Child Protection in Families Experiencing Domestic Violence*, at 11 (2003); Alicia Lieberman, *Attachment Perspectives on Domestic Violence and Family Law*, 49 Family Court Review 529, 530 (2011). Not surprisingly, the U.S. Surgeon General has declared domestic violence to be the number one health concern in our country.

The society at large likewise understands that grave psychological injuries can be sustained by children without any physical injuries. Witness the tremendous outcry over the current administration's policy of separating migrant children from their parents. The children generally suffered no physical injuries. Yet, the terrible psychological toll inflicted upon them is well understood by most people.

Psychological Impact

Recently, some courts presented with the grave risk of harm defense have begun to recognize the psychological impact of domestic violence on children. An instructive most recent example is a 2017 case from the U.S. District Court for the Southern District of New York, *Davies v. Davies*, affirmed by the U.S. Court of Appeals for the Second Circuit. 2017 U.S. Dist. LEXIS 10494 (S.D.N.Y., Jan. 25, 2017), aff'd *Davies v. Davies*, 717 Fed. Appx. 43 (2d Cir. 2017). (The author represented the respondent-mother in that case, both at trial and on appeal.)

In *Davies*, the District Court found that the child suffered severe psychological harm primarily from witnessing a great deal of abuse of his mother:

The evidence at trial showed beyond any doubt that Mr. Davies's behavior towards both Ms. Davies and K.D., and in K.D.'s presence, was extremely violent, unpredictable, outrageous, menacing, and dangerous. It was a pervasive, manipulative violence that left few physical scars, but which was nonetheless severely damaging to Ms. Davies, and runs an almost certain risk of continuing to negatively affect K.D.

Many courts, however, are still using an unjustifiably narrow definition of harm. In *Souratgar v. Lee,* for example, the Second Circuit affirmed a district court's return of a child despite numerous acts of domestic violence, many documented, against the child's mother, including in the presence of the child, because "at no time was [the child] harmed or targeted." 720 F.3d 96, 104 (2d Cir. 2013). Similarly, as recently as January 2018, the Fifth Circuit affirmed a district court's return of a child because there was no "objective evidence" of "physical abuse" of the child, which the district court noted was "the more pertinent issue for likelihood of grave risk of harm to [the child]." *Soto v. Contreras*, 880 F.3d 706, 710 (5th Cir. 2018)

Conclusion

Of course, not every case involving allegations of domestic abuse will result in a finding of a "grave risk of harm" to a child. Proving grave risk of psychological harm under the heightened standard of clear and convincing evidence is no small undertaking. But both practitioners and courts should recognize the terrible psychological harm to children caused by domestic violence, and consider evidence well beyond physical injuries. It is time the grave risk of harm defense be given its full intended meaning pursuant to the Hague Convention so that children can be protected against avoidable harm.

Mediators

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ties regarding negotiations that occurred, and which resulted in an agreement between the parties.

In its decision, the court did not attempt to distinguish between divorce mediation services rendered by a mediator who is also an attorney, versus an attorney who represents both parties in the negotiation and drafting of an agreement in a matrimonial action. Instead, the court simply chose to focus its attention on the Code of Professional Responsibility for attorneys in New York State. In its decision, the court stated that "The critical issue here…is not the actual or probable betrayal of confidences, but the mere appearance of impropriety and conflict of interest." It further stated that "a lawyer may serve in the capacity of an impartial arbitrator or mediator even for present or former clients provided the lawyer makes appropriate disclosures and thereafter declines to represent any of the parties in the dispute." The court's decision does not go on to state what those proper disclosures might be.

A few cases did attempt to clarify the issue regarding confidentiality in the mediation process where the mediator was also an attorney. In *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dept. 2007), a nonparty witness in a divorce action appealed from an order denying his motion seeking to quash a subpoena issued by one of the parties for his appearance at a deposition and for his records in connection with a mediation process that he conducted with the parties prior to the commencement of the action.

At the deposition, one of the parties wanted to show the circumstances surrounding the execution of the separation agreement entered into during the mediation process, to demonstrate that the terms of the agreement were not fair and reasonable at the time of the making of the agreement. The Appellate Division upheld the lower court, stating that it did not abuse its discretion in refusing to enforce the confidentiality agreement entered into by the parties as part of the mediation process.

However, in *Radoncic v. Velcek*, 20 Misc.3d 1141, 873 N.Y.S.2d 236 (Sup. Ct., Nassau County, 2008), the court took a different view, extending the statutory protection of Domestic Relations Law Section 235, which prohibits an officer of the court from releasing any pleadings, affidavits, judgments, agreements, memoranda, transcripts and other documents in a matrimonial action to anyone other than a party and his or her attorney, to "any and all documents related to any alternative dispute resolution proceedings, including, but not limited to arbitration or mediation sessions, related to… divorce and separation proceedings…including but not limited to correspondence…and any and all submissions provided to any arbitrator or mediator."

> Regarding conflict of interest, most attorneys will refrain from switching roles between attorney and mediator in either direction, once the litigation or mediation process is already under way, despite there being some vague provision in the law allowing them to do so.

The court of Appeals attempted to resolve the conflict between these two cases in *Hauzinger v. Hauzinger*, 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008). In this matter, the parties signed a waiver, releasing the mediator from maintaining confidentiality. In its decision, the court denied the mediator's contention that a qualified privilege existed pursuant to New York State Civil Practice Law and Rules Section 3101(b), which prohibits the admissibility of privileged material, stating that while the privilege of confidentiality existed for mediation, it was nonetheless explicitly waived by the parties in writing.

The courts have also attempted to clarify issues regarding conflict of interest. In the matter of *In re: Knight*, 308 A.D.2d 189, 763 N.Y.S.2d 94 (2nd Dept. 2003), the court held that the attorney engaged in a conflict of interest by serving as mediator for both parties in a matrimonial action, and then filing the final divorce documents as attorney for one of the parties without disclosing his service as mediator to the other party and the court. Presumably, the court relied upon the *J.R.M. v. P.A.M.* case, which permits attorneys to act as mediators upon the presentation of proper disclosures, whatever those might be.

Most divorce mediators who are also attorneys will have the parties execute written confidentiality agreements which are often times a part of their standard retainer agreements that they sign. Regarding conflict of interest, most attorneys will refrain from switching roles between attorney and mediator in either direction, once the litigation or mediation process is already under way, despite there being some vague provision in the law allowing them to do so under so called proper disclosures as referred to in the above cases.

Conclusion

As these types of switching of roles between attorneys and mediators become more commonplace, the courts will need to further clarify under what circumstances matrimonial attorneys may act in the capacity of divorce mediators, what the rules are for such attorneys as they relate to potential conflicts of interests, and what steps such attorneys may take to protect themselves when they are accused of breaching confidentiality agreements. Hopefully, this will lead to better understanding of the role of matrimonial attorneys acting in the capacity of divorce mediators, as well as a greater appreciation of the divorce mediation process as a whole.

Surrogacy

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the potential legal consequences.

The intended parent, the surrogate and the surrogate's spouse, if applicable, must sign the contract prior to the embryo transfer, and each of the parties must be represented by separate counsel. As currently drafted, non-access during the time of conception is not included as a necessary representation to be made by the "gestational carrier" as a term of the contract. However, the petition for a judgment of parentage must include such representation. Perhaps this is a drafting oversight.

The contract must state that the surrogate will undergo embryo transfer, attempt to carry and give birth to the child, and surrender custody of the resulting child(ren) to the intended parent(s) immediately upon birth. The contract must contain terms which state that the intended parent agrees to accept custody and assume sole responsibility of the resulting child(ren) immediately upon birth—regardless of number, gender, or mental or physical condition. There must also be language acknowledging that the surrogate has the right to use a health care provider of her own choosing and describe how the intended parent(s) will cover the medical expenses of the surrogate and child. The contract must clearly state that the rights and obligations of the intended parent are not assignable.

The contract may not, however, abridge a surrogate's right to make decisions safeguarding her health or the health of the fetus, including the right to terminate a pregnancy and the right to reduce the number of fetus(es). Reasonable compensation negotiated in good faith is permitted for the surrogate's services rendered, expenses and/or the medical risks incurred or to be incurred, as well as for her time and inconvenience. However, compensation may not be paid to purchase gametes (eggs or sperm) or embryos, or to pay for the relinquishment of parental interest in a child. It also may not be conditioned on the purported quality or genome traits of gametes or embryos, actual genotypic or phenotypic characteristics of the donor or the child, or the health or condition of the child.

After execution of the contract but before the surrogate becomes pregnant, the surrogate, her spouse, or any intended parent may terminate the surrogacy contract by giving notice of termination to all parties. Proper termination releases the parties from all the obligations set forth in the contract, except that the intended parent remains responsible for the surrogate's incurred reimbursable expenses under the contract. Unless the terms of the contract provide otherwise, the surrogate is also entitled to keep all payments received.

The CPSA directs that any disputes regarding the rights and obligations under the contract are to be resolved in the New York State Supreme Court. However, the remedy of specific performance is not available for any term which requires the surrogate to be impregnated, terminate the pregnancy, or reduce the number of fetuses or embryos she is carrying.

Unlike now, there will be a legal avenue for both mother and father to establish parentage of a child born through gestational surrogacy prior to the child's birth as well as after the birth of the child. The parties may commence a proceeding for a judgment of parentage at any time after the gestational contract has been executed, which becomes effective upon birth. If the parties fail to obtain a judgment of parentage, a court will look to the best interests of the child, taking into account genetics and the intent of the parties to establish parentage. However, an absence of genetic connection to the intended parent will not be a sufficient basis to deny a judgment of legal parentage.

Time for a Change?

Marriage equality, changing social norms with respect to family, and advancements in assistive reproductive technology (ART)[16] have shifted public discourse on surrogacy over the last three decades. Same-sex couples, couples suffering from infertility or health concerns, and women who decide to postpone motherhood or who in the past could not have children, now can and do through ART.[17] Surrogacy is seen as a "social good," and permitting surrogacy contracts gives a broader segment of society equitable access to family formation. At the same time, legitimate concerns and ethical considerations cannot be overlooked or minimized—such as the potential of health risks for surrogates and possible exploitation of women.

Some opponents of the CPSA see a disturbing parallel between the fate of the handmaids in **Margaret Atwood's tale** of the Republic of Gilead and modern-day surrogates and **look at surrogacy** as a problematic **commercial transaction**,

Among others, it is not clear whether the CPSA provides sufficient safeguards to reduce concerns surrounding informed consent. While requiring a surrogate to obtain a medical evaluation and legal counsel is a step in the right direction, it does necessarily prepare a woman for the potential emotional and medical risks associated with surrogacy or adequately protect her from exploitation.

While some argue that gestational surrogacy mitigates the emotional trauma a surrogate may suffer in relinquishing the child at birth because she is not the genetic mother, the lack of a genetic relationship does not necessarily obviate the distress a surrogate may feel upon surrendering the child she has carried for nine months.[18] There are also substantial, unanticipated health risks associated with gestational surrogacy and pregnancy in general. Through the IVF process, multiple embryos are routinely implanted to ensure success, which often results in multiple births and comes with an increased risk of Caesarian sections, longer hospital stays, gestational diabetes, fetal growth restriction, pre-eclampsia, and premature birth.[19]

Surrogates are also at risk for prenatal diagnosis of fetal disease, which requires invasive surgery.[20] The drugs used to regulate the surrogate's menstrual cycle to ensure successful transfer of the embryos, come with multiple unpleasant and even life-threatening side effects, including, the risk of intracranial hypertension.[21] There is also the startling reality that, despite all of the medical advancements in the United States, more American women die of pregnancy-related complications than any other developed country.[22]

Many believe that the issues regarding informed consent, including the health risks and the socioeconomic gap between the surrogate and the intended parents are persuasive arguments in favor of continuing the ban on commercial surrogacy. Some opponents of the CPSA see a disturbing parallel between the fate of the handmaids in Margaret Atwood's tale of the Republic of Gilead and modern-day surrogates and look at surrogacy as a problematic commercial transaction, like the sale of organs and sex work, that proliferates the commodification of human life and preys upon the economically vulnerable. Equally unsettling may be the idea that women lack agency and cannot appreciate for themselves the associated risks or anticipate their response to pregnancy. To that point, those in favor of the proposed legislation may argue that restricting commercialized surrogacy is paternalistic and a violation of procreative freedom.[23]

Conclusion

The proposed legislation presents right-minded people with a dilemma. Proponents argue that legalizing surrogacy contracts is a step in the right direction, fostering, as it does, equitable access to family formation for people who wish to but cannot otherwise form a biological family. Opponents fear that legalizing these contracts will expose women and children to risk, and open a Pandora's box of unintended consequences. While the proposed legislation does not reach surrogacy agreements under which the surrogate carries a fetus resulting from her own ova being fertilized by the intended parent's sperm, thereby avoiding a Baby M tragedy, other complications, foreseen and unforeseen, but certainly unintended, remain. As with many changes in public policy, and particularly a 26-year-old public policy, the answers are not easy. It comes down to the following: Legalizing surrogacy arrangements in New York will be both a boon and a bane. Therein lies the dilemma.

1. See Ariz. Rev. Stat. §25–218 (2011), Ind. Code Ann. §31-20-1-1 (2006), Mich. Comp. Laws §§722.855–859 (1988).
2. See Surrogate Parenting In New York: A Proposal For Legislative Reform, New York Sen. Judiciary Comm., (Albany, NY; New York State Senate Judiciary Committee, Dec. 1986) (proposing regulation of contractual surrogacy).
3. S. 1429-A, 1987-1988 Regular Session, New York (Feb. 3, 1987).
4. In re Baby M, 537 A.2d 1227 (N.J. 1988).
5. See Katha Pollitt, The Strange Case of Baby M, I think I Understand Judge Harvey Sorkow's Ruling in the Baby M Case, The Nation, Jan. 2, 1988, available at www.thenation.com/article/strange-case-baby-m/.
6. See Jeffrey Schmalz, Albany Surrogacy Bill is Withdrawn, N.Y. Times, June 18, 1987.
7. New York State Task Force on Life and Health, Surrogate Parenting: Analysis and Recommendations for Public Policy (1998), www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogateparenting.pdf
8. N.Y. Dom. Rel. Law §§121-124.
9. N.Y. Dom. Rel. Law §123(2)(A).
10. See Public Health Law §4130.
11. N.Y. Dom. Rel. Law §124.
12. NY Cls Family Ct Act §517, §542.
13. Neither the Family Court Act nor any other provision of the law provide for an order of maternity.
14. See T.V. (Anonymous) v. NY State Dept. of Health, 88 AD3d 290 (2d Dept 2011).
15. Child-parent security act, Assemb.B.A-6959A, Reg. Sess. 2017–18 §§581 (N.Y. 2017), available at http://legislation.nysenate.gov/pdf/bills/2017/A6959A.
16. See Jeff Wang and Mark V. Sauer, In Vitro Fertilization (IVF): A Review of 3 Decades of Clinical Innovation and Technological Advancement, Therapeutics And Clinical Risk Management, Vol. 2 (4): 355–364 (2006).
17. Gina Bellefante, Surrogate Mothers' New Niche: Bearing Babies for Gay Couples, N.Y. Times, May 27, 2005 available at www.nytimes.com/2005/05/27/us/surrogate-mothers-new-niche-bearing-babies-for-gay-couples.html.
18. In her 2014 film, Breeders: A Subclass of Women?, Jennifer Lahl presented the remarks of psychotherapist Nancy Verrier who spoke about the emotional bond of child-bearers and children that forms even without a genetic connection.
19. Mary Rose Somarriba, The Overlooked Risks of Surrogacy for Women, Institute For Family Studies, Nov. 22, 2017, available at ifstudies.org/blog/the-overlooked-risks-of-surrogacy-for-women.
20. Committee Opinion, The American College Of Obstetricians And Gynecologists, No. 660 (2016).
21. See Drugs Commonly Used for Women in Gestational Surrogacy Pregnancies, The Center For Bioethics And Culture Network, available at http://breeders.cbcnetwork.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf.
22. See Nina Martin, Focus on Infants During Child Birth Leaves U.S. Moms in Danger, NPR, May 12, 2017, available at www.npr.org/2017/05/12/527806002/focus-on-infants-during-childbirth-leaves-u-s-moms-in-danger (Every year in the U.S., 700 to 900 women die from pregnancy or childbirth-related causes, and some 65,000 nearly die—by many measures, the worst record in the developed world.); see also Pregnancy Mortality Surveillance System, Centers For Disease Control And Protection, available at www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html.
23. See Lorraine Sorrel, Baby M Again, Off Our Backs: A Women's News Journal, July 31, 1987. (Sorrel argued that allowing Mary Beth Whitehead to break her contract would mean that a "woman cannot be responsible for making reproductive decisions or motherhood is so sanctified… that women will rarely be allowed…other significant roles.").

Prenup

« Continued from page 10

reversing the lower court's decision and granting the wife's motion to set aside the parties' prenuptial agreement on the basis of unconscionability, the appellate court considered the possibility that the wife would end up as a public charge if the prenuptial agreement was enforced. The court noted that the wife, the primary caregiver of the parties' children, was unemployed, had limited assets, and would receive only $20,000 in satisfaction of all claims despite her husband earning about $300,000 per year as a physician.

Further, *Taha* serves as a reminder that while a prenuptial agreement may not have been unconscionable at the time of its signing, the agreement, as it pertains to maintenance, may be deemed unconscionable when examined at the time of the granting of a judgment of divorce. The case tracks the applicable statute, Domestic Relations Law §236(B)(3), which provides that maintenance provisions set forth in a prenuptial agreement must be fair and reasonable at the time of the making of the prenuptial agreement and not unconscionable at the time of entry of final judgment.

However, as relayed in *Ku v. Huey Min Lee*, 151 A.D.3d 1040 (2d Dept. 2017), a prenuptial agreement is not unconscionable, "merely because, in retrospect, some of its provisions were improvident or one-sided." For example, in *Barocas v. Barocas*, 94 A.D.3d 551 (1st Dept. 2012), the court upheld the property division provisions set forth in the parties' prenuptial agreement and refused to set it aside based upon unconscionability. Consequently, in *Barocas*, despite a 15-year marriage, the husband was entitled to property valued at approximately $4.6 million and the wife was entitled to only an IRA account valued at about $30,550.

Lesson 6: Procedural Formalities

Domestic Relations Law §236(B)(3) provides that, "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."

The acknowledgment requirement functions to prove the identity and authenticate the signature of the person signing the prenuptial agreement. In addition, the acknowledgement imposes on the signer a measure of deliberateness in the act of executing the document.

In *Galetta v. Galetta*, 21 N.Y.3d 186 (2013), the Court of Appeals was tasked with determining whether the acknowledgment was deficient, thus rendering the prenuptial agreement invalid. The court ruled that the acknowledgment was defective because it omitted the language that the notary knew the party or had obtained sufficient evidence to know that the party was the person described in the prenuptial agreement.

Instructively, in *Galetta*, the court differentiated between the facts in the case at hand and a situation in which an acknowledgment conforms with substantive elements of a valid acknowledgment but deviates from the exact language prescribed by statute. In making this important distinction, the court compared the circumstances to *Weinstein v. Weinstein*, 36 A.D.3d 797 (2d Dept. 2007), in which a party argued that the prenuptial agreement was invalid and unenforceable because the acknowledgment did not contain the precise statutory language. In *Weinstein*, the court held that since the acknowledgment substantially complied with the statutory requirements, the prenuptial agreement was valid.

Likewise, in *B.W. v. R.F.*, 53 Misc.3d 366 (Sup. Ct., Westchester Cty., 2016), the court upheld the prenuptial agreement, where it found that the language in the acknowledgment conformed substantially with the statutorily required language. Therefore, an acknowledgment generally is deemed sufficient if it is in substantial compliance with the applicable statute.

Clearly, in order to assure the validity of a prenuptial agreement, it is best practice to strictly adhere to formality requirements. Otherwise, the matter may be litigated and a court will use its discretion in determining substantial compliance.

Lesson 7: Interim Relief

A long time might lapse between the commencement of a divorce and the resolution of the case. During such time, a party may be entitled to receive or apply for interim relief, such as temporary maintenance.

A notable lesson can be gleaned from the case *Lennox v. Weberman*, 109 A.D. 3d 703 (1st Dept. 2013). In *Lennox*, the parties entered into a prenuptial agreement in which the wife waived all claims to a final award of alimony or maintenance. The appellate court upheld an award of temporary maintenance in the absence of an express provision in the prenuptial agreement waiving temporary maintenance.

Careful attention must be paid to detail in drafting prenuptial agreements, as upon divorce or death **every word may be carefully scrutinized**.

Similarly, in *McKenna v. McKenna*, 121 A.D.3d 864 (2d Dept. 2014), the parties' prenuptial agreement contained a provision waiving maintenance and equitable distribution. However, as in *Lennox*, there was not an express waiver of temporary maintenance. Therefore, the court in *McKenna* held that the wife was not precluded from seeking temporary maintenance.

The key takeaway from cases like *Lennox* and *McKenna* is that in instances where the parties intend to effectuate a full waiver of maintenance, the prenuptial agreement should make explicit reference to interim, temporary, and/or pendente lite maintenance.

Lesson 8: Occupancy Of the Marital Residence

Any residence, regardless of its size, typically seems too small during the pendency of a divorce. People often develop strong attachments to their homes and such connections can intensify during the divorce process.

In some cases, a party may voluntarily move out. Otherwise, in order to obtain exclusive occupancy during a divorce proceeding, a party needs to show: (i) either his/her spouse established an alternate residence and his/her return would cause domestic strife; or (ii) his/her spouse poses physical harm or threatens to damage property.

This standard may be a difficult or impossible to meet. Therefore, it may be helpful to include provisions in a prenuptial agreement governing temporary exclusive occupancy of a residence during a divorce proceeding.

In a prenuptial agreement, couples may address the disposition of the marital residence in the event of a divorce, as well as incorporate provisions governing occupancy and vacating of the premises. The agreement also may set forth terms regarding the sale or buyout of the property.

Such occupancy provisions are enforceable, as demonstrated by *Freed v. Kapla*, 129 A.D.3d 615 (1st Dept. 2015). In *Freed*, a husband endeavored to invalidate a prenuptial agreement on the basis that his wife made oral promises to take care of him. In the parties' prenuptial agreement, the husband waived spousal maintenance and agreed to vacate the wife's residence upon notice of her intent to permanently separate. The court in *Freed* held that alleged verbal assurances were insufficient to overcome the clear and unambiguous language set forth in the parties' prenuptial agreement and denied the husband's application.

Lesson 9: Legal Representation and Counsel Fees

While the absence of legal representation without more does not establish overreaching or by itself nullify an agreement, it is important for each party to retain separate and independent counsel of his or her own choosing in connection with a prenuptial agreement. Separate counsel is significant because prenuptial agreements have far-reaching implications, and each party should enter into the agreement knowingly and voluntarily.

In common practice, a drafting attorney may provide recommendations for opposing counsel and relay them through his or her client. The fact that a party's attorney recommended the other party's counsel, even if that party also paid for all of the other party's legal fees, is insufficient to establish duress or overreaching.

Case and statutory law typically provides that the wealthier spouse is responsible to contribute to the less wealthy spouse's counsel fees in the event of a divorce. Domestic Relations Law §237, which governs the award of counsel fees, imposes a rebuttable presumption that counsel fees should be awarded to the less monied spouse.

In a prenuptial agreement, couples may choose to deviate from the applicable law that would otherwise pertain to counsel fees. For example, each party may waive or limit counsel fees from the other party in the event of a divorce. The waiver or restrictions at times may be subject to certain exceptions, such as custody litigation, where a court may deem it necessary to award legal fees in order to level the playing field regarding counsel fees.

Lesson 10: Drafting Detail

Careful attention must be paid to detail in drafting prenuptial agreements, as upon divorce or death every word may be carefully scrutinized. As much time may have passed and circumstances may have substantially changed, practitioners may find that concepts and formulas that may have seemed clear at the time of execution of the agreement may be susceptible to varying interpretations.

For example, in *Anonymous v. Anonymous*, 150 A.D.3d 91 (1st Dept. 2017), the court was required to determine the ownership of valuable artwork. The husband claimed to own tens of millions of dollars of artwork, whereas the wife contended it was jointly owned. She also claimed to separately own other pieces of expensive artwork. The parties' prenuptial agreement did not include a specific mechanism regarding the division of their art collection upon divorce. Rather, the prenuptial agreement provided that any property owned as of the date of the agreement or "hereafter…acquired" by one party would remain that party's separate property. The prenuptial agreement further provided that any property acquired during the marriage that is jointly held by the parties shall be equally divided. The appellate court, in reversing the lower court's decision, held that invoices alone, while relevant, were not dispositive of ownership, and remanded the case to the lower court to consider all of the facts and circumstances regarding the acquisition of the artwork.

Likewise, in *Tietjen v. Tietjen*, 48 A.D.3d 789 (2d Dept. 2008), the wife moved for a declaration that, pursuant to the parties' prenuptial agreement, the appreciation of her separate property was excluded from equitable distribution. The court declined to preclude her husband from seeking equitable distribution of the appreciation on the wife's separate property, including her separate property residence and pension, based upon his contributions and efforts during the marriage, because the parties' prenuptial agreement failed to evidence a clear intent to override the default equitable distribution statute pertaining to appreciation on separate property. Therefore, the husband was permitted to seek equitable distribution of the appreciation in value of, or enhancements or additions to, the wife's separate property, as well as any income derived from her separate property, to the extent that such appreciation or income was attributable to his contributions or efforts.

Conclusion

Prenuptial agreements remain highly favored by New York courts and are attractive to an ever growing number of couples. As discussed in this article, many nuances are involved in drafting and negotiating prenuptial agreements. As a result, it is imperative for practitioners to stay abreast of the recent case law developments.