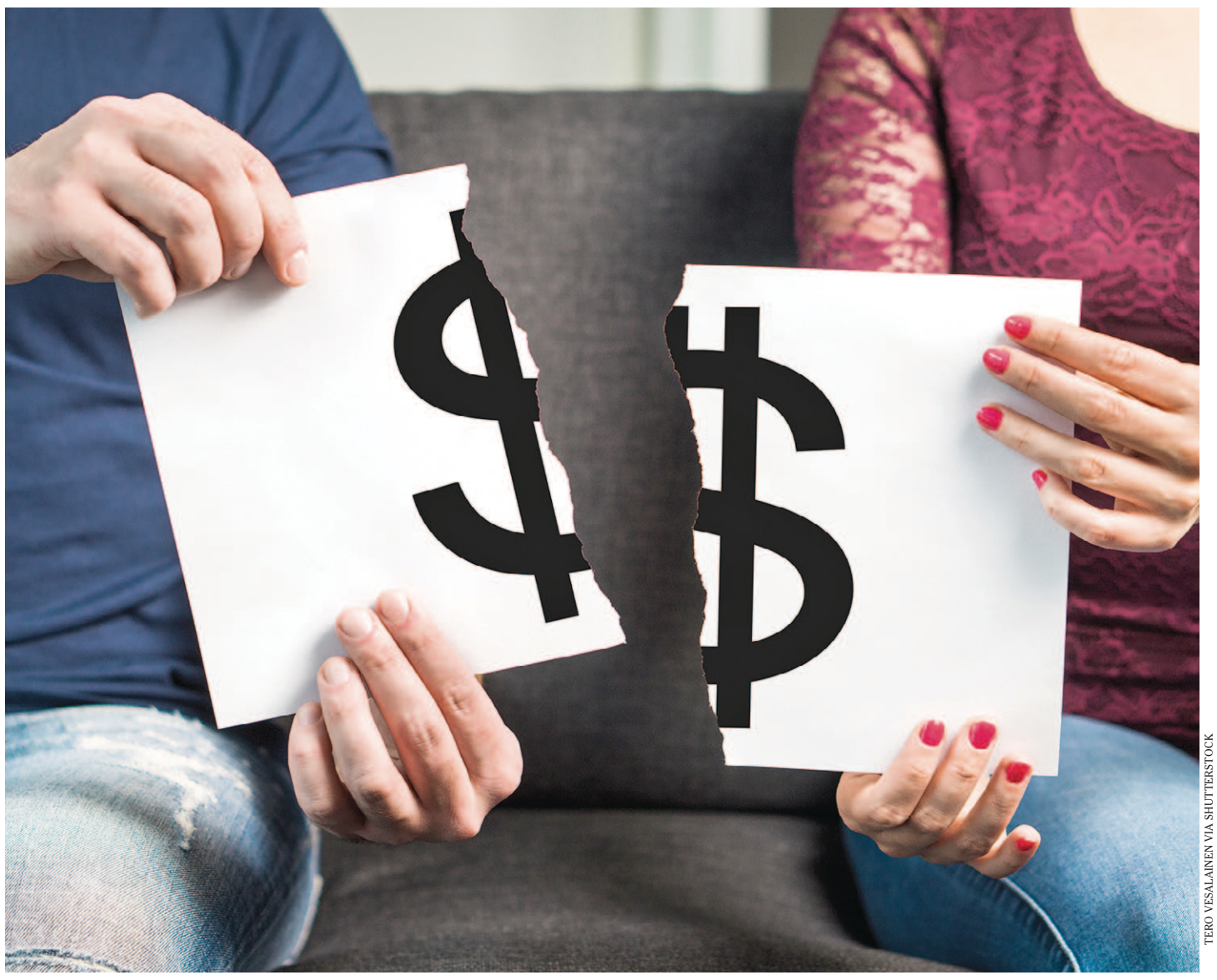
Matrimonial Law



TERO VESALAINEN VIA SHUTTERSTOCK

Prenups and High Net Worth Divorces: Do They Solve Everything?

BY STEVEN J. MANDEL

While any high net worth individual might consider a prenuptial agreement to be an ironclad contract, New York state law might not agree. New York is one of the few states which hasn't adopted the Uniform Prenuptial Agreement Act (UPAA). New York has its own set of rules and laws for these types of agreements.

A prenuptial agreement is designed to help avoid chaos, strife and acrimony should a divorce occur in that marriage. However, as evidenced by the recent attention-grabbing stories involving Robert De Niro, "prenups" are not able to solve every problem that arises in a divorce, even when the terms are clearly spelled out and agreed upon beforehand.

In De Niro's case, the divorce attorney his wife hired has issued six subpoenas for his financial records even though De Niro's attorney claims the prenup makes it extremely clear what she is entitled to from their 2004 agreement. The public has learned that De Niro's total wealth may be upwards of $500 million. When the stakes are that high, one can be sure attorneys on both sides will be working hard for their clients.

Agreeing to a prenup is only the first challenging step: Executing the agreement should a divorce occur is an entirely different matter. When a couple marries, they combine assets, they share friends and sometimes business relationships and they often have children. Each of those is treated differently by the law, and as life moves forward and becomes entwined for the two individuals who are married, finding common ground in a divorce becomes increasingly difficult.

> New York law states that any prenuptial agreement must be "fair." **Such a vague and subjective term can turn an attorney's hair gray,** especially when the definition of fair changes over time.

For those couples who both enter into a marriage with significant assets, even the best written prenups can create headaches. Most business contracts are written by two or more parties with little or no emotion involved. Prenups are also essentially business contracts, but emotion, history, religion, self-worth, psychology and more come into play in the relationship, meaning that the dollars and cents often take a back seat. If a married couple sat across from each other before a marriage took place and negotiated every detail as if they were two businesses merging, then a divorce might be easier to negotiate. However, that rarely (if ever) happens. Love birds often refuse to see their marriage as a contract, and prenups can have huge, unforeseen holes in them.

For example, New York law states that any prenuptial agreement must be "fair." Such a vague and subjective term can turn an attorney's hair gray, especially when the definition of fair changes over time. Making matters more complicated, circumstances dictate fairness. What was considered fair when the couple married 20 years ago may not be considered fair today. For example, celebrities who marry before they've hit stardom or Wall Street bankers who marry before they've made it to the executive level will surely have issues with any prenuptial agreement later in life. In New York, a potential spouse is under no obligation to disclose his/her finances before the signing of a prenuptial agreement. However, if the individual does disclose assets and misrepresents the value of those assets, the resulting prenup may be overturned in court.

Premarital assets or what is known as "separate property" are off limits; however, those assets become extremely difficult to distinguish over the course of one's life and career. In New York, there are countless people who have built businesses, invested smartly and now would be considered high net worth individuals. Assets owned before a marriage are usually off-limits in a divorce if there is a prenup, but any increase in the value of those assets due to contributions of a spouse can change matters significantly. Let's say a man has a financial firm for five years before he gets married. Then, once he's married, his spouse can prove she's helped the value of that firm increase through her actions, whether it be working in the office, helping with a marketing campaign, introducing him to new clients, or taking care of the home so he can go to work. A judge may rule against the man if the spouse's attorney can show that the spouse's efforts made a significant difference in the value of the business.

The role a prenup can play in custody is often extremely limited. Unlike many states, New York prenups can resolve some issues regarding education, support and care of children. However, in most cases a judge will make the final decision on custody and support to ensure any agreement is in the best interests of the child/children. When it comes to what religion a child is raised in, custody, visitation and such, that's a matter that is only handled during divorce proceedings.

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Adventures in Matrimonial Mediation: A Journey

BY LESLIE J. WILSHER

I never thought I'd want to mediate matrimonial disputes. So much sturm und drang! All that pain, anger, resentment, and distrust! Of course, as a practitioner in the area of estate planning and administration, I had occasion to draft pre- and post-marital agreements, or to represent a party to one.

But those couples were on good speaking terms. So, for the most part, it wasn't difficult for them to agree on things.

When I began mediating custody and child support cases for the New York Peace Institute (formerly part of Safe Horizon), however, I realized two important things. First, it wasn't my sturm und drang. I could acknowledge the emotions expressed by each member of the couple, even feel inwardly sympathetic, without having to experience those emotions myself. In fact, as a mediator, I needed to maintain distance in order to remain neutral and keep the conversation balanced. Second, in encouraging my pre- and post-nup clients to work most matters out for themselves, I already was following, albeit unwittingly, a major precept of mediation, which is to create a forum in which the participants can work things out for themselves.

Ultimately, two things convinced me of the merits of mediating matrimonial disputes. I received my first request from clients seeking a separation. The process took place over a number of months since, in mediation, clients participate in setting the pace. This couple had two teenage children, so we met for a handful of sessions, in person and by telephone. They also found it helpful to see their progress in writing, so we went through several drafts of a separation agreement. On conclusion, they agreed the process was preferable to fighting it out in court. Then, I participated in a mediation clinic with Prof. Robert Collins of Cardozo Law School. The clinic was an ideal way to experience the divorce mediation process in-depth, by co-mediating with someone who had handled many such mediations before, and who also had given the process a great deal of thought.

Practical Aspects Of the Process

To me, one appealing aspect of matrimonial mediation is that it entails making a very specific set of decisions. The issues will vary, of course, depending on the couple's financial situation, including their respective earning capacity, whether there are minor children and, if so, how many and of what » Page S6

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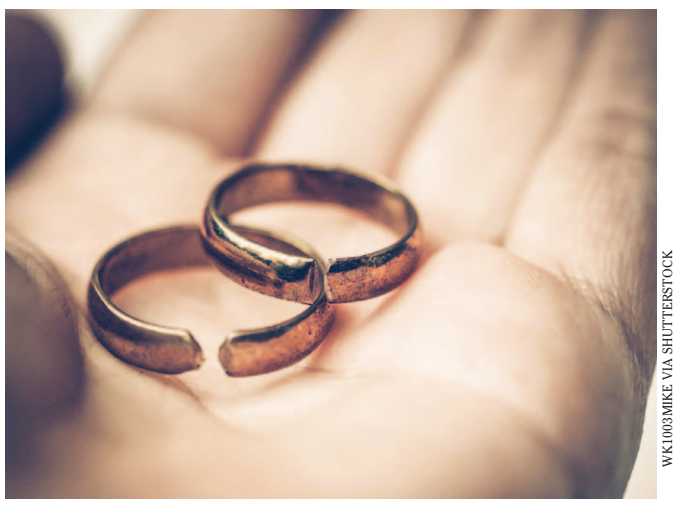
Divorce vs. Death: Pecuniary Rights And How They Differ

BY HARRIET NEWMAN COHEN AND TIM JAMES

Sometimes, the older client's question is posed in the starkest form: Am I better off getting a divorce or just waiting for my spouse to die? The smart lawyer's answer is "It depends on a lot of variables."

This article will discuss some of those variables, and the different ways in which New York law, and, in passing, the Uniform Probate Code which other states have adopted, protect surviving spouses from disinheritance. It also notes the dissimilar status of offspring. The applicable law with respect to estate and divorce rights will be the law of the state in which the deceased spouse was domiciled at the time of his or her death, or where the parties reside, in the divorce scenario. As part of the "death gamble", of course, there is always the risk that the monied spouse will transfer assets—fraudulently or otherwise—before the death, in such a manner as to place them beyond the reach of the provisions of the law designed to protect the surviving spouse (in New York, EPTL §5-1-1-A[b] and [c]). That possibility needs to be factored into the equation.

In New York, a surviving spouse's elective share of the estate of a deceased spouse is the greater of $50,000 or one-third of the decedent's net estate, as defined under 1990's statutory reforms designed to protect surviving spouses. EPTL §5-1.1-A(a)(2). Under the prior law, the elective share was 50% of the decedent's net estate if there were no living children of the decedent at the time of the decedent's death, and one-third if the decedent left living children. But a spouse could choose to place the amount of the elective share in trust, with the surviving spouse receiving only *the income therefrom* during his/her lifetime—a deprivation and an insult. In addition, the surviving spouse today is entitled to take or retain possession of (and not count toward the elective share) certain personal property, ranging from the family bible to clothing and household items worth up to $20,000, and one motor vehicle worth up to $25,000. EPTL §5-3.1.



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One must resist the impulse to compare the one-third elective share guaranteed to a surviving spouse to the unofficially presumptive 50-50 division of marital property in divorce after a number of years of marriage or to conclude that divorce yields results more financially generous than death. First, in the absence of a will, a surviving spouse will inherit *all* of the deceased spouse's estate if the decedent has no living children, or $50,000 plus 50% of everything above that amount if the decedent has one or more living children. One does not get 100% of even the marital estate in a divorce. EPTL §4-1.1. Second, if spouses have assets that they hold as joint tenants or tenants by the entirety, such as real property or jointly titled bank or securities accounts, in the event of the death of one spouse, those assets will pass directly to the surviving spouse, outside of any will or intestate succession. By contrast, title does not control in divorce. Third, whereas equitable distribution applies only to *marital* property, a surviving spouse's elective share (or intestate share) applies *both* to assets that would be classified as marital property, *and* to assets that would be classified as separate property, in the context of a divorce action. Thus, where a spouse who dies has a significant amount of separate property, the surviving spouse's elective share may amount to significantly *more* than he or she would typically receive as equitable distribution in a divorce action.

As a result of reforms enacted in New York estate law in the 1960's and 1990's, the net estate based on which a surviving spouse's elective share is calculated is more inclusive than it was previously. Now it better protects the surviving spouse's inheritance rights against manipulations designed to deprive the survivor of what the law regards as his/her fair share of the decedent's estate. These protections are akin to those afforded a spouse where there has been dissipation of marital property in the context of a divorce. The net death estate now encompasses not only the "probate estate" (all assets titled in the decedent's name, minus the decedent's debts and the costs of administering the estate), and the value (at the time of the decedent's death) of testamentary substitutes, such as Totten trusts (see EPTL » Page S7

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Does **Empowering Children** During **Divorce Litigation** Serve Them Well?

BY LISA ZEIDERMAN

ANDREY POPOV VIA SHUTTERSTOCK

For better or worse, an unemancipated child of an intact family has little choice but to reside with and accept those decisions made by his/her parents. In intact families, decisions pertaining to time sharing with the parents, a child's general welfare, education, religious preferences, medical and health issues, camp, and even extracurricular activities are routinely determined by a child's parents.

Contrast the foregoing with a child of divorcing parents. During a divorce and/or custody proceeding and even thereafter in post-judgment proceedings, a child may voice his/her desires regarding the foregoing issues through his/her attorney, usually appointed by the court.

As recently as June 2019, the Appellate Division Second Dept. held that: "The Family Court erred in failing to give due consideration to the expressed preferences of the child, who was 14 and 15 years old at the time of the proceedings in the Family Court, and who communicated a clear desire to remain in the father's custody." *Newton v McFarlane*, 2019 WL 2363541, *1 (2d Dep't June 5, 2019) No. 2017-13478, V-20779-10/16I, V-33124-10/16I.

Previously children were represented by law guardians who made a recommendation to Judges as to a child's best interest. However, in 2007, the role of Attorney for the Child (AFC) was clarified in §7.2 of the Rules of the Chief Judge. An AFC is now required to zealously advocate the child's position on critical issues such as access with a parent, education, and other major decisions, so that the child's voice through an AFC may be considered by the Judge.

The history of the development of the AFC is as follows: In October 2007, Chief Judge Judith Kaye, in consultation with the Administrative Board of the Courts, and with the approval of the Court of Appeals, promulgated a new §7.2 of the Rules of the Chief Judge. Section 7.2 was passed in response to a report submitted by the Matrimonial Commission in 2006 to Chief Judge Kaye and closely reflected the recommendations outlined therein. The Commission concluded that the attorney for the child is not and should not be regarded as a fiduciary. (Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York (February 2006). Nor was an AFC to be an investigator for the court.

Pursuant to §7.2, the law guardian is now referred to as an AFC and an AFC's mandate was to advocate the child's position subject to the limited exceptions set forth below. Like the parents' respective attorneys, an AFC is subject to the ethical requirements applicable to all lawyers, including but not limited to disclosure of client confidences. 22 NYCRR. As such, when the child client instructs an AFC to keep his/her confidences regarding his/her preferences, an AFC must do so. That means that a parent may not know why, for example, his/her 13-year-old child is voicing a desire not to live with and sometimes even have contact with a parent. 22 NYCRR.

With an AFC advocating a child's desires, the question presented is what is the proper balance to strike between respecting a child's desires and preferences and empowering the child to the point where the child believes that he/she has not just a voice but also a vote in making adult decisions that may have a long-term effect on the child.

Significantly, the child's preference may be based upon misinformation or misplaced views. Additionally, the child may be easily influenced and manipulated. In cases such as the foregoing, an AFC's role is even more critical as it is an AFC who can advise the child client, while providing the child information and assistance about the court proceedings in an honest, realistic and unbiased manner. In that way, an AFC can help the child formulate his/her desires based upon sound information and then articulate the child's desires to the court after consultation with the child client.

Pursuant to §7.2, an attorney is to fully explain the options available to the child and may recommend to the child a course of action that in the attorney's view would best promote the child's interests. 22 NYCRR. However, after counseling and advising the client, an AFC must advocate the child's desires so long as the child is capable of voluntary and considered judgment, even if an AFC believes that what the child wants is not in the child's best interests.

The New York State Bar Association (NYSBA) determined that it was appropriate and imperative to deviate from the previous standard regarding the role of an attorney for the child, because the NYSBA felt "the child often has a keen insight concerning his or her needs," and should, therefore, be the driving force in legal proceedings, especially custody matters. New York State Bar Association Committee on Children and the Law, Law Guardian Representation Standards, Vol. II: Custody Cases (3d ed., 2005).

When an AFC believes that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child can then advocate a position that is contrary to the child's wishes. However, an AFC must inform the court of the child's articulated wishes if the child wants the attorney to do so, even if that is contrary to the position that an AFC takes in the courtroom. 22 NYCRR. Thus, for example, even when the AFC is aware that a parent is influencing a child's decision about access or other major decisions that the AFC believes is not in the child's best interest, the AFC still must advocate for the child's desire except in the situations set forth above.

The foregoing is not only a departure from the previous standard, which required the AFC to advocate the best interests of the child, even if those interests were at odds with the child's wishes, but it is also a departure of what children of intact families experience. In some situations, it can result in an empowerment of children that begs the question of why children of divorcing parents are afforded that power and voice that children of intact families often lack.

A significant question to be considered is whether this evolution of an AFC's role is actually helping the child or instead helping the child achieve what the child wants. For example, there are matters in which one parent has successfully lobbied against the other parent to the point where the child has a strong desire to sever contact with a parent. Are we empowering the child too much when the child's attorney is now advocating the child's desire not to see a parent and in fact to slice that parent out of the child's life? If the child's AFC is a strong advocate and the parent's attorney is not as skilled, what is the result? Are we faced with the child seizing the power in the parent/child relationship? Further, given the costs of litigation, the reality may be that a parent simply must cede to the child's desires before a judge has the opportunity to determine the best interests of the child. For those instances, will the child later resent the parent for not fighting harder? Moreover, while the judge in the matter does determine what he/she believes is in the child's best interest, this may only occur after a trial of the matter. The reality is that the judge's decision may not occur for months if not years after certain decisions have been made and realities set a course too late to realistically change.

With the expectation that an AFC is to be working with the child client to zealously advocate the child's position, the balancing of the child's desires versus the child's best interest must be the focus. If there is consensus that the child should remain a child and not make adult decisions, then there must be timely safeguards put into place by the court to guard against lobbying and manipulation of children and inappropriate empowerment of children. The safety mechanism in place for children to remain children is the court. However, for the court to be an effective safety mechanism, it must utilize the arsenal of tools available, including when appropriate the appointment of forensic psychologists to perform an evaluation, a full development of a case before the court and importantly an in camera interview with the child so that the court can hear the reasoning behind the child's voice and ultimately make a decision based upon the child's best interest. Most of all, while the child should understand that his/her voice will be heard, the child must understand that the court will ultimately make a decision based upon the child's best interest.

The new role of the AFC, while respectful to the child's desires, does pose issues for the parents embroiled in litigation. Parents who want to act like parents are suddenly finding themselves competing for their child's affection, such as: homework versus computer time; pizza versus vegetables; unlimited video games and computer time versus rules regarding video games and computer use. Curfews fly out the window and the list continues. In certain instances, parents who are concerned that their children's voice may become too powerful in the courtroom find their role and authority as parents descending into a popularity contest between the parents to gain the child's approval.

Are we empowering the child too much when the child's attorney is now advocating the child's desire not to see a parent and in fact to slice that parent out of the child's life?

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Termination of Maintenance And DRL §248 Interpretation

BY STUART GARTNER

As every seasoned matrimonial practitioner is aware, the issue of termination of maintenance is a hot button item when negotiating a separation agreement or settlement stipulation. No spouse wants to support a former spouse and the spouse's long-time paramour.

Even after all other issues as to custody, equitable distribution, child support and counsel fees are resolved, the "cohabitation" monster rears its ugly head. Domestic Relations Law §248 (modification of judgment or order in action for divorce or annulment, provides in part) provides as follows:

> The Court in its discretion upon application of the payor on notice, upon proof that the payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married to such other person, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such payee.

Historically, the literal requirements of DRL §248 have been extraordinarily difficult to meet, in order to modify a Judgment of Divorce. As a result, counsel for the paying spouse customarily provides in an agreement that maintenance terminates upon the earliest of a certain term; upon the death of the former spouse; death of the payor spouse or various forms of "cohabitation", as specifically defined in the Agreement or Stipulation.

Prior to *Graev v. Graev*, 11 N.Y.3d 262 (2008), most attorneys had a clear understanding of cohabitation. In *Graev*, the Court of Appeals held that the term cohabitation as used in that matter was ambiguous: neither the dictionary nor New York case law supplies an authoritative or "plain" meaning, and as a result, extrinsic evidence would be needed as to the parties' intent. Without such proof, "there is no way to assess the particular factors inherent in the dictionary meaning or case law discussion of 'cohabitation' the parties may have meant to embrace or emphasize." Id. at 274.

As far back as *Northrup v. Northrup*, 43 N.Y.2d 556 (1978) and *Bliss v. Bliss*, 66 N.Y.2d 382 (1985), the courts have held that DRL §248 imposes two requisites for the termination of alimony in the absence of marriage: (1) Habitually living with a "man" and (2) holding "herself" out as his "wife". These requirements are now of course theoretically gender neutral.

In *Northrup* and *Bliss* there was no underlying agreement/stipulation, simply a Judgment of Divorce. In *Bliss*, the parties were married for approximately 15 years, while post-divorce Mrs. Bliss resided on and off (more on than off) with a Mr. Fleming over some 14 years. In great part due to the fact that she referred to herself as "Mrs. Bliss" throughout this relationship, the Family Court granted Mrs. Bliss' DRL motion to dismiss Mr. Bliss' petition. However, a unanimous Appellate Division, First Department reversed the dismissal (107 A.D.2d 394, 396), holding that Mrs. Bliss "clearly took on all of the accoutrements of married life with Fleming and therefore the two prong test of Section 248 was satisfied."

The Court of Appeals reversed the Appellate Division, citing *Northrop*, 43 N.Y.2d 570, 571 and 572 (1978) and declaring that it is up to the Legislature to modify the requirements of DRL §248. In summary, the court construed the DRL §248 strictly and literally. Justice Sol Wachtler wrote a dissent in *Northrup*, but thereafter as Chief Judge of the Court of Appeals, joined in a unanimous decision rejecting the former husband's effort to terminate maintenance.

Markhoff v. Markoff, 225 A.D.2d 1000 (1996) is one of the few cases wherein maintenance was terminated under DRL §248. The former husband had been directed to pay his former wife maintenance until her death or remarriage. After a hearing, the Supreme Court concluded that there was sufficient evidence to terminate maintenance (then "alimony") and the wife appealed. The record on appeal demonstrated among other facts that the "new" man changed his address to the ex-wife's residence; moved in with her; wrote checks bearing the ex-wife's address; moved his personal effects to her address; registered his car there; shared a bedroom and meals; traveled together; used a common phone and fax machine and listed his address on hers and his federal tax return. When the ex-wife sought to sell her residence, potential buyers were told that the "new" man was her husband. When a process server attempted to serve her "friend" with legal papers, the ex-wife suggested the process serve come back later since "my husband takes long showers." See also *Matter of Paul S. v. Roberta S.*, 91 Misc.2d 211, Family Court, Queen County (1977), wherein ex-wife received W-2s in her boyfriend's last name, her employment records listed her boyfriend as her spouse and the lease on the boyfriend's apartment listed her as his spouse). Based upon these facts, the Family Court prior to *Bliss* determined that the "holding out" requirements of *Northrop* and *Bliss* were met.

Perhaps the most scholarly, historical and thorough analysis of DRL §248 is found in the lengthy opinion of Justice Richard A. Dollinger in the matter of *Sanseii v. Sanseii*, 48 Misc.3d 706 (2015). *Sanseii*, aside from its extraordinary analysis of DRL §248, is also interesting for its procedural posture.

The parties were not yet divorced and the court had ordered pendent lite maintenance to be paid by the husband, based upon the disparity of the parties' income. The court suspended maintenance payments in the exercise of discretion under DRL §248, and shifted the burden of proof to the wife to demonstrate her need for support. The wife was permitted to reopen the proceedings and present evidence that the continuation of maintenance was necessary to maintain independence for herself under the conditions at that time and the ruling in *Graev*.

Recently in *Kelly v. Kelly* (4th Dep't March 15, 2019), which involved a separation agreement, the Fourth Department (without any reference to *Northrup* or *Bliss* and relying on *Graev*), determined that the trial court had improperly denied the plaintiff's application to terminate maintenance. Plaintiff's maintenance obligation pursuant to the agreement terminated if defendant remarried or there was a judicial finding of cohabitation pursuant to DRL §248. Citing *Graev*, the court inquired as to whether the "relation or manner of living "resembled" marriage.

In *Kelly*, the former wife and her paramour took multiple vacations together, attended a family reunion, lived together and had a sexual relationship. The former wife also wore a diamond ring on her left hand that the paramour had purchased for her. They also shared certain expenses.

In *S. P. v. M.P.*, decided Jan. 24, 2019, the Supreme Court, Richmond County denied an ex-husband's effort to terminate spousal support. There was no agreement between the parties. The parties Judgment of Divorce interestingly provided that support could be terminated "upon the ex-wife's cohabitation" with another adult with whom she is romantically involved for a period of 60 days. Thus the trial court had modified the husband's burden by adding the term "romantically involved" and by mandating that cohabitation necessarily continue for 60 days. The Appellate Division, some 10 years after the Judgment of Divorce, later held that in addition to failing to establish cohabitation under DRL §248, the plaintiff failed to introduce sufficient evidence to establish the requisite time period for "cohabitation". The wife acknowledged a romantic relationship and that her male friend normally stayed over her house 3-4 nights a week. The court, citing *Northrup* and *Bliss*, denied the former husband's application based on a lack of "holding out."

In *Connor v. Connor,* the Appellate Division, Second Department, in denying a former husband's effort to modify or eliminate maintenance, held that there was no "holding … herself out" under DRL §248. The former wife admitted in her testimony that she had been living with a male friend with whom she was "romantically involved for less than a year." The court cited *Bliss* and *Northrup*. In *Connor*, there was also no underlying agreement.

The court in *Northrup* held that the former wife had "habitually" lived with another man and that "individuals" may » Page S7

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Even after all other issues as to custody, equitable distribution, child support and counsel fees are resolved, the "cohabitation" monster rears its ugly head.

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Inchoate Rights to Marital Property

BY JOEL R. BRANDES

When the Equitable Distribution Law (EDL) was enacted (Laws of 1980, Ch. 281, effective July 19, 1980), Domestic Relations Law §236, Part B(1)(c), gave a radically new statutory definition to "marital property." Before the EDL, if the term "marital property" was used it referred solely to jointly owned property, such as a residence owned as tenants by the entirety, or joint bank accounts. Under Domestic Relations Law §236 Part B, "marital property" includes what was previously jointly owned property and more.

Domestic Relations Law §236, Part B, (1)(c) provides that "marital property" means: "All property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in an agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined." This definition applies for purposes of equitable distribution of family assets upon divorce. It does not apply where the marriage is dissolved by death. See EPTL 5-1.2(a)(1).

The statutory definition of marital property is broad and comprehensive. See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 583 (1985). The phrase "regardless of the form in which title is held" indicates that the distribution of marital property upon dissolution is not controlled by who has legal title to a family asset produced during the marriage.

In *O'Brien*, it was noted that "marital property" as the term is used in the Equitable Distribution Law is a term of art and a new species of "property" that was not anchored in common law property concepts or affected by decisions in other states having a different statutory definition. The Court of Appeals held that an interest in a profession or a professional career potential, there a physician's license, "was marital property subject to equitable distribution." (*O'Brien* and its progeny were legislatively overruled by Laws of 2016, Ch.269.) The fact that the license was not assignable, could not be transferred and could not be sold and had no market value did not preclude the license from being a "valuable property right" that enhanced the husband's earning capacity, which the EDL had recognized by providing for distributive awards.

The public policy expressed by the definition of marital property is that the "product" of the marital partnership is subject to equitable distribution. Ordinarily, assets produced before marriage or after the execution of a separation agreement or the commencement of a matrimonial action are not the products of an on-going marital partnership. In general, the characterization of property as "marital property" occurs when a dissolution action is commenced, or when property is designated as marital in a valid agreement that conforms to the requirements of Domestic Relations Law §236(B)(3).

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In *McDermott v. McDermott*, 119 A.D.2d 370 (2d Dep't 1986), the issue was the authority of the court to limit the husband's choice of pension options. In its decision, the Second Department stated that equitable distribution created new property concepts under which the Supreme Court was authorized to limit the husband's choice of pension options.

ANDRII YALANSKYI VIA SHUTTERSTOCK

It pointed out that the centerpiece of the equitable distribution revolution was the concept of marital property and the judicial power to distribute it. The court held that under the economic partnership doctrine Mrs. McDermott began acquiring an interest in her husbands' pension from the moment he joined the plan. That interest, unenforceable and unallocated as it may have been prior to the divorce action, constituted the seed from which an inchoate interest in the pension emerged as a marital asset when the divorce action began, and matured into a true ownership interest when the equitable distribution judgment terminated the action. During the marital property phase, when a spouse's interest is still inchoate, it is protectable against unwarranted dissipation. When inchoate rights become actual ownership interests by virtue of equitable distribution judgments, they are susceptible to even greater protection because their enhancement status eliminates some of the inhibitions inherent in the exercise of injunctive power prior to distribution.

It would appear that in *Hallsville Capital, S.A. v. Dobrish*, 87 A.D.3d 933 (1st Dep't 2011), the First Department rejected the conclusion that an inchoate interest in property acquired during the marriage is created upon the marriage of the parties. It observed that Domestic Relations Law §236(B)(5)(a) provides that the court "shall provide for the disposition [of the parties' property] in a final judgment"; the statute does not "create any contingent or present vested interests, legal or equitable at any point before judgment." However, the authority it cited for its conclusion was Justice O'Connor's concurring opinion in *Leibowits v. Leibowits*, 93 A.D.2d 535, 549 (1983), which has no precedential value. See *White v. Mazella-White*, 60 A.D.3d 1047, 1048 (2009); *Musso v. Ostashko*, 468 F.3d 99, 107 (2006) ("A mere judicial declaration of equitable distribution, without entry, cannot give a spouse an interest in property superior to that of a creditor … holding a valid judgment lien.").

In *Pangea Capital Management v. Lakian*, — N.E.3d —, 2019 WL 2583109 (2019), the U.S. Court of Appeals for the Second Circuit certified the following question to the Court of Appeals: If an entered divorce judgment grants a spouse an interest in real property pursuant to Domestic Relations Law §236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property? The Court of Appeals answered the question in the negative.

John and Andrea Lakian were married in 1977. In 2002, they purchased a home on Shelter Island, Suffolk County, for $4.5 million. Title to the property was recorded in John's name and immediately transferred to a trust, for which John was the sole trustee and each spouse was a 50% beneficiary as tenant in common. In 2013, Andrea commenced an action for divorce.

When inchoate rights become **actual** ownership interests by virtue of equitable distribution judgments, they are susceptible to even greater protection because their enhancement status eliminates some of the inhibitions inherent in the exercise of injunctive power prior to distribution.

A judgment entered on June 11, 2015 incorporated by reference an agreement that settled all issues, including providing for the sale of the Shelter Island property. Under the settlement, Andrea would receive 62.5% of the proceeds plus another $75,000 and John would receive the balance.

In 2012, Pangea Capital Management brought an action against John. Pangea voluntarily discontinued that action in favor of arbitration. The arbitrator ruled in Pangea's favor on Jan. 6, 2016, and Pangea subsequently brought an action in federal court to enforce the $14 million arbitral award against John. Pangea sought and obtained an order of attachment on the Shelter Island property. Several months later, John asked the federal district court to modify the order of attachment to permit the sale of the home. The court allowed Andrea to intervene and the parties agreed to the sale and further agreed that the proceeds, totaling over $5 million, would be deposited with the Clerk of the court while the dispute over Pangea's claim to the proceeds was litigated. The parties also agreed that their rights to the proceeds would constitute the "cash equivalent" of their rights in the Shelter Island property. During this time, the federal district court confirmed the $14 million arbitral award against John and entered a judgment in Pangea's favor in November 2016, which Pangea promptly docketed.

Andrea contended that, pursuant to the terms of the divorce settlement, she was entitled to 62.5% of the sale proceeds, plus $75,000. Pangea argued that, because it docketed its judgment before Andrea docketed her judgment of divorce in Suffolk County, CPLR 5203 gave Pangea priority over Andrea with respect to the Shelter Island property.

The Court of Appeals noted that CPLR 5203(a) concerns "Priority and lien on docketing judgment," and provides, in relevant part: "No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned."

The Court of Appeals explained that under Domestic Relations Law §236(B)(1)(c), marital property is "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held." Andrea had an interest in that marital property. Citing *McDermott*, it held that "[L]egal rights to specific marital property vest upon the judgment of divorce, with 'inchoate rights' becoming "actual ownership interests by virtue of [an] equitable distribution judgment."

The court held that Pangea's conception of Andrea as judgment creditor was utterly incompatible with the legislature's dramatic revision of the Domestic Relations Law in 1980. By incorporating the concept of "marital property" into Domestic Relations Law §236, "the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law." Under that statute, both "spouses have an equitable claim to things of value arising out of the marital relationship." Marital property "hardly fall[s] within the traditional property concepts because there is no common-law property interest remotely resembling marital property." Marital assets are not owned by one spouse or another, and the dissolution of a marriage involving the division of marital assets does not render one ex-spouse the creditor of another. Andrea therefore could not properly be considered a judgment creditor of John. Thus, CPLR 5203(a), by its plain terms, had no application here, and Pangea had no priority. Subsection (a) applies to transfers of the interest of a judgment debtor in real property; the equitable distribution of Andrea's share was not the transfer of the interest of a judgment debtor to a judgment creditor. Subsection (c) concerns only the priority given to a judgment creditor as against a lien created by a petition in bankruptcy, which was irrelevant here.

The court held that the Second Circuit's decision in *Musso v. Ostashko,* had no application. In *Musso*, Tanya Ostashko obtained a decision in her matrimonial action, awarding her certain assets. Her husband's creditors immediately filed an involuntary bankruptcy petition against her husband before the judgment was entered, and the Second Circuit held that because the divorce judgment had not been entered, the bankruptcy petition took priority, and all the marital assets were within the bankruptcy estate. *Musso* addressed a question that was not present here: When an award distributing marital assets has been made, but a bankruptcy petition is filed against a spouse before the divorce judgment is entered, do all the marital assets become part of the bankruptcy estate?

Pangea also relied on *Musso*'s statement that "under New York law an equitable distribution award is a remedy, and the enforcement of that remedy is no different than the enforcement of any other judgment." That statement was dicta, and did not accurately convey New York law because an entered judgment of divorce that distributes marital property is not like a money judgment of a judgment creditor.

The judgment of divorce was "a final settling of accounts" between marital partners with an equitable interest in all marital property. Because the judgment did not render Andrea a judgment creditor of John (and it did not render John a judgment creditor of Andrea), Andrea was not subject to the docketing requirements of CPLR 5203.

Conclusion

Pangea is not the last word on the subject. In a footnote, the court pointed out that in some situations one spouse or ex-spouse might be a judgment creditor as to the other. For example, one spouse may obtain a money judgment against the other spouse pursuant to Domestic Relations Law §244. This was not the case here and the court had no reason to decide whether a spouse seeking to enforce a judgment pursuant to Domestic Relations Law §244 is a judgment creditor of the other spouse.

Who Gets **Custody** of the **Dog**?

SYLVIE BOUCHARD VIA SHUTTERSTOCK

BY LORRAINE R. SILVERMAN

You love your dog. He is just as spoiled as your children. He has toys; he sleeps in your bed; he even gets a monthly subscription box full of goodies. Along with your children, your dog is included in your Will. He is family.

While contemplating the potential end of a relationship when adding a pet to a home may seem absurd, the reality is that pets often outlive human relationships. When they do, who gets custody? Is the pet treated like a child with a sharing arrangement? If so, how are expenses for the pet divided? Most importantly, what does the law say?

For much of New York's history, dogs and other companion animals were strictly treated as property; the same as a couch or lamp. See *Mullaly v. People*, 86 N.Y. 365 (1881). That means, when a couple broke up, the court treated the pet as a piece of personal property to be awarded to one of the parties. Appreciating the connection we have with our pets, courts are finally rethinking how we treat them during a break-up.

In 1999, in a case involving a dispute over ownership of a cat, the court held: "we think it *best for all concerned*" that the cat remain with the defendant, citing the cat's old age and limited life expectancy, and the fact that he had "lived, prospered, loved and been loved" by the defendant for several years. *Raymond v. Lachmann*, 264 A.D.2d 340 (1st Dep't 1999). The court also specifically recognized the "cherished status accorded to pets in our society" as well as "the strong emotions engendered by disputes of this nature" in declining to apply a traditional property-based analysis. Id. *Raymond*'s handling of the distribution came to be known as the "best for all concerned" standard.

Since *Raymond*, several trial courts have adopted its standard. One such case occurred in 2013, wherein parties to a divorce sought possession of a dog acquired during the marriage. *Travis v. Murray*, 977 N.Y.S.2d 621 (Sup. Ct. New York Cty. 2013). At the time of the divorce, the parties had spent over two years together raising the dog. Id. at 623. In determining who would take possession of the dog, the court recognized the law regarding companion animals was grossly out of step with people's perceptions regarding their pets, stating: "While the dog owners of New York might uniformly regard their pets as being far more than mere property, the law of the State of New York is in many ways still largely at odds with that view." The court went on to acknowledge that "at the same time that the traditional property view has continued to hold sway, there has been a slow but steady move in New York case law *away* from looking at dogs and other household pets in what may be seen as an overly reductionist and utilitarian manner." Id. at 626. Highlighting the *Raymond* decision, *Travis* called it "one of the most important statements from a 'modern court' as to the 'de-chattelization' of household pets." Id. at 627. The *Travis* court explained:

> The [*Raymond*] decision is a clear statement that the concept of a household pet [] being mere property is *outmoded*. Consequently, it employs a new perspective for determining possession and ownership of a pet, one that differs radically from the traditional property analysis. *This new view takes into consideration, and gives paramount importance to, the intangible, highly subjective factors that are called into play when a cherished pet is the property at issue.*

Employing the "best for all standard," *Travis* explained that "a strict property analysis is *neither desirable nor appropriate*," because a pet "is decidedly more than a piece of property." Id. at 628. The court aptly recognized that "[t]he changes in the way society regards dogs and other household pets all but insure that cases involving [this] type of dispute … will only increase in frequency," and offered hope that *Raymond*'s guidance would assist other courts in the future. Id. at 632.

One year after *Travis* was decided, the standard was again employed in *Hennett v. Allan*, 43 Misc.3d 542 (Sup. Ct. Albany Cty. 2014). In *Hennett*, long-term partners who had never married disputed possession of their dog. When they separated, defendant signed an acknowledgment stating all of his "personal property" had been removed from their former residence, and any remaining "personal property" constituted the sole and separate property of the plaintiff. Plaintiff claimed that the dog belonged to her because it was "personal property" left at the residence. In deciding the case, Justice Michael Lynch (now of the Appellate Division, Third Department) thoughtfully analyzed the evolution of New York's case law in this area, identifying a "recent trend" determined "to treat companion dogs as more than just property." Id. at 545-46. Reviewing *Raymond* and *Travis*, Justice Lynch concluded that the dog was not "personal property" (id. at 547), declaring:

> Today, we should take the next step in recognizing that pets are more than just "personal property" when it comes to resolving disputes between owners. In such disputes … pets should be recognized as a "special category of property." It follows that the reference to "personal property" in the subject release does not extend to [the parties' dog]. Certainly, the attachment each party professes to have with [the dog] would only be consistent with recognizing that [the dog] falls within a "special category of property" that is simply not covered by the release.

Whether you're married, engaged or dating, couples often test the compatibility of their relationships by their ability to "co-parent" a treasured family pet.

But how does the court determine who gets the dog? In *Hennett*, the court determined it necessary to hold a hearing focused upon "the circumstances as to how [the dog] was acquired and cared for, and the actual arrangement between the parties for spending time with [the dog] after defendant left the [parties'] residence." Id. at 548.

Since *Hennett* was decided in 2014, a host of trial courts across the state have continued the trend of adopting this standard and turning to Justice Lynch's handling for support. In *Ramseur v. Askins* the parties disagreed over possession of a two-year-old Shih Tzu (*Ramseur v. Askins*, 44 Misc.3d 1209(A) (Civil Ct. Bronx Cty. 2014)). Citing *Hennett*, *Ramseur* held that "companion animals fall within a 'special category of property,'" and, accordingly, applied the "best for all concerned" standard. In applying the standard, *Ramseur* also saw fit to apply *Travis*'s "straightforward factors," as they provide "parties and courts clear direction when deciding with whom a treasured pet should reside." Id.

The standard was again applied the following year in *Gellenbeck v. Whitton*, where the court was asked to rule on an ownership dispute involving the family dog. There, the court held, "[c]onsistent with *Travis v. Murray*, in making its determination, this Court will apply

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Mediation

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ages. But regardless of a couple's particular issues, the need to resolve them—usually in a very specific way—serves as a guidepost for the conversation and helps the mediator keep the discussion on track.

For couples with a minor child or children, invariably the first issue on the table is who gets custody? "Custody," it turns out, is a very loaded term. Many clients come to mediation with a preconceived—and often inaccurate—notion of what it means. For two of the parents we met at the clinic, "having custody" seemed to be the very embodiment of parenting. While it is true that "having custody" has important ramifications, it needn't—and oughtn't—be a parent's sole objective. Mediation allows for less contentious examination of the ramifications of custody, and more flexibility in working out the details.

Mediators use the terms "decision-making" and "parenting time" in order to differentiate the two aspects of custody and diffuse its emotional overload. Many parents don't realize that these two aspects of "custody" are not inseparable, and do not necessarily have to be resolved in the same way. A couple may want joint decision-making with respect to decisions about education, medical treatment, and so forth, even though they expect that the children will be spending far more time with one of them. Conversely, a couple may want equal time, but be content to allow one of them to hold decision-making authority. The mediator can explain to the former that they may opt for joint custody. In the latter case, the mediator will explain that the parent with decision-making authority will be the "custodial parent."

A major premise of divorce mediation is that the parties themselves are in the best position to make decisions about child-rearing. After all, they've been doing it all along with at least some degree of success. They are familiar with the children's and their own schedules. They also know what other resources, such as family members who live nearby, are available to pick up any slack. It therefore makes sense to have a couple work out a parenting schedule with each other directly, rather than through their attorneys.

Similarly, since the parties are familiar with their finances (assuming they have been honest with each other), they are in the best position to make their own decisions about asset division. Note that, while a mediator may not give advice or evaluate the manner in which a couple plans to divide their assets, a mediator may provide information. So, for example, a mediator may tell a couple how other couples generally arrive at a value for the marital residence. A mediator also may explain how retirement accounts are handled in order to maintain favorable tax treatment, although the division itself is left to the matrimonial legal experts.

Mediating child support obligations requires familiarity with the Child Support Standards Act. The New York statute (Family Court Act §413) provides the guidelines used by courts in determining child support obligations, which are explained to the couple and recited in a mediated separation agreement. The statute also provides factors to be considered in deviating from the guidelines; and mediation provides an excellent forum for the couple to consider them. As in the case of decisions about parenting, the parties themselves are the most knowledgeable about their respective financial situations, including availability of assistance from other family members, special needs of the children, and other obligations of the non-custodial parent.

New York courts also have guidelines for computing spousal support. These, too, are explained to the couple and recited in a mediated separation agreement. Again, the parties are the ones most familiar with their respective abilities and financial needs, and are therefore in the best position to work out support arrangements for themselves. Each party will know, for example, the details of his or her employment situation and future earning potential; and each party will know his or her current intentions about seeking other employment, going back to school, relocating, and so forth.

> A mediator may decide to assign the couple **"homework"** to complete on their own between sessions. Assignments may entail dividing up the furniture, or figuring out which holidays are important to whom.

Matrimonial mediation also provides a forum for couples to work through certain estate planning issues that may arise in the context of a divorce. A couple with minor children should agree on a guardian for those children. The parties know who the options are, and how they feel about those options. The parties may decide to use life insurance as a means of securing child support or spousal support obligations. Again, in mediation, each party can decide (1) whether he or she trusts the other to receive the insurance proceeds directly, and (2) if not, who might be available to manage them instead.

Tips for Success

Sometimes it pays to start with an easy issue. Mediation ultimately may be less stressful and more efficient than litigation, but it is arduous work for the parties while they are going through it. If a couple becomes stuck on a particularly thorny issue, it generally pays to move on to a simpler one. This reduces the level of tension in the room. And once the simpler issue is resolved it gives everyone—mediators included—a sense of accomplishment, and fosters willingness to continue.

Another important mediator practice is reassuring the parties about progress. Individual mediators have different views about how much venting to allow. But even in an entirely civil conversation, a couple may spend much of a mediation session going in circles over the same issue. It's important, at the end of the conversation, to point out what progress the couple has made, and to express appreciation for the difficult work they've been doing.

Matrimonial mediation usually requires a few sessions—more if there are minor children involved. This can be used to advantage. A mediator may decide to assign the couple "homework" to complete on their own between sessions. Assignments may entail dividing up the furniture, or figuring out which holidays are important to whom. Or a couple may need "processing time" between sessions. Mediation fosters communication; and often information will surface that one or both parties need to consider further, just as we all sometimes need to "sleep on it" before making a complicated or difficult decision. I worked with one couple who spent most of a session arguing about where the children would attend school in the fall. Mom did most of the talking, so I asked Dad what he thought. At first, he replied, "Well, she's in charge of education." But when I asked again, he took a deep breath and said, "To tell you the truth, I feel emasculated [by being excluded from decision-making in this area]." We concluded the session shortly thereafter, but when they returned for the next session, all the school decisions had been made.

And that's the most appealing aspect of matrimonial mediation: Not only is it more efficient and less painful than battling over these issues in court, but sometimes something remarkable happens.

Dog

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the standard of 'what is best for all concerned,' and the parties each have the burden of proving why [the dog] will have 'a better chance of living, prospering, loving and being loved' in the care of one [party] as opposed to the other." *Gellenbeck v. Whitton*, 2015 NY Slip Op. 30289(U) (Sup. Ct. New York Cty. 2015).

Likewise, in *Nero v. Fiore*, "in an action for replevin for a pet," the Supreme Court, Nassau County, explained that it "can consider what is 'best for all concerned'" when deciding which party should retain possession of the dog (*Nero v. Fiore*, 2016 NY Slip Op. 30332(U) (Sup. Ct. Suffolk Cty. 2016). And again, in *Mitchell v. Snider*, when asked to determine whether an unmarried split-up couple's dog belonged to the ex-boyfriend who purchased it or the ex-girlfriend who possessed it, a judge in Manhattan determined that the "best for all concerned" standard was the "correct standard to be applied in dog possession cases." *Mitchell v. Snider*, 2016 NY Slip Op. 50877(U) (Civil Ct. New York Cty. 2016). In deciding the matter, the court, relying again on *Hennett*, held:

> In a case where parties claimed to have purchased and selected a dog together and they both have a strong relationship with the dog and extensive involvement with the dog's care, the court [is] tasked to determine which party [has] the most genuine right of possession through his or her conduct. Such analysis require[s] consideration of how the dog was acquired and cared for and the arrangement between the parties after one party left their joint residence.

Mitchell expanded the *Travis* factors, reasoning that "ownership is just one factor to consider when determining who should possess the dog based upon the best for all concerned analysis. The court must also consider intangible factors such as why each party would benefit from having the dog in his or her life and why the dog has a better chance of prospering, loving and being loved in the care of one party or the other." Id. *Mitchell* ultimately offered the following "best for all concerned" factors: Who is in the best position to meet the dog's daily physical and emotional needs based on a healthy, active lifestyle; time constraints on each party; type of home and yard of each party; the emotional bond each party shares with the dog; any safety concerns for the dog while in the care of either party; each party's financial ability to care for the dog; opportunities to socialize with other dogs; access to dog-friendly parks and outdoor activities; access to veterinary care and pet stores; each party's ability to care for the dog, including, but not necessarily limited to, feeding, watering, walking, grooming, bathing, petting, playing, training, taking the dog to the veterinarian and engaging in other recreational and dog-friendly activities. Id.

> While contemplating the potential end of a relationship when adding a pet to a home may seem absurd, **the reality is that pets often outlive human relationships.**

The court ultimately determined that "both parties were co-owners of the dog," as it was "evident that both parties intended to be joint owners of the dog at all times" prior to the parties' separation. Id. However, based on the circumstances of the case, the court determined that the defendant should retain possession of the dog, but noted that this was only necessitated because the plaintiff "decided to move across country and make it virtually impossible to continue their agreed upon alternating care arrangement." Id.

Most recently, Supreme Court, Nassau County retreated from this trend. In a 2018 divorce proceeding involving the contested ownership of a dog jointly cared for during a marriage (*L.F.M. v. S.R.M.*, 2018 NYLJ LEXIS 2851 (Sup. Ct. Nassau Cty. 2018)), the court analyzed the issue by first classifying the dog as to property, but by then continuing the "more recent trend" of treating companion dogs as more. Id. The court in *L.F.M.* arrived at the conclusion that "in all matrimonial matters before this court, the court adopts the 'best for all concerned' standard as the presumptive norm if pet visitation is presented to the court as an issue between the parties." Id. The court in *L.F.M.* then took this analysis a step further and concluded that, as a general rule, "[i]f there are no children of the marriage, this Court will implement a shared pet visitation schedule on a weekly or bi weekly basis depending on the parties' proximity to each other." Id.

In sum, whether you're married, engaged or dating, couples often test the compatibility of their relationships by their ability to "co-parent" a treasured family pet. Just like a future child, our pets come with emotional, psychological and financial responsibilities that may outlive our relationships. New York, through its judicial decisions, has taking note of this reality. Thanks to our thoughtful and forward-thinking judiciary, pet owners are not without recourse to determine what type of ownership arrangement of their pet is "best for all concerned."

Death

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§7-5.1[d]) established by the decedent; the decedent's contributions to joint accounts with others; the decedent's contributions to jointly owned real property or other property; the proceeds of retirement, savings-pension, deferred-compensation, death-benefit, stock-bonus or profit-sharing plans (except that, with respect to qualified plans under §401 of the IRS Code payable to the surviving spouse, only half is deemed a testamentary substitute); gifts from the decedent during his/her lifetime which, by their terms, were to revert to the decedent in the event that the recipient predeceased the decedent; the value (as of date of death) of property transferred by the decedent during his/her lifetime, where such transfers were revocable by the decedent up until the time of his/her death, the assets that otherwise remained within the control of the decedent up until the time of his/her death, or where the decedent retained the use or possession of, or the right to receive the income from, the transferred property, up until the time of his/her death; and any property transferred by the decedent, not for fair consideration, within one year before his/her death (excluding the annual gifts of up to $15,000 provided for in IRS Code §2503). EPTL §5-1.1-A(b)(1). The "conclusive presumption" is that the decedent's contribution was 50%. (The law made a decision not to require tracing between spouses.)

New York estate law mitigates against windfalls, by specifying that various financial benefits received by the surviving spouse are to be counted against the amount he/she is entitled to receive as an elective share. These include assets that pass to the surviving spouse from the decedent by intestacy (in unusual circumstances), by disposition under the decedent's will or by the testamentary substitutes discussed above. So, for example, for a couple whose assets consist primarily of a residence jointly owned by the parties as tenants by the entirety, the passing of the deceased spouse's undivided 50% share of the home to the surviving spouse by operation of law may well satisfy the surviving spouse's one-third elective share of the decedent's net estate.

The Uniform Probate Code

In contrast to New York law, the Uniform Probate Code (UPC), as updated in 2008, provides for an elective share of 50% of the *marital* portion of the decedent's "augmented estate", subject to a minimum amount called a "supplemental share." UPC §2-202. But the UPC's definition of the decedent's "augmented estate" differs from New York's "net estate" in that it focuses not only on assets that were held by the decedent (either at the time of his/her death, or before a transfer), but rather on the assets (including transferred assets) of *both* parties, and on ensuring that the surviving spouse receives a fair share of the parties *collective* assets. UPC §2-203(a). And the portion of the augmented estate that is deemed "marital" is based not on the origin of the assets, as in New York law, but on the length of the marriage, based on a graduated scale that tops out with 100% of the augmented estate deemed marital after 15 years of marriage. UPC §2-203(b).

> UPC 2-203(a) provides that
> [T]he value of the augmented estate … consists of the sum of the values of all property, whether real or personal, movable or immovable, tangible or intangible, wherever situated, that constitute
> (1) the decedent's net probate estate;
> (2) the decedent's nonprobate transfers to others;
> (3) the decedent's nonprobate transfers to the surviving spouse; and
> (4) the surviving spouse's property and nonprobate transfers to others.

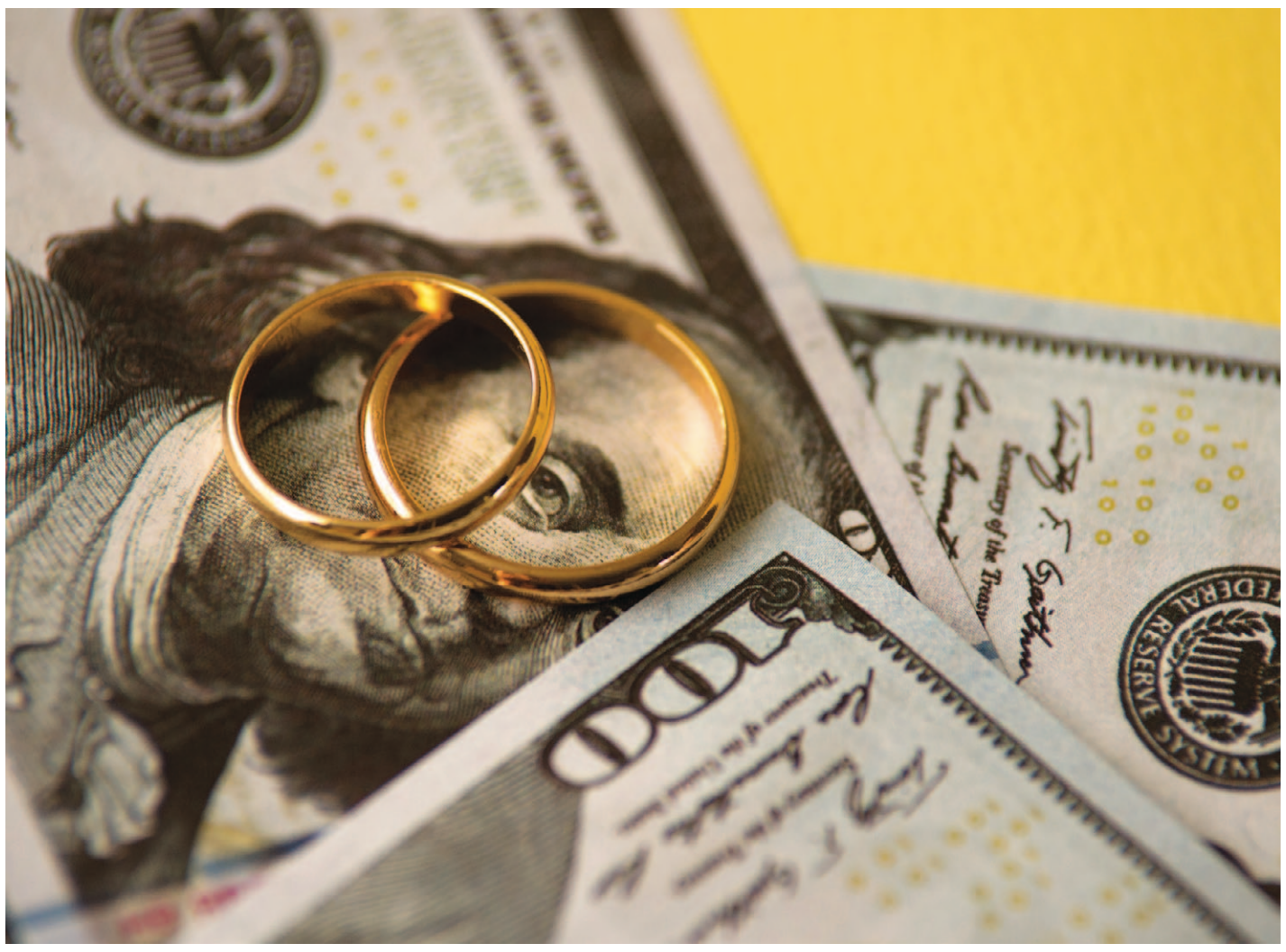
"Nonprobate transfers to others" are defined by UPC §2-205 and UPC §2-208 and are similar to the "testamentary substitutes" defined in New York's EPTL §5-1.1-A(b)(1).

To avoid windfalls, UPC §2-209 provides that the surviving spouse's elective share is to be fulfilled in the first instance by (1) assets in the augmented estate that have passed to the surviving spouse by will or by intestate succession, (2) nonprobate transfers to the surviving spouse by the decedent during his/her lifetime (as defined in UPC §2-206), which include insurance benefits paid to the surviving spouse on account of the death of the decedent (not classified as a "testamentary substitute" under New York's EPTL §5-1.1-A[b[[1]) , and/or (3) the "marital" portion of the surviving spouse's assets and nonprobate transfers (calculated as set forth in UPC §2-203[b], discussed below). If those assets are equal to or greater than the amount of the surviving spouse's elective share of the marital portion of the augmented estate, then the elective share is fulfilled without the need to override any portion of the testamentary provisions made by the decedent.

The intent of this scheme is to approach more nearly the principles behind the equitable distribution laws that apply in divorce actions in New York and most states. As explained in the Uniform Probate Code Official Comment (Article II, Part 2):

> *The main purpose [of the UPC's 2008 revisions] is to bring elective-share law into line with the contemporary view of marriage as an economic partnership … .*
> The general effect of implementing the partnership theory in elective-share law is to increase the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were disproportionately titled in the decedent's name; and to decrease or even eliminate the entitlement of a surviving spouse in a long-term marriage in cases in which the marital assets were more or less equally titled or disproportionately titled in the surviving spouse's name. *A further general effect is to decrease or even eliminate the entitlement of a surviving spouse in a short-term, later-in-life marriage … in which neither spouse contributed much, if anything, to the acquisition of the other's wealth …* except that a special supplemental elective-share amount is provided in cases in which the surviving spouse would otherwise be left without sufficient funds for support.

Id. (emphasis added). Touching on an issue that is often a sensitive one in late-in-life marriages, and often gives rise to prenuptial agreements, the same Comment observes that "*Conventional elective-share law … basically rewards the children of the remarried spouse who manages to outlive the other, arranging for those children a windfall share of one-third of the loser's estate."* (emphasis added).



BURDUN ILIYA VIA SHUTTERSTOCK

Under UPC §2-203(b)'s "Alternative A," the "marital portion" of the parties assets is established via a presumption based on the length of the marriage, rather than based on the factors that distinguish marital property from separate property under the laws of New York and other states which often give rise to extensive and expensive litigation. UPC §2-203(b). *The adoption of that approach to defining "marital property" would be very consequential, however, in cases where the marriage is of long duration, and the decedent had a large amount of pre-marital or inherited assets.* It is presumably for that reason that UPC §2-203(b) offers an "Alternative B." Under "Alternative B," marital property is defined pursuant to the terms of the Model Marital Property Act or the "definition chosen by the enacting state."

Living Separate and Apart and Abandonment: New York Law

Another variable to be considered in the "death vs. divorce" analysis is whether a spouse will lose or has lost the right to an elective share due to abandonment or the like. EPTL §5-1.2(a)(5) bars a surviving spouse from claiming an intestate share or an elective share where "[t]he spouse abandoned the deceased spouse, and such abandonment continued until the time of death." New York law also denies the right to an elective share to a spouse "who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having need of support." EPTL §5-1.2(a)(6).

New York's courts have set a high bar for disqualification from the right to receive an elective share based on abandonment. In *Matter of Reifberg's Estate*, 58 N.Y.2d 134 (1983), the Court of Appeals, citing, inter alia, *Matter of Maiden*, 284 N.Y. 429 (1940), explained:

> It is axiomatic that, to challenge a spouse's right of election [based on abandonment], *more must be shown than a mere departure from the marital abode and a consequent living separate and apart*. Sensitive to the reality that marital partnerships … run the range of conflicts common to all human relationships, the law has long required that *one who seeks to impose such a forfeiture must, in addition, establish, as in an action for separation, that the abandonment was unjustified and without the consent of the other spouse*.

Id. at 138 (citations omitted and emphasis added). Accord *Estate of Arrathoon*, 49 A.D.3d 325 (1st Dep't 2008) (no abandonment where "petitioner and decedent, who had been married for 65 years, were each forced by circumstances to live with, or near, the child who could provide them with emotional and practical support … and that their separate living arrangements were necessitated by their advanced age and failing health"). See, however, *Estate of Maull*, 161 A.D.3d 570, 571 (1st Dep't 2018) (court below "properly determined that petitioner abandoned decedent and that the abandonment was unjustified in that it was the result of orders of protection against him in favor of decedent … based on his acts of domestic violence").

New York's courts have **set a high bar for disqualification** from the right to receive an **elective share based on abandonment.**

Fault grounds, such as cruel and inhuman treatment (including domestic violence) and abandonment, may have lost their vitality as grounds for divorce, but they retain it for providing justification for denying wrongdoer surviving spouses their elective shares.

Offspring's Rights: Death vs. Divorce

In contrast with the strong concern with child support in the context of divorce actions, as manifested by New York's very strong and long Child Support Standards Act based on the payor parent's gross income and applicable until the child has reached age 21 neither the UPC nor the trusts and estates laws of New York and the 48 other common-law states mandate that a decedent's minor children must receive any share at all of the decedent's estate even if disinheritance leaves them destitute. By contrast, the one civil law state, Louisiana, grants the child of a decedent the right to receive a share of the decedent's estate if he/she is under the age of 24, or is "permanently incapable of taking care of his or her person or administering his or her estate" due to "mental incapacity or physical infirmity." Louisiana Statutes Annotated, Louisiana Civil Code (LSA-CC) Article 1493. But even in Louisiana, a parent may disinherit such a child for any of eight specified reasons that constitute "just cause." LSA-CC Articles 1619-1621.

Hypothetical: Arithmetic Examples for Death vs. Divorce

Husband and wife were married 10 years ago. It was the second marriage for both. Husband is now 72. Wife is now 60. Husband retired three years ago. The parties reside in New York.

Husband has the following assets:

- His undivided joint interest in the marital residence, with a market value of $800,000, which has no mortgage, and which the Husband owned prior to the marriage. Shortly after the marriage, Husband conveyed title to Husband and Wife jointly, as tenants by the entireties. But the parties signed a memorandum stating that the Husband's intent was not to surrender his separate-property interest in the marital residence in the event of divorce, but to ensure that Husband's interest would pass to Wife in the event of his death during an intact marriage.
- Bank and securities accounts, solely titled in Husband's name, with a total value of $500,000, only $200,000 of which would be deemed marital in the event of a divorce.
- Retirement assets of $600,000, all of it in a qualified plan under ERISA and §401 of the IRS Code, $250,000 of which was accumulated during the marriage of the parties. As part of Husband's divorce settlement with his first wife, Husband retained all of the retirement assets and wife number one waived her interest therein.

In a New York divorce action, only marital assets would be subject to equitable distribution. Since the marital assets would amount to $450,000 in this hypothetical—the marital portions of the bank and securities accounts and the retirement plan—Wife might expect to receive equitable distribution of $225,000, or perhaps a little more if the Wife did not have any significant assets of her own, and the court awarded her more than 50%. Because Husband is retired, Wife would likely receive little or no maintenance.

If Husband were to die while the parties were still married, however, Wife would end up in a much better financial position than in divorce, even if Husband had executed a will purporting to leave his entire state to his daughter by his first marriage. While the marital residence would be treated as separate property in a divorce action, upon Husband's death, sole title to the marital residence worth $800,000 would pass to Wife outside Husband's estate by operation of law (a testamentary substitute to the extent of half the value thereof, or $400,000). As surviving spouse, Wife would also receive the $600,000 in Husband's ERISA retirement plan outside of Husband's estate, thereby emerging with assets worth $1.4 million. If Husband had *not* made Wife joint title- owner of the marital residence, Wife would still receive the $600,000 in Husband's retirement account—more than the one-third of Husband's net estate of $1,150,000, namely, $383,333, computed as follows: $400,000 (one-half the value of the marital residence) plus $300,000 (one-half of the amount in his retirement account), plus $500,000 (100% of his solely titled bank and securities accounts), minus $50,000 (the estate's estimated administration expenses) equals a net estate of $1,150,000, one-third of which would be $383,333. Wife's elective share would be more than satisfied by the $600,000 in retirement funds alone and all the more so if she received the marital residence as well. In either case, Wife would do better financially as a result of Husband's death during the intact marriage than she would in a divorce.

Conclusion

Whether a spouse should take the "death gamble" and wait it out, or opt for an immediate divorce, depends on numerous variables. Where the decedent is domiciled at the time of his/her death will be a key factor, and one which, especially in a dysfunctional marriage, may well be beyond the control of the surviving spouse. The possibility of the estate being denuded by the decedent before his/her death is another factor. What does the spreadsheet comparing the bottom lines in death and divorce show? Will waiting it out be safe? Tolerable? These and other questions will need to be answered. Giving the client the best possible advice requires the attorney's careful assessment of all possible variables.

Maintenance

« Continued from page S3

conform to the lifestyle of a married couple, *but that still is not enough*." 43 N.Y.2d at 572. Compare that reasoning with *Kelly*, where the court concluded that plaintiff established by a preponderance of the evidence, that defendant was engaged in a relationship or living with a man, in a manner "resembling or suggestive" of marriage, but this was not enough to terminate maintenance. In *Kelly*, apparently the parties conduct was enough.

The reluctance of the court to liberally construe DRL §248 and the need for specificity in drafting is made evident by *Matter of Patti Blonder v. Evan Blonder*, decided by the Second Department on April 17, 2019. *Blonder* concerned a separation agreement, incorporated but not merged in a judgment of divorce. The husband sought to compel the sale of the former marital home. The parties' separation agreement provided that the husband would pay the wife maintenance for a total of seven years, noting that "maintenance payments to the [respondent] shall end upon the death or remarriage of the [respondent], or the death of the [appellant]." The Agreement further provided the Wife with exclusive occupancy of the marital home until the parties' youngest child turned 18 or graduated high school, the respondent's marriage or the respondent's cohabitation with an unrelated male.

The parties subsequently entered into an amendment to the separation agreement, agreeing to sell the home. Importantly, the amendment did not modify the husband's maintenance obligation. The husband ceased paying the wife maintenance, alleging that the wife was "holding [herself] out" as another's wife. The Family Court dismissed the husband's claim.

In affirming, the Appellate Division held: "Here, the term 'remarriage' as used in the *maintenance provision* of the parties Separation Agreement is unambiguous and not subject to interpretation." The "house" and "maintenance" provisions were deemed independent.

The Take Away

When drafting a separation agreement or stipulation of settlement, the scribe must be very specific in defining cohabitation and the requisites to terminate maintenance to a former spouse.

The reluctance of the court to liberally construe DRL §248 and the need for specificity in drafting is made evident by 'Matter of Patti Blonder v. Evan Blonder'.

In connection with child custodial issues, the court recognizes traditional and non-traditional relationships, regardless of an actual marriage. Even non-married parties may be interested parties with standing as to custody and support. However, unless there are carefully drafted cohabitation provisions, the court will still look to the *actual remarriage* of a former spouse with a literal and myopic reading of DRL §248.

While the courts and the Marriage Equality Act have expanded the traditional definition of a "parent" or "family", DRL §248 has not kept pace with the realities of human relationships. The legislature in its wisdom should consider grounds for termination short of "holding out", based upon the conduct of the former spouse over a relative period of time.

Justice Dollinger concluded that a strict reading of *Northrop* will result in never being able to attain the equitable power the legislature intended to provide the judiciary. If the purpose of maintenance is intended to provide the former spouse with the ability to obtain economic independence, then "when a former spouse lives in a marriage-like relationship with another and they 'hold themselves out' as an 'income unit' and a recipient spouse 'holds' herself out as economically intertwined with another, the underlying purpose of a maintenance payment by the former spouse is undercut."

California is a Community Property State, however New York legislators or courts can look to California Family Code §4323(a), which states:

> (1) Except as otherwise agreed to by the parties in writing, there is a *rebuttable presumption* affecting the burden of proof, of decreased need for spousal support of the supported party is cohabitating with a non-marital partner. Upon a determination that circumstances have changed, the Court may modify or terminate the spousal support as provided for in Chapter 6 of the Code … .
> (2) *Holding oneself* out to be the spouse of the person with whom one is cohabiting *is not necessary* to constitute cohabitation as the term is used in this subdivision.

New Jersey, has taken a more progressive approach than that of New York. In New Jersey: "Cohabitation is defined as a mutually supportive intimate personal relationship … with duties and privileges associated with marriage …. but not necessarily with a single household." The payor spouse is eligible to seek a suspension or termination if cohabitation is proven. The court then list the factors for suspension or termination. 2014 New Jersey Revised Statutes. Title A—Administrative of Civil and Criminal Justice Section 2A: 34-23 alimony, maintenance (NJ Rev. Stat §2A: 34-23(2014)) (Section n.).

Today "social realities" require a significant modification of the interpretation of DRL §248, even more so than when Judge Wachtler called for such recognition some 34 years ago in *Bliss*.

The reluctance of the court to liberally construe DRL §248 and the need for specificity in drafting is made evident by 'Matter of Patti Blonder v. Evan Blonder'.