PENNSYLVANIA BAR ASSOCIATION
Your Other Partner

Pennsylvania Family Lawyer

Volume 44, Issue No. 2

From the Chair

By Helen E. Casale

Helen E. Casale

In order to prepare to write this update, I went back and took a look at my notes from when I was elected as the incoming treasurer of the Section, a mere five years ago. I wanted to see what I thought I wanted to accomplish. Right from the start, I knew I wanted to improve this Section in so many ways. I really wanted to appeal to the family lawyer just starting out in his practice. I wanted to be able to show that new lawyer what the PBA Family Law Section can deliver to make his practice even better. I think the Section, as a whole, accomplished this task.

Throughout this year, I wanted our Executive Committee to be more visible. I sent out periodic video messages to update our Section members as to what our Section was working on. I realized that some of our members could not simply rely on the two in-person meetings per year to gain this insight. In addition, during the in-person meetings, I changed the business meeting to Saturday instead of Sunday to make it more convenient for our in-person attendees to find out what Council was deciding and doing. Also, our 2020-2021 Chair **Dave Schanbacher,** put the wheels in motion for the Law in the Family podcast. We had many episodes premier this year on a variety of family law topics that reached members across the commonwealth. And, of course, our *Family Lawyer* committee chairs, **Elizabeth Fineman** and **Judy Springer**, continued to roll out our quarterly newsletter. They worked diligently to recruit a number of contributors to author articles and case law updates. This is not an easy task. Editing this newsletter is very time consuming. However, I truly believe it is one of the most valuable deliverables we have for our members.

We worked hard to develop programming for the Winter and Summer meetings with topics to appeal to many different family lawyers including adoption, dependency, complex financial issues and mental health issues. The Health and Wellness Committee reached out to all of our members to gain a better understanding of what family lawyers needed to strike a balance in their practice and home lives. We are also hoping that going into the 2022-2023 PBA year we will be able to coordinate regional dinners with judges as guest speakers in counties such as Dauphin, Westmoreland and perhaps Erie and Lackawanna. We want to add counties to that list to continue this reach out to our members that do not reside in the Pittsburgh or Philadelphia area. I recognize Pennsylvania is a commonwealth made up of small, medium and large counties with a plethora of family law attorneys that see many different issues and circumstances. Understanding the differences in all of these practices helps all of us become better family law attorneys overall.

Of course, my most ambitious project was the making and producing of a video to help parents, judges, court staff and family law practitioners better understand what needs to occur during custody exchanges for children and demonstrate different ways of communication between parents. Our Video Task Force took this project on with gusto and I am so proud to say we are ready to preview it for everyone at the Summer Meeting in Newport. It will also be available online. As I have stated previously, this video would have never come to fruition without the hard work of our Task Force chairs, **Carolyn Zack, Christina DeMatteo, Kelley Fazzini** and **Colleen Norcross**.

While I do recognize that a large cross section of our members do not attend the in-person meetings, I am hoping some will make an exception this year. We will be in Newport, Rhode Island, for the first time ever. As this pandemic continues, it seems as though people are trying to get back to "normal" and we certainly hope to see this in our attendance at the Summer Meeting and get back

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From the Editors

By Elizabeth J. Fineman and Judy M. Springer

Elizabeth J. Fineman

Judy M. Springer

With temperatures and expenses rising, we hope that this issue finds you well and looking forward to summer activities and perhaps summer vacation.

This issue of the *Pennsylvania Family Lawyer* begins with Helen Casale's final From the Chair column. We thank Helen for her contributions to and support of the *Pennsylvania Family Lawyer* this year. On behalf of the Family Law Section, we also thank her for her leadership of the section. Helen took the brave step of resuming in-person meetings for the section, with an eye toward keeping section members and families safe.

In this issue, you will once again find columns for the Military, Technology, Legislative, Rules, Alternative Dispute Resolution and section news. This issue also contains articles on service of process in parental termination cases, parental alienation, and partition actions for unmarried couples. In line with Helen's theme of wellness for attorneys which she has focused on during her term, you will also find an article about putting yourself first sometimes. Be sure to read the Case Notes section, which contains an unusually high number of cases to consider in your practice.

The meeting next month should provide lots of opportunities to reconnect and recharge in the beautiful setting of Newport, Rhode Island. We hope that you are able to attend and take advantage of all that the meeting plans to offer.

Keep sending in submissions and ideas for us. If you have any articles or even fictional stories or other literary pieces you would like to share, please pass them along to us. Please also continue submitting all of your news and updates to Adam Tanker. We hope that you have a healthy and fun summer!

Elizabeth J. Fineman is a partner at Antheil Maslow & MacMinn LLP in Doylestown. She is co-chair of the Bucks County Bar Association Family Law Section, a member of the Doris Jonas Freed American Inn of Court and served on the executive board. Fineman earned a bachelor of arts in government and law from Lafayette College and earned both a Juris Doctor and LL.M. in taxation from Temple University Beasley School of Law.
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Law In the Family Blog

By Anthony Hoover and Aaron Weems

The Pennsylvania Bar Association Family Law Section recently released a new podcast on September 30, 2021, titled "Law in the Family" to serve as a platform for discussing interesting and emerging issues in the law, as well as events within the PBA Family Law Section. Though a family law-oriented podcast, the topics will often delve into other areas of law and commerce as we interview a variety of people from diverse professions and viewpoints.

The podcast is hosted by Anthony Hoover of Levin Hoover Family Law Firm and Aaron Weems of Fox Rothschild LLP with episodes available on iTunes, Spotify and Anchor. Several episodes have been released with more in production on topics such as parental alienation, cryptocurrency, medicinal marijuana and building a law practice. The podcast is intended to be a way to connect with Section members, and we hope to continue to expand our reach into other topic areas you would like to hear about.

Each issue of the *Family Lawyer* will include a list of the episodes released since the prior issue with a link to all episodes. Two more episodes have since been released since the spring issue:

Episode 13 – Arbitration in Family Law Cases with Shelly Grossman and Carolyn Zack

Episode 14 – Dealing with Repeat Custody Filings and Frivolous Petitions with Skip Persick

Click on the link to listen to these and every episode of Law in the Family!

Listen to Law in the Family Podcast

Anthony M. Hoover is a founding member of the Levin Hoover Family Law Firm. Anthony is a prior adjunct professor of family law, prior chair of the PBA Family Law Section Rules Committee, prior member of the PBA Family Law Section Programming Committee, a co-host of the PBA Law in the Familiy prodcast, and regularly writes and speaks regarding complex family law topics. He can be reached at Anthony@LevinHooverLaw.com or (717) 888-9952.

Aaron D. Weems is a litigation partner in Fox Rothschild's Family Law practice group and based in the firm's Blue Bell, Montgomery County office. Aaron is involved in a variety of local and state bar association activities, including serving as a chair of the Montgomery County Bar Association Family Law Section, Council for the PBA Family Law Section, and on PBA's Family Law Section Executive Committee. Aaron is a Villanova University and Villanova University School of Law graduate. He can be reached at (610) 397-7989 or AWeems@foxrothschild.com.

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Authors' submission due dates: fall issue — Sept. 1; winter issue — Nov. 1; spring 2023 issue — March 1; summer 2023 issue — May 1

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From the Chair

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to "full capacity" for our registration. Program Chairs **Lauren Sorrentino** and **Julie Colton** have developed an amazing line up of programming for the weekend. We will be touching on Constitutional issues, gender identity issues, ART and adoption issues, issues we confront in our practice on businesses and how the new support guidelines are impacting our practice now that we have seen them in play since January — and that's all just on Friday! On Saturday, we will have **Bill Eddy** from the High Conflict Institute as our plenary speaker immediately followed by the preview of our parenting video and a round table discussion with some of our actors. On Sunday, the case law updates are back with a great group of young speakers moderated by the unflappable **Elizabeth Early** in a repeat performance.

We have all experienced so much change and turmoil over the last two years. No one could have ever imagined we would be locked up in our homes for so long and afraid to come out to go to the grocery store, school, gym or office. It really showed us what is important in our lives – our families and friends. We found new ways to connect with one another and, now that we are transitioning back to our "old ways" I think we are doing it in a more thoughtful manner. We have seen our country so divided and watched (especially over these last few months) violence escalate around us. I truly believe, however, that things will get better. I believe this is true for the Family Law Section as well. Each year, we get better and better. With this new slate of officers coming in for the 2022-2023 PBA year, I am confident that we have so much to look forward to on the horizon. What we do is not easy. We have seen so many people "broken" over the years and even more so now. My practice is full of adults and children suffering through mental health crises. It creates a challenge for all of us as family law practitioners. We are stronger though if we stand together. I want you to use the Family Law Section to make yourself an even better lawyer so we can help those that cannot see that light at the end of the tunnel.

Helen E. Casale is a shareholder with Hangley Aronchick Segal Pudlin & Schiller in Norristown; chair of the PBA Family Law Section; Fellow of the American Academy of Matrimonial Lawyers; co-chair of the Membership and Marketing Committee for the American Bar Association, Section of Litigation. She is a current member of the Montgomery Bar Association and its Family Law Section as well as the New Jersey State Bar Association and its Familiy Law Section. She is admitted to practice in Pennsylvania and New Jersey.

Upcoming PBA Family Law Section Meetings

PBA Family Law Section Summer Meeting
July 14-17, 2022
Newport Marriott, Newport, RI

PBA Family Law Section Winter Meeting
January 13-15, 2023
The Hotel Hershey, Hershey, PA

PBA Family Law Section Summer Meeting
July 13-16, 2023
The Sagamore Resort on Lake George, Bolton Landing, NY

PBA Family Law Section Winter Meeting
January 10-14, 2024
Charleston Place, A Belmond Hotel, Charleston, SC

PBA Family Law Section Summer Meeting
July 10-14, 2024
Hyatt Regency Chesapeake Bay, Cambridge, MD

Court Reviews Proper Service for Parental Termination

By James W. Cushing

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Being properly served or noticed of court proceedings is perhaps the most basic element of due process for anyone involved in the court system. Receiving proper notice is especially important when one's parental rights are to be terminated.

In the matter of *In Re: M.K., a Minor, Appeal of: R.J.K., Father*, 2022 Pa. Super. 7, the Pennsylvania Superior Court considered whether a father — R.J.K. — received proper notice of a hearing to terminate his parental rights. In *M.K.* the Court of Common Pleas of Lancaster County involuntarily terminated R.J.K.'s parental rights to his daughter M.K. after a hearing at which R.J.K. did not appear.

Children and Youth Services ("CYS") had been involved with R.J.K. and M.K. since 2009. For most of the child's life, R.J.K resided in Ohio, and the child was adjudicated dependent in 2018 when she was 12 years old. While the child was in the care of CYS, a permanency plan was developed with the goal of reuniting the child with her father. Eventually, on March 29, 2021, CYS filed a Petition to Terminate R.J.K.'s parental rights, alleged that R.J.K. failed to complete the requirements of the permanency plan and determined that terminating father's parental rights would best serve the needs and welfare of the child.

A hearing on the Petition to Terminate was scheduled on June 14, 2021. In the interim, between the filing of the Petition to Terminate and the hearing on the same, R.J.K. appeared at a permanency review hearing on April 26, 2021. During the April 26, 2021, hearing, the date of the termination hearing was stated twice on the record. Although R.J.K. did not appear at the June 14, 2021, termination hearing, his attorney did, and attempted to contact his client during the hearing. Ultimately, as R.J.K. did not appear, the trial court ruled against him and terminated his parental rights. R.J.K. appealed to the Pennsylvania Superior Court which affirmed the decision of the trial court.

When evaluating this matter, the Pennsylvania Superior Court first addressed the significance of service of process in a parental termination hearing by noting that it is protected by nothing less than the due process clause of the Fourteenth Amendment of the United States Constitution. Constitutional due process requires a litigant to receive adequate notice, and the chance to defend oneself in a court proceeding. Accordingly, the Court indicated that while due process may be flexible, in a matter as significant as parental termination, strict compliance with service procedures is required.

In addition to the U.S. Constitution, the court noted that the relevant mode of service of process in this sort of matter is laid out in the Adoption Act of Pennsylvania (Section 2513) and requires service via personal service or registered mail. In addition, the Pennsylvania Orphans' Court Rule 15.6 requires notice via personal service or registered or certified mail.

In the instant matter, R.J.K. was present at five hearings prior to the June 14, 2021, hearing, and had never indicated a change of address. According to the record at the April 26, 2021 hearing, the Court instructed R.J.K. to be present at the June 14, 2021, hearing, and CYS sent notice of the hearing to his last known address via certified mail. The agency received a receipt showing delivery of the notice on May 14, 2021, a full month prior to the hearing. Despite this, the trial court was informed at the June 14, 2021, hearing that R.J.K. had not been in contact with CYS or his attorney since at least April 2021.

R.J.K. argued to the Superior Court that mentioning a hearing date at a prior hearing is not one of the procedurally authorized ways to provide notice (per the laws and rules noted above). Furthermore, he contended the alleged certified mail delivery of the hearing notice was lacking as it was not signed by him or some other individual at his residence, but was, instead, merely asserted to have been delivered by the United States postal worker who allegedly delivered it. Consequently, R.J.K. reasoned, there was no evidence of delivery upon an actual adult at his residence. In addition, R.J.K. observed that there is no evidence at all that anyone ever attempted to personally serve him with the hearing notice.

In making its ruling, the Superior Court found no error of law or abuse of discretion from the trial court. The Superior Court believed that delivery via certified mail was sufficiently proved regardless of the lack of a signature as the United States Postal Service tracking history indicated delivery.

Significantly, for the Superior Court, was the fact that R.J.K.'s attorney was present at the June 14, 2021, hearing and, despite his inability to contact his client or explain R.J.K.'s absence at the aforesaid hearing, he, somewhat inexplicably, never requested a continuance of the hearing in order to attempt to secure his client's appearance at a rescheduled hearing.

The Superior Court also observed that R.J.K.'s arguments appeared semantical in that he never argued he did not receive notice, only that he did not sign the card for certified mail. Based on that, therefore, the Superior Court ruled that the trial court could conclude he received sufficient notice, especially when viewed in

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Avoiding the Parental Alienation Trap

By Robert D. Weinberg
In Consultation with Dr. Eric Bernstein

Written in collaboration with Dr. Eric Bernstein, a licensed psychologist, who for almost 20 years has worked as a child custody evaluator in Western Pennsylvania and with experience in investigating for parental alienation, this article is an attempt to bring attention to an important matter for our interest, how to investigate for, and respond to issues of parental alienation.

Parental alienation undoubtedly occurs in high conflict custody cases. Oftentimes the favored parent may not even realize that he or she is engaging in alienating conduct, such as removing the other parent's picture or refusing to talk to the other parent at a baseball game. This subtle messaging can have serious, deleterious consequences for the child's relationship with the other parent.

However, focus on parental alienation to the exclusion of other factors can result in missing the broader problems that often lead to parent/child estrangement. The more effective approach to dealing with "alienation" facts is to consider such evidence as a part of a larger rubric commonly referred to as "resist and refuse problems" (RRP). RRP will consider the bad actions of one parent but, more importantly, RRP will scrutinize the entire family system to come to an understanding as to why a child is rejecting a parent; it also informs the remedy.

The RRP rubric is multidimensional. It looks at parenting style: is the parent affectionate, empathic and supportive? Is the parent permissive, submissive or passive? Or is the parent unemphatic, unresponsive or even cold toward the child?

RRP also considers parenting style on a spectrum ranging from passive to authoritative to authoritarian. When combined with a parent's nature, you have effective parents who are warm, empathic, and appropriately authoritative, to parents who are possibly warm but permissive or even passive, to parents who are cold and authoritarian.

RRP also looks at the needs of the child at issue in terms of how they fit with parenting style. Much of this can be gleaned from each parent's historical involvement in caretaking and nature of the parent/child relationship over the child's life.

All of these elements come together in an effort to understand the family system and the dynamic forces at play in the various relationships to begin to try to understand why a child may reject a parent.

For example, if dad was frequently absent when a child was young and mother was a constant, this factor would suggest that the child would naturally have an affinity for mother later in life.

In this example, perhaps the dad is more authoritative and a bit "colder" or less empathic in his interactions with the child. When the parties ultimately separate, dad's efforts to set limits that he feels are appropriate, but may be more draconian than mother's, would understandably be met by the child's preference for the comfortable caretaker without resort to any discussion of alienation.

Add to the mix that perhaps the mother is permissive but loving in her parenting style: the child gets to choose. Now the child is empowered to refuse time with dad. The family dynamic is increasingly unhealthy; yet alienation is still not a part of the problem. Of course, there are issues of abuse, neglect, mistreatment, trauma and violence that could color a child's perspective and relationship with a parent.

Now assume that mom is angry at dad. Perhaps he cheated. Mom may signal through her conduct — putting

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conjunction with the fact that he was told of the June 14, 2021, hearing date twice at the April 26, 2021, hearing.

Based on the above, the Superior Court ruled that R.J.K. did receive adequate notice of his parental termination hearing, and affirmed the decision of the trial court.

This case is a cautionary tale to litigants, especially in dependency matters. While effectuating sufficient notice is a basic element for due process, evaluating whether someone received notice can be subject to an analysis that takes a somewhat holistic view of a case, and how and when someone is informed of a hearing.

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Avoiding the Parental Alienation Trap

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away dad's picture at her house — that dad did something wrong. She may not even realize that her behavior is signaling to an aligned child that the child needs to assuage mom's demonstrated stress by rejecting dad. The child starts to feel an internal loyalty divide and needs to message fealty to mom by calling dad names or refusing to go with him. The fun memories with dad are quickly forgotten and expunged. Mom may even "parentify" the child or rely on the child for emotional support, which serves to further erode appropriate parent/child boundaries.

Now add into this miasma that, in a pique of anger, mom has made some negative comments about dad to the child. "Your dad missed your game because he was with his girlfriend." "Your dad lied about where he was last night." Or perhaps the child has a phone and calls mom while at dad's house, afraid for some unjustified reason. And mom, instead of saying "you're fine," comes and picks the child up.

Mom's behavior is clearly problematic. But it is not the only reason, and not necessarily even the most important reason, why a child comes to reject a parent. Indeed, a child in this scenario with a stronger bond with dad would be more able to see how mom's statements don't align with his or her own concrete experiences; but where dad's relationship is frail or his own conduct has, at least in part, informed the child's worldview, mom's conduct becomes all the more impactful in buttressing the child's rejection of dad.

Under any scenario, however, waging an alienation war against mom will only deepen the divide between dad and child. Yes, mom's "bad" acts need to be addressed and stopped. But, more importantly, the mom in this example — the aligned parent — absolutely must be a part of the solution, and this is where the alienation trap leads estranged parents astray.

Many commentators on parental alienation suggest that the offending "alienator" must be removed from the children to reverse their estrangement. There are several programs and professionals, the subject of much controversy, who support a "de-programming" methodology, which can be as severe as a total expungement of the offending parent for a brief or even extended period from the estranged children's lives.

To correct the family dynamic, however, all family members must have a seat at the table. And the aligned parent holds the key to changing the direction of the family system.

In order to make this change, all elements of the family system need to be addressed. In the example above, dad needs to improve his parenting style; he needs to respond empathically to concerns of the child without accusing or belittling the child or the mother. Mother also needs to reform her parenting style; she needs to learn not only how to set limits in her house but also how to support reasonable limits at dad's house (and why failing to do so will have a negative impact on her own relationship later). Mom cannot be a lifeline to pick up the child at any time because he or she is "uncomfortable" at dad's: realigning the family system will invariably be uncomfortable, awkward and stressful for everyone. Further, both parties need to work on co-parenting to harmonize their efforts with the child.

Critically, the child needs to work through the reasons for rejecting a parent. Considering the child's age and maturity, this starts with taking head-on the stated justifications for the rejection; some of these may be legitimate and fact-based. However, the child also needs to work through the unjustified reasons for rejecting a parent in a sensitive therapeutic process that is fully supported by both parents.

The entire "reunification" process is best overseen by a team of skilled clinicians with significant experience not just in psychology but in working with families of separation and divorce. It should truly be a treatment "team" working in concert with each other to harmonize their messaging to the entire family and to ensure consistency in the treatment approach.

Indeed, one of the major drivers of a family system failure is the involvement of clinicians who are not experienced in this specific area and who may, unwittingly, reinforce the unjustified rejection of a parent by a child or who may push a parent to attack the other in unconstructive ways (such as by waging an alienation accusation campaign) because the therapist is acting as an advocate for their patient.

Attorneys and courts must also support this shift in addressing RRP. Contempt claims and legal remedies will only serve to entrench the family dynamic problems. It makes no sense to have the sheriff try to make a child go — all of this tells a child that going with the estranged parent is a punishment and thus serves to deepen the child's rejection. And further evaluations may serve to make a child angrier — probably at the estranged parent — when the likely recommendation will be for the family to participate in therapy.

Of course, a trial may be necessary. But the court's authority should be utilized to coerce compliance with the therapeutic treatment regimen; regular status conferences with counsel and the lead reunification therapist would allow the court to ensure that all parties are engaged and acting in good faith.

The judicial framework for addressing RRP should be a specific, detailed court order that requires the parties and children to participate in an intensive reunification process; sanctions should apply to noncompliance with the therapeutic process as opposed to forcing a child to go with the other parent. The order should include authority for the clinicians to direct the dates and times of appointments; to dictate short periods of custody with the estranged parent; and to allow access to all information and professionals —

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including therapists — that had worked previously with all family members.

Time is of the essence: every day that passes without addressing the negative dynamic will serve to intensify the child's rejection and reduce the chances for a more positive outcome.

All participants in the reunification effort must agree on a simple message: it is in the child's best interests to have healthy relationships with both parents, as children who unjustifiably reject a parent will invariably have their own mental health issues and relationship difficulties — including possibly rejecting the favored parent down the road.

The estranged parent must accept that success may be simply having dinner with the child without a supervisor or a series of positive text exchanges. Progress toward reunification will be painfully slow even if the aligned parent is supportive. Estranged parents must also learn to listen to their child without interruption or challenge and to respond with simple empathy, even to lies. Expectations must be managed accordingly.

The aligned parent must message to the child that he or she will not be upset if the child shows affection for the other parent.

The framework may also require the services of a third party "supervisor," who, ideally, can develop a comfort level with the child and who can accompany transitions and even oversee interactions with the estranged parent. Many parents would balk at the notion of being "supervised," but this intervention provides a level of protection for the estranged parent from false claims as much as it serves to "protect" the child.

These remedies and interventions necessarily reject the notion that parental alienation explains everything. Indeed, a simple focus on parental alienation to exclusion of all other factors will only further trap estranged parents in a never-ending cycle of litigation without any real hope of a successful reunification.

Dr. Eric Bernstein is most recognized for his work in matters concerning child custody, child dependency and juvenile delinquency. He routinely investigates for children's best interests and with consideration to issues of violence, risk, addiction, alienation, abuse and parenting. Having performed several thousand evaluations, testified approximately two hundred times as an expert for the Court, and practicing in approximately 12 counties and in two different states, Dr. Bernstein is skilled in negotiating through complex and layered cases. On a national level, he presented at Association of Family, Conciliation, and Courts (AFCC), and more locally, for the Pennsylvania Psychological Association, Mid-Annual Judges Conference and Pennsylvania Bar Association about matters concerning professional ethics, domestic violence, parental alienation and child custody evaluations. Dr. Bernstein can be contacted as follows: www.drericbernstein.com; 412-338-1808.

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Responding to the Divorce Where One Spouse Is Ready to "Burn Down the (Financial) House"

By Mark R. Ashton

Extreme times produce irrational responses. On June 1, 2022, an unhappy orthopedic patient in Oklahoma decided it was time to kill his surgeon. He took three other lives as well as these people got "in his way."

We are seeing this kind of irrational and largely self-destructive conduct in the domestic world was well. In April 2022, the Superior Court decided a case where the books and records of the business were so bizarre that no sense could be made of them. In an odd twist the Superior Court remanded the case out of concern that the party who kept the books may have been treated unfairly. *Snyder v. Snyder,* 2022 Pa. Super. 72; 2022 WL 1161756 (April 20, 2022).

The non-precedential *Crimi* case, decided on May 25, 2022, follows a similar theme. *Crimi v. Crimi* 1349 EDA 2021 (non-precedential). The Crimis married in 1992 and separated 21 years later in 2013. Husband filed for divorce in 2017 according to the court's opinion although the docket number still carries a 2009 number when there had been an earlier filing.

The parties had an antique business called Best of France, Inc. Husband owned 90%; wife 10%. Curiously, while the matter was pending Husband closed Best of France and then re-opened as Edmondo Crimi, LLC. He did that in April 2019.

We mentioned that the case had a 2009 filing number. While informing us that the 2009 case was withdrawn in August 2010 (fn. 1) the trial court opinion described a 2014 order by which the parties agreed that inventories of the then existing Best of France assets would be performed and photos of the antiques taken, quaintly, to preserve the facts "in amber." This apparently did occur as wife introduced her inventory and the photos during the trial in 2021.

Five months after the divorce was filed (or perhaps better put "resumed") the parties were back in court in June 2017 where the court ordered husband to provide wife with a revised/current inventory and wife was to account for what she had "taken" from the business. The order was ignored so the parties returned for another hearing where the judge reordered them to do what she said and to update the business inventory monthly. We do not know whether either order was complied with; only that the matter meandered on to a non-record master's hearing in late Summer 2020. Note well, that somehow, someway, the business called Best of France was closed by husband in April 2019 and re-constituted in his name as an LLC. As one might expect the master's recommendation was appealed and a trial de novo was scheduled.

After several days of trial over several months in early 2021, the trial court directed husband to pay $836,394 as "equitable reimbursement alimony" in 6 annual installments of $139,399. Husband appealed.

The core of the appeal is husband's contention that the trial court divided the business assets while ignoring $3,329,000 in business debt, almost half of which was due to one individual. As one might expect, that individual professed to have a secured interest in the inventory of antiques. At trial, husband argued the business (Best of France or Crimi LLC?) was worth negative ($1,000,000). Wife said the business was worth $2,100,000. Thus, a $3,000,000 delta in values.

While telling us that there was no separation until 2013, the trial court concludes that husband began in 2012 to gut the value of the business by taking loans from someone named Chance Worthington. Wife professed to have no knowledge of these loans. The trial court opines that as a shareholder wife <u>had</u> to be informed of the debt and <u>consent</u> to it. It also notes that in 2017, while the parties were fussing over inventories, husband settled a lawsuit brought by another antique dealer by borrowing money from Chance Worthington and granting him a secured interest in all of the Best of France "machinery, equipment, inventory and accounts." This was said to secure an obligation due to Worthington since 2014. How the 2014 debt relates to the 2012 debt due Worthington is unexplained. But, the trial court notes that husband never made any payments to the two creditors (Worthington and another named Shapiro)

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and that there was no loan documentation submitted to the court at trial, nor were these debts carried by the accountant on the business balance sheet. At the risk of tedium, I note that husband professed that Worthington had a secured interest in the assets as a matter of New York law. One has to ask when and how New York adopted "paperless" secured interests? Moreover, how did the assets of Best of France get into the hands of Crimi, LLC in 2019 without addressing the secured interests said to be outstanding?

The opinion informs us that there was also a parcel of real estate. Husband stopped paying the mortgage and taxes on that property after "separation." The property was sold by the sheriff and the mortgagee took title. The resourceful Chance Worthington popped up and made a deal to buy the property from the bank for $700,000. Chance was fortunate to find a party to lease his newly acquired property. Husband agreed to pay Worthington $6,000 a month as rent. That is almost twice what it would have cost husband to borrow $700,000 when the foreclosure/rental deal was made. The trial court found that husband paid the rent promptly and that at the time the foreclosure took place, his bank statement demonstrated the ability to pay Wells Fargo its monthly mortgage. This foreclosure and lease were expressly found to be a dissipation intended deliberately to deprive wife of an equitable distribution.

The appellate opinion ends blandly. The trial court made credibility determinations and those are entitled to the "fullest consideration." The appellate court found that it saw no records dispositively showing that the debts to either Worthington or Shapiro were actually made before separation. It also enforces an agreement wife alleged that she made with husband as a condition of their reconciliation. "We agreed that he would not do anything with the business without my knowledge and primarily had to do with taking out loans, whether they were business or personal private loans or business loans. No loans period without a discussion and he agreed to that."

The case also presents a curious analysis on the valuation of "inventory." While there were two court orders in 2017 related to creating an inventory of assets, neither party produced an expert opinion related to the value of that property. In fact, husband did not produce an inventory at all but professed that he relied upon his records of his acquisition costs. Meanwhile, he also told the court that there was "no way" to track what was in the business inventory at the date of separation. Wife offered the court photos of the property she professed to be inventory and provided 2014 values for each object based upon her "professional opinion." Her opinion was that the inventory had a wholesale value of $1,595,753. The trial court adopted those values and discarded husband's argument that his reported acquisition costs should have been employed instead noting that he did not provide that information. The court does reference the Forms 1125-A filed with the business returns and concludes that they reconcile with wife's valuation. (Opinion p. 20). The problem this writer sees with that reconciliation is that the year-end inventories for tax years 2013 and 2014 never exceeded $457,000.

In the end, the case is remanded and for that the trial court must be granted sympathy. It seems the equitable reimbursement alimony included what amounted to arrears from a spousal support/alimony *pendente lite* (APL) action. The Superior Court properly notes that support/APL arrearages are one kind of award. Equitable reimbursement alimony is confined to settings where distribution of the "existing marital assets … would be insufficient to compensate the payee spouse for his or her contributions to the marriage." *Johnson v. Johnson*, 864 A.2d 1224, 1230 (Pa. Super. 2004). The appellate panel notes that the court identified and valued marital assets based on wife's inventory. Husband argued that these assets were subject to a security interest, but he provided no documentation to show the loans or the perfection of the secured interest. Meanwhile, the court offers that if wife should cohabit, the alimony might be lost. (Opinion p. 32). But, isn't the entire point of this "reimbursement alimony" to eliminate that risk? Section 3701 of the Divorce Code indicates that alimony is needs based and the need is deemed forfeited by cohabitation. 23 Pa.C.S. 3706. Equitable reimbursement really is not alimony because it is equity based and not needs based. This is a topic where there needs to be judicial clarity. Suppose a New York court finds that the inventory is physically located in that state's jurisdiction and that there is somehow a valid lien due to Worthington or Shapiro? Isn't wife still entitled to her share of what the Pennsylvania court found to be unencumbered marital assets? Equitable reimbursement may be her only remedy and cohabitation should not allow those rights to be lost. The Superior Court was correct to sever the support arrears from equitable reimbursement. But the court could and should have simply clarified through a modified order that $836,394 was indefeasible equitable reimbursement and that the balance of alimony *pendente lite* due under the December 2019 order ($21,780 per page 3 of the opinion)

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Articles

Putting Yourself First … At Least Some of the Time

By Melanie J. Wender

I became aware of a potential health issue several years ago. At that time, my doctor advised me that it was not anything to be concerned about, so I continued on with my life and continued to focus on my career. When the issue raised its ugly head again, I ignored it. It was not a convenient time for me to deal with it. I had too much going on at work, hearings coming up and clients who depended on me. So, again, I put it off. Then I moved to my current firm and my boss right away encouraged me to get this health issue checked out. Well, I finally did just that and what I thought was likely going to be a nonissue was actually an issue. Now, I'm one surgery done, a second to go and then additional treatment and medication management.

Why I am telling you all my troubles? Well, to hopefully encourage others not to follow my example. We, as in associates, put so much pressure on ourselves. We need to bill as much as possible, be available for work at all hours, and then network, network, network! Our whole lives can, at times, be consumed by work, which is incredibly problematic. It is exactly for this reason why associates are at higher risk of burnout, a state of mental, physical and emotional exhaustion. We put so much pressure on ourselves to achieve career success that we put everything else on the backburner, including our health.

As associates, we also feel that we do not have an option, that if we tell our boss that we need to take time off to address a medical issue, it will somehow negatively impact our career. The time off will result in fewer billable hours and then suddenly we can't figure out how to make-up that time. The truth of the matter is that if we have honest conversations with our bosses, with the partners, they will actually understand and encourage you to take the time off that you need. Your boss does not want you to burnout. Your boss needs you! Your boss also wants you to be healthy because, again, the firm needs you! We need to work to change the career narrative for lawyers. You can get ahead by working hard and taking time off. You can be successful and achieve partnership status by taking time off for vacation and for doctor's appointments. You can also be successful by establishing boundaries and times when you do not work. Frankly, it is incredibly important and healthy to have time established when you do not work, when you perhaps watch the "Real Housewives of Dubai" (highly recommend) or enjoy a happy hour with friends.

I realize that all of the above is easier said than done and I am saying all of this to myself especially. I am clearly guilty of putting my career on the forefront and ignoring bigger issues. But, I am now forced to take time off, to slow down a bit and actually get my health, the most important thing, in order. The lesson here is to put you first. Get to those doctor's appointments, make time for friends, do not make work your sole focus. Now, hopefully, I will see all of you at the summer meeting in Newport, Rhode Island, and we can all let our hair down and have some much deserved fun!

Melanie J. Wender is a family law attorney at Antheil Maslow & MacMinn LLP in Doylestown, Bucks County. She regularly authors for legal industry publications and is a board member of the Bucks County Bar Association and Legal Aid of Southeasters Pennsylvania. Melanie can be reached at mwender@ammlaw.com or 215-230-7500.

Articles

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was not modified by the final divorce decree and order.

This is a troubling case. It is chock-full with important legal issues, none of which was really decided. Like the recent *Snyder* case, it is also a case where one party effectively led the court and a spouse on a wild goose chase to find the assets. The takeaway is that courts need to get a leash on cases such as this one.

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"You Can't Do That!" — Stop Signs and Solutions In Military Pension Division Cases (Part 2)

By Mark E. Sullivan

(Part 1 of this article covered arrears in collecting pension-share payments, jurisdiction, COLAs (cost-of-living adjustments) for the pension, getting garnishment payments, and deadlines.)

Q. Let's talk about getting the plan administrator's approval; that's what I obtain when I'm doing a QDRO. Most civilian employers will let my office submit a draft order for review and approval before it's filed with the court. Does DFAS allow that?

A. No, you can't do that. The retired pay center will not provide pre-filing approval or review by the retired pay center. When the order has been signed by the judge and filed with the court, the agency will give "conditional approval" if it meets the requirements for such a document:

If the former spouse applies prior to the member receiving retired pay, the designated agent will perform a legal review of the application, and may conditionally approve it based on information available at the time of the review concerning the member's duty status (active or Reserve).

DoDFMR Vol 7b, Ch. 29, ¶290405.A.

When the individual starts receiving retired pay, the agency will perform a second review prior to establishing the former spouse's direct payments.

Q. Is there a "go-by" I can use to write up a good, solid and acceptable military pension division order?

A. While you'd surely like a good, solid YES for the response, the true answer is a definite *maybe*. You can find sample pension text at Figures 29-1 and 29-2 at the end of Chapter 29, Volume 7b of the DoDFMR. Here is the essential data required:

1. Plaintiff's SSN
2. Plaintiff's address
3. Defendant's SSN
4. Defendant's address
5. Date of marriage
6. Date of divorce
7. County and state of divorce

8. If the divorce was granted after December 23, 2016 and, at time of divorce, the member was not receiving retired pay, then the two data points for the Frozen Benefit Rule are also required (as of date of divorce, the member's years of creditable service — or retirement points for a member of the Guard/Reserve — and also the "High-3" pay information).

What about the member's Social Security Number? The SSN is often barred from publication in a court order by state law. It is permissible to leave that item out in the MPDO (military pension division order); in the alternative one might insert only the last four digits and state that the full SSN is shown on the cover sheet, DD Form 2293, which must accompany the military pension order and the divorce decree.

Be careful using these examples in the DoDFMR, however. Figures 1 and 2 entirely omit any Survivor Benefit Plan coverage, which may be one of the issues that is in the divorce settlement or the judge's property division order.

To find better text for pension division orders and clauses, see the Silent Partner infoletters on *Getting Pension Orders Honored by the Retired Pay Center*, and *Military Pension Division: Guidance for Lawyers*, both at the website of the North Carolina State Bar's military committee, located at www.nclamp.gov > For Lawyers.

Q. I heard from the other side that their client, Sergeant Jack Smith, got a medical retirement, and that the court cannot divide any of that. Can the judge divide

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military disability retired pay?

A. Once again, you can't do that. Military disability retired pay is granted to individuals who are found to be unfit for service. The topic is covered at Chapter 61 of Title 10, U.S. Code. When the Service Member (SM) has served at least 20 years or has a disability rating from the military (NOT his VA rating!) of at least 30%, then he receives MDRP, or military disability retired pay. He is informed of this by his branch of service, which must determine how his MDRP is calculated. Jack Smith is entitled to payment of the higher of these two amounts:

- Retired pay based on his years of service (i.e., longevity retired pay), or
- Retired pay based on his percentage of disability.

Only disposable retired pay (DRP) can be divided, and Jack's DRP consists of gross pay less certain items, including "The amount of retired pay for a member retired under Title 10, Chapter 61 computed based on percentage of disability." 10 U.S.C. §1408 (a)(4)(A) (iii); DoDFMR Vol. 7b, ch. 29, ¶290701.B.5.

Thus, if Jack's retired pay is $2,500 based on longevity calculations (vs. only $2,000 based on percent of disability), only $500 would be divisible as DRP, since the underlying $2,000 cannot be divided — it's excluded from the definition of DRP. If, on the other hand, Jack's retired pay is $2,500 based on percentage of disability computations (vs. only $2,000 based on years of service), then none of it can be divided. The entire amount is excluded from the definition of disposable retired pay.

Note, however, that if the parties agree on payments through the retired pay center, they can accomplish monthly garnishments through a consent order for spousal support, as shown in the following two questions.

Q. The parties have not been married for 10 years during at least 10 years of creditable military service. Does that mean there is no way to get payments through DFAS?

A. No — it simply means that you cannot get pension-share payments for the former spouse *as property division* through the retired pay center. 10 U.S.C. §1408(d)(2). There is a work-around, however. There is no 10/10 overlap rule for payments made by the retired pay center as spousal support. Thus the officials at DFAS will accept and honor a "consent order for alimony," for example, which sets out all the required information and specifies that the former spouse will receive the payments (fixed dollar amount, formula or percentage) upon the retirement of John Doe. The order should also state that the payments will be non-modifiable if there is a change of circumstances, and they will not end if Jane Doe remarries or cohabits.

Q. I'm really upset about the Frozen Benefit Rule, which limits what my client can get to only the fixed benefit for John Doe on the "date of divorce." Is there a work-around for that too, so my client can get a share of final retired pay instead of the amount set at the divorce date?

A. Yes. You can use the "alimony alternative" above to get around the Frozen Benefit Rule so that Jane Doe gets a share of the full retired pay of John Doe, not just a share of what he would have received if he'd retired at divorce. Recall that the Frozen Benefit Rule, Sec. 641 of the National Defense Authorization Act for 2017 (and found at 10 U.S.C. §1408 (a)(4)(B)) redefines what "disposable retired pay" is, for the purposed of limiting what can be divided as property. Spousal support garnishments are not based on "disposable retired pay." They are based on "remuneration for employment." 5 C.F.R. Part 581; DoDFMR Vol. 7b, ch. 27. Thus, the amount subject to spousal support garnishment is not limited to hypothetical retired pay of an individual upon divorce.

Q. Colonel John Doe is domiciled in another state. Our judge says that doesn't matter, since our state has long-arm jurisdiction over him because the marriage existed here in East Virginia for 15 years, the house and personal property is here, the parties were married here, and both children were born here. Is the judge right? Can we get military pension implemented through the retired pay center if John Doe doesn't have our state as his legal residence but we have loads and loads of that "long-arm stuff?"

A. The rules are clear in this area, and the answer is a qualified NO. A state court can only exercise jurisdiction over the division of uniformed services retired pay if it's his domicile, if he's living there (other than because of military assignment) or if he consents to the court's juris-

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diction (which is called a "general appearance" in most states). 10 U.S.C. §1408(c)(4). So the only way you can get jurisdiction is if you can get the defendant to enter a general appearance.

Q. I just filed the summons and complaint for Jane Doe's divorce, and I need to get the address of the defendant to serve him. Can I get that from DFAS? After all, they send payments to him every month. Will they give the address to me without a court order?

A. Once again, *you can't do that*. Since you don't have service of process, you can't get a judge to enter a lawful and valid order. Even if you could, the folks at DFAS probably don't have the defendant's address since all money transfers have been done electronically since 2013; no one sends out monthly pension checks any more. There is, of course, a chance that the files at DFAS will contain some correspondence which would show the defendant's address, once you have service, file a motion and get a hearing for a court order. Unless you can send DFAS a court order for release of the correspondence files, most likely you'll need a private investigator.

(Part 3 of this article will cover Guard/Reserve pension division, the Frozen Benefit Rule, VA waivers and indemnification, and the Survivor Benefit Plan.)

Endnotes

[1] For more information about the Frozen Benefit Rule, which fixes the military pension that is divided at the hypothetical value on the date of divorce, see the Silent Partner infoletters on this subject at www.nclamp.gov > For Lawyers.

[2] Remember that, under the Tax Cuts and Jobs Act of 2017, alimony payments are not deductible for the payor (and not taxable to the payee) for instruments executed after December 31, 2018. This means that some consideration may need to be given to reducing the amount of alimony, since pension-share payments are included in her income and excluded from the payor's income. Thus the parties might agree on, say, $2,500 per month in alimony to replace $3,000 a month in pension division.

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of THE MILITARY DIVORCE HANDBOOK *(Am. Bar Assn.) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.*

Level up with PBI CLE.

Check out what's new

"An Ounce of Prevention ..."

By Alicia A. Slade

"An ounce of prevention is worth a pound of cure" originated in 1736 by Benjamin Franklin to educate the citizens of Philadelphia about fire prevention and awareness. The phrase was used to convince the citizens of the city that it is better to prevent fire than fighting a fire and rebuilding afterwards.

Benjamin Franklin's phrase is applicable today to explain how important it is to use multi-factor authentication (MFA) tools to prevent a ransomware attack or cybercriminals from gaining access to your emails and your client's data. Prevention and being proactive to thwart off a cyberattack will save you time, money, and your reputation.

Two-factor authentication (2FA), also referred to as multi-factor authentication (MFA) or dual-factor authentication is taking an extra step during the account login process. The extra step verifies your identity via a cell phone app, a text message or an email to the owner of the account. Many people feel that this extra step is too difficult because they need to enter a secure code or approve the login via an app on their smartphone. Just think, this is no different than taking the extra step to lock your office door or residence before leaving. You hold the key to reenter the premises.

Cybersecurity professionals agree that having a strong password is important but using multi-factor authentication (MFA) is 99% more effective at stopping cybercrimes. The extra step prevents an IT disaster and keeps your client's data safe.

Email compromise schemes are prevalent. The contents found within emails and attachments are valuable to cybercriminals. Over the past several years, firms have moved their email from on-premises Exchange Servers to either Microsoft 365 Exchange Online Hosted Email or some other hosted email service, such as Gmail. The migration of email to a hosted environment moves the emails from servers within your office to the Microsoft Cloud or some other provider. With this, a cybercriminal doesn't need to breach the office network, servers or computer. The cybercriminal can breach an individual's cloud account instead. When a cloud account is breached, the individual is oblivious that a cybercriminal has gained access to their email or data in the cloud. The only way to know if a cybercriminal is trying to access your account is by using multi-factor authentication (MFA). When the cybercriminal breaches the login ID and password of a hosted email account, prior to permitting access to the account, a verification request is sent to the owner of the account with a code or an Approve/Don't Approve alert notification. When the individual receives the alert and knows that they themselves are not accessing the account, they can stop the cyberattack.

Unfortunately, too many people think if their firm is small or if they don't have important data, a cybercriminal would not or try to get access. They could not be more wrong. The size of the firm does not prevent an attack and many types of data are valuable to a cybercriminal to exploit.

While writing this article, one of my technicians received a call from a client. An attorney at a 15-person firm realized that their email had been compromised. Bank information had been changed and emailed to an attorney at a different firm. The attorney realized the compromise when the other attorney sent a response email that stated they "got it." The compromised attorney saw the response and knew that they had not sent the email and called the other attorney immediately. After some investigation, it was determined that the cybercriminal had been in the attorney's email account for over a week. The cybercriminal observed incoming and outgoing emails and the responses, waiting for banking information to be exchanged. Although implementing multi-factor authentication had been recommended many times to the firm, the attorney had refused implementing it because they did not want to take the occasional verification extra step. The extra verification step is only needed when an email account is accessed from an unfamiliar IP address, geographical location, or device.

A few months ago, I received a call from the director of a four-person nonprofit organization who was referred to me. The director proceeded to explain that the non-profit organization used an Instagram account with over 4,000 followers. The director explained how it had taken several years to cultivate these social media followers. Posting to Instagram was the method the organization used to communicate with donors and general followers of the organization. A cybercriminal had gained access to the nonprofit's Instagram account and was holding *the account for ransom. The director was rightfully upset and realized the consequences of the ransom attack. This attack happened easily because the organization was not using multi-factor authentication to protect the Instagram account.*

It is important to use multi-factor authentication not just for your email and remote access but for social media accounts and your website (LinkedIn, Facebook, Instagram, Twitter, etc.). Additionally, any online portals you use to access financial investments, banking, payroll and insurance, should be setup to use multi-factor authentication. The option to setup two-factor or multi-

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Legislative Update

This article summarizes several domestic relations bills introduced in the 2021-2022 legislative session of the Pennsylvania General Assembly. Status of each bill is as of June 13, 2022. The full text of the bills, as well as their legislative history, may be found at: http://www.legis.state.pa.us/cfdocs/legis/home/bills/.

Newly Introduced Legislation

Marriage

House Bill 2580, Printer's No. 3092, was introduced on May 6, 2022, received first consideration in the House and was laid on the table on May 24, 2022, and was removed from the table on June 7, 2022. The bill would eliminate the waiting period between application and issuance of a marriage licenses.

Bills Currently Under Consideration

Divorce

House Bill 875, Printer's No. 2904. The bill passed the House (200-0) on April 25, 2022 and was referred to the Senate Judiciary Committee April 26, 2022. Requires that a divorce decree include notice of the need to update the beneficiary on a party's life insurance policy if the intent is to keep the other party as a beneficiary.

Parentage/Paternity/Parental Rights

House Bill 1731, Printer's No. 2963. The bill passed the House (203-0) on May 23, 2022, and received first consideration in the Senate on June 8, 2022. Creates the Pennsylvania Advisory Committee on Greater Father Involvement within the Joint State Government Commission.

Bills Inactive at the Current Time

Adoption

Senate Bill 188, Printer's No. 156. Termination of parental rights of putative father.

Alimony

House Bill 282, Printer's No. 253. Bans alimony in cases of spousal abuse.

House Bill 876, Printer's No. 862. Alimony pendente lite amendments; use of marital home as residence pendente lite.

Child Support

House Bill 111, Printer's No. 79. Allows health care co-ops to serve as an option for mandatory child medical support.

Custody

House Bill 1139, Printer's No. 1191. Expands grandparents standing in custody matters.

House Bill 1146, Printer's No. 1201. Criminalizes the act of "rehoming" (an unregulated custody transfer).

Senate Bill 78, Printer's No. 930. Enacts "Kayden's

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factor authentication is typically found within the account security or privacy settings of the portal.

Email is a goldmine for cybercriminals. The data stored in OneDrive, SharePoint, Google Drive, Dropbox or wherever in the cloud is too. A cybercriminal does not need to breach your computer network or your computer to get to your emails and documents since they can more easily breach your cloud account. The only way to know that a cybercriminal is trying to gain access to your online account is by using multi-factor authentication so you will be notified of the peculiar access request and can stop it.

Taking precautions and being proactive, can and will save you money. If your plan is to sit back and think that it won't happen to you or why would the cybercriminal want anything you have, it is just a matter of time before it happens to you, or your data is held for ransom.

"An ounce of prevention is worth a pound of cure" (Benjamin Franklin, 1736) could not be truer when it comes to using multi-factor authentication." I want to sound the alarm and make you aware of the importance of taking the extra step within your accounts. Use multi-factor authentication to prevent a cybersecurity attack!

Alicia A. Slade, MS, MBA, is the president of Plummer Slade, Inc., a computer networking, Managed Services Provide (MSP), and Managed Security Service Provider (MSSP) located in downtown Pittsburgh. Plummer Slade provides IT Managed services and solutions to hundreds of law firms in Pittsburgh and the surrounding area. Plummer Slade is exclusively endorsed for IT Solutions by the Allegheny County Bar Association (ACBA). Alicia can be reached at 412-261-5600 or aslade@plummerslade.com.

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Law," to authorize the court to impose restrictions or safeguards on custody in cases where there is a history of abuse of a child or household member by a party.

House Bill 2287, Printer's No. 2675. Enacts the Uniform Deployed Parents Custody and Visitation Act.

Senate Bill 881, Printer's No. 1184. Adds a new Chapter 62 to Title 53 (Municipalities Generally) that creates a one-time grant program for municipalities to develop Safe Exchange Zone Programs that would provide a location near law enforcement or an active public area for the exchange of custody of a child.

Divorce

House Bill 809, Printer's No. 793. Requires the parties to make certain financial filings within 45 days of filing for divorce or annulment.

Families

Senate Bill 195, Printer's No. 168. Updates the Commonwealth's Family Caregiver Support Program.

Senate Bill 577, Printer's No. 623. Amends the Human Relations Act to prohibit discrimination on the basis of familial or marital status.

House Bill 159, Printer's No. 2326. Amends Chapter 63, Child Protective Services of Title 23 (Domestic Relations) to include the U.S. Department of Defense Family Advocacy Program in investigations of child abuse and neglect allegations involving military families.

House Bill 530, Printer's No. 493. Parental Involvement Leave Act.

Senate Bill 746, Printer's No. 863. Extends family and medical leave coverage to domestic partnerships.

House Bill 1210, Printer's No. 1271. Amends the Human Relations Act to prohibit discrimination on the basis of familial, marital, or family caregiver status.

Family Court

House Bill 1366, Printer's No. 2412. Adds a new subchapter to Chapter 73 of Title 42 (Judiciary and Judicial Procedure) to adopt the Uniform Family Law Arbitration Act, which would allow voluntary private arbitration of family law matters such as custody and child support.

House Bill 1391, Printer's No. 1507. Joint Resolution proposing amendments to the Pennsylvania Constitution that would result in family court reform.

House Bill 1392, Printer's No. 1508. Enact the Uniform Family Law and Justice Act.

Marriage

House Bill 138, Printer's No. 108. Marriage license application via affidavit.

House Bill 485, Printer's No. 448. Identifies religious practitioners who can perform a marriage ceremony.

House Bill 724, Printer's No. 711. Adds current and former members of the Pennsylvania General Assembly to the list of persons who may solemnize marriages.

House Bill 824, Printer's No. 806. Repeals 23 Pa.C.S. § 1704, which declares that same sex marriages are void in Pennsylvania.

Senate Bill 558, Printer's No. 587. Repeals 23 Pa.C.S. § 1704, which declares that same sex marriages are void in Pennsylvania.

Parentage/Paternity/Parental Rights

House Bill 115, Printer's No. 83. Uniform Parentage Act.

House Bill 1038, Printer's No. 1079. Parental incarceration cannot be the sole justification for termination of parental rights.

Senate Bill 1150, Printer's No. 1533, was introduced and referred to the Senate Judiciary Committee on April 1, 2022. The bill revises the procedures for name changes of adults and unemancipated minors.

Property Rights

Senate Bill 303, Printer's No. 314. Public employees would not be able to make or change beneficiary designations on their pension or retirement plans without the consent of their spouse.

Yvonne Llewellyn Hursh is counsel with the Joint State Government Commission, the primary and central nonpartisan, bicameral research and policy development agency for the General Assembly of Pennsylvania in Harrisburg, and the legislative editor of the Pennsylvania Family Lawyer. *She can be reached at yhursh@legis.state.pa.us*

Rules Update

By Daniel Bell-Jacobs and Kate O'Connor

We would like to hear from you! We're interested in hearing about your experiences with the new support rules. We will be presenting the rules update at the Family Law Section Summer Meeting, and we'd like to incorporate your recent case experiences based on those new rules into our presentation. Please feel free to contact Daniel or Kate and let us know how the changes in the support rules have affected your practice.

For more information regarding proposed and enacted rules, please visit The Pennsylvania Supreme Court Domestic Relations Procedual Rules Committee website. If anyone would like to contact the Rules Committee, please feel free to contact Daniel Bell-Jacobs (dbell-jacobs@hkhlaw.net) or Kate O'Connor (KOConnor@sweeneyneary-law.com).

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ADR Corner

Crucial Role of Lawyers in Successful Mediation

By Shelly Grossman and Carolyn Zack

A client seeking to resolve their domestic relations matters through mediation is equally in need of their lawyer's support and advice as is the client anticipating their next court appearance. Lawyers who send their clients to mediation without properly preparing them to address the many factors at play and possible outcomes are doing themselves and their clients a disservice. The role of the lawyer in mediation is not in the backseat, but in the front seat assisting the client at the steering wheel.

Picture a client who had optimistically entered the mediation process and emerged having "successfully" reached an agreement with their soon-to-be former spouse. Imagine their diminished spirit after returning to their lawyer only to hear, "That's a bad deal for you; you should get so much more or pay so much less." That client is then faced with the dilemma of accepting the lesser deal or starting over in litigation. A better scenario would have been the lawyer coaching the client through the mediation process, reviewing the disclosures and the options discussed at the mediation sessions and advising the client how to respond at the next session. The mediated agreement would reflect a deal reached by the parties that each of their lawyers confirmed are "within the range" of reasonable outcomes based on full financial disclosure. In that scenario, everyone walks away feeling better about the process and the fairness of the deal reached. Most importantly, the parties feel that they have reached a cost effective and amicable resolution on their own without court intervention. They are now less polarized and have set the stage for better and more cooperative communications into the future. Needless to say, they also feel good about the legal counsel and support they had throughout the process.

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Crucial Role of Lawyers in Successful Mediation

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So, what is the role of the lawyer in mediation when the clients are at the mediation table alone?

Teacher and Coach

Without the benefit of legal counsel, parties come into the mediation process with their lay person's view of what is fair, which is fine if the parties are on the same page and on the same bargaining level. However, if one party is the financial decision-maker of the family or otherwise more dominant than the other, then the mediation process becomes skewed. Balance can be created where both parties are educated by counsel in the information they need to obtain from the other side, along with a reasonable range of outcomes and a list of issues to address.

Parties are encouraged to consult with their lawyers after each mediation session so that they can review the discussions and come up with a plan to respond to the issues raised in preparation for the next mediation session. Progress is made when the parties are comfortable with the issues and possible ways to resolve them at the next mediation session.

Such coaching can place the parties on equal footing and empower them to negotiate final terms at the next mediation session. In mediation, the parties must have the ability to ask for what they need and want and must be able to negotiate for it, knowing when and what to compromise to reach a deal. The mediator will ensure that the venue is a safe place to do so.

Self-education is a challenge given the different customs between counties and the subjective nature of the Divorce Code. A client's best source of education is a local family lawyer who can review the specific details of a client's estate and provide an overview of what they are obligated to pay or are entitled to receive. Counsel can provide a list of documents to request and review the disclosures with their client to verify the values and balances. Counsel can advise as to whether real estate, business or other appraisals or evaluations are needed. As the mediation progresses, counsel can review with the client what was discussed at the last session and prepare the client to make final decisions at the next session. A mediator should not pressure a client to agree until they are comfortable and have had an opportunity to discuss the tentative plan with counsel. Counsel assists in moving the process forward faster and, therefore, more cost effectively.

Disclosure

Many parties who choose mediation have the misconception that it is "cheaper" and "quicker" because the mediator will collect the financial information, evaluate it, recommend a settlement and then formalize any agreement. While the mediator can facilitate the exchange of information, the discussion of the information exchanged, and the parties' negotiation of a resolution, the mediator is not responsible for doing the work from start to finish. For example, the mediator cannot provide legal advice or advocate for either party. They advise clients of the importance of transparency and disclosure to ensure the validity and lasting nature of the agreement reached at mediation. Parties are encouraged to ask for information and review documentation to satisfy their due diligence and lawyers who are assisting parties in the mediation process should forewarn them that disclosure is key to the success of the mediation. Many clients do not know what documents to ask for, nor how to interpret them. Imagine a lay person trying to decipher equity compensation such as stock options and restricted stock units on differing vesting schedules? Then, figuring out the tax impact at the mediator's prompting? Since the mediator cannot provide legal advice, the mediator is not able to analyze such documentation. Parties are encouraged to review the information with their lawyer and/or accountant. This will ensure that the requirement of full and fair disclosure is met.

Issue Identification

While the mediator will probe the parties about their concerns over the such issues as the maintenance of life insurance, the status of their tax filing, division of tax refunds and tax liabilities, child tax credits and dependency exemptions, child's college-related expenses, etc., many clients are not sure what to ask for or why they need it. This is where legal counsel is invaluable to mediation clients desperate for an out-of-court solution that is equitable and long-lasting, with no regrets. A lawyer is the best means to provide invaluable education to the mediation client as they are going through the mediation process. Such details are best resolved before an agreement is drafted.

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Putting the Parties on Equal Footing

Legal counsel can boost the confidence of the client who may have been historically submissive to the other's party's preferences. Likewise, legal coaching can reveal to the more dominant party the value in considering other alternatives presented by the mediator. Mediation clients are in the unenviable position of having to make a business deal in a highly emotional situation. Negotiating the deal with balance and objectivity is a challenge. Counsel can provide their mediation client with reasonable expectations and a reality check, thereby enabling both the more dominant client and the more submissive client to reach a fair agreement that both parties can feel good about with no regrets.

Joining the Process

In some situations where parties are unable to overcome their disagreements and emotional hurdles to reach an agreement, counsel can be invited into the mediation sessions in a last-ditch effort to stay out of court. With the party's trusted mouthpiece and advocate in the room, the mediator may be more assertive and make recommendations on those issues on which the parties have reached an impasse. The session can look more like a settlement conference. Counsel can present their client's perspective and concerns, with the mediator chiming in with their neutral suggestions to reasonably address them. A negotiation can ensue ensuring all ancillary issues and details are addressed and fully resolved. Such lawyer-assisted mediation results in a successfully mediated agreement that minimizes costs and maximizes legal protections and comprehensiveness.

Drafting the Agreement

Finally, there has been recent discussion among mediators about who should draft the agreement. Can the mediator truly be neutral and objective in writing the terms of a property settlement agreement that is not skewed in favor of one or the other party? What "boilerplate" language should or should not be included? Should contingencies (such as methods for resolving future disputes regarding alimony modification, child support modification and custody) be addressed? Should cohabitation be defined or not and, if defined, what are the parameters? These are just some of the questions that come up as we draft for our clients, and mediators who do so are faced with the same choices.

There is no right answer, although a recent case out of Massachusetts, *Reid v. Kroll, et al.*, Superior Court, No. 2181CV00769 (filed 11/29/21), should give mediators pause before drafting. In Reid, the husband filed a claim against a mediator who drafted the parties' separation agreement, alleging that the agreement was poorly drafted and allowed his spouse to collect alimony, despite the parties' intent that alimony was waived. The husband alleged that the mediator acted as a lawyer in drafting the agreement and agreeing to file a joint petition for divorce on behalf of the parties. On a motion to dismiss, the trial court noted under the Massachusetts rules of dispute resolution, a mediator is not permitted to provide legal advice, counseling or other professional services in connection with the dispute resolution process, even if the mediator is an attorney. A mediator does not practice law by developing a settlement agreement or drafting a memorandum of understanding, but the mediator does practice law in drafting a settlement agreement on which the clients will rely to secure rights in their divorce action. The court reasoned that nonlawyer mediators are not permitted to draft a legal separation agreement to be used in court since they do not practice law. The court also recognized an inherent conflict in the mediator-attorney's representation of the parties in this drafting since there is a limitation on joint representation in an adversarial matter such as a divorce. The court, therefore, held that the allegations in the husband's complaint supported a finding that an attorney-client relationship existed between the mediator, the husband, and his ex-wife, pursuant to which the lawyer had a duty to furnish legal services competently, including the drafting of the agreement and related advice, and that the mediator breached this duty by negligently drafting the agreement. The trial court, therefore, denied the mediator's motion to dismiss.

While Pennsylvania does not have rules for dispute resolution, it does have Rules of Professional Conduct governing the lawyer's role as a third-party neutral. Under Rule 2.4, the lawyer who serves as a third-party neutral (such as a mediator) shall inform unrepresented parties that the lawyer is not representing them and, if a party does not understand the lawyer's role in the matter, shall explain the difference between the role as neutral and the role as advocate for the client. The potential for confusion about the lawyer's role is the rationale for this rule. Un-

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der Rule 1.7, a lawyer is also duty-bound not to represent a client if the representation involves a concurrent conflict of interest with another client; this Rule therefore prevents an attorney from representing both parties in a divorce action since the parties' interests are, by nature, divergent and the conflict cannot be waived.

The question therefore becomes whether an attorney-mediator who has assisted the parties in developing an agreement of their economic issues can also prepare the property settlement agreement setting forth the terms of that agreement. There is no express prohibition under Pennsylvania law for the mediator to draft the agreement; however, the mediator is well-advised to ask the parties to retain counsel for this purpose. Alternatively, if the parties are represented by counsel in the mediation process, the mediator may choose to be the scrivener only with an express understanding that the parties will submit the draft agreement to counsel to be reviewed and finalized by their respective attorneys. In other words, it is just a step in the process and not the final document, unless the parties and their attorneys agree. There is, perhaps, less concern for a mediator who is drafting a proposed custody stipulation in a court-mandated mediation session since, among other reasons, the stipulation for custody will be submitted to the court for approval and can be reviewed and modified in the child's best interest; however, the mediator should nevertheless confirm with the parties in writing that they have the opportunity to review the draft stipulation with their attorney before they sign.

Conclusion

Although the lawyer may not be physically (or virtually) present during mediation sessions, their thoughtful advice is crucial to their client's ability to achieve their goal of reaching a fair and comprehensive agreement with their former partner. Clients will appreciate their lawyer's support of their desire to stay out of court and/or to maintain a conciliatory relationship with their children's other parent. Disclosure and an understanding of the financial and ancillary issues will be ensured, resulting in a valid and satisfactory agreement. Coaching clients throughout the mediation process will eliminate the client's disappointment of learning that the agreement they mediated over the past few months is not in their best interest, leaving them with the difficult reality of continued fees and possible court intervention. A lawyer-assisted mediation agreement will avoid the unhealthy stress of continued discord with their child's other parent or estranged spouse/partner. A lawyer's role as coach and counselor during the mediation process is crucial in the client's pursuit of a conciliatory process to closure. In addition, the lawyer-mediator should take care not to overstep their bounds in providing legal advice and should encourage parties to retain counsel to draft their property settlement agreement or, at the least, have their counsel review and finalize the agreement before it is signed.

Shelly Grossman served as a Family Court hearing officer in Chester County, Pennsylvania, for over fourteen years, where she presided over equitable distribution matters from preliminary through settlement conference and trial. She is a partner at Potts, Shoemaker & Grossman LLC, located in Chester County, where she acts as an arbitrator, mediator, and parenting coordinator, and practices family law, with a focus on divorce cases. Shelly is a member of Council and serves as the liaison to the PBA ADR Committee. Shelly is past-Chair of the Family Law Section of the Montgomery Bar Association. Shelly can be reached at shelly@pottsshoemaker.com or 610-840-2626.

Carolyn Zack also served as a Family Court hearing officer in the Court of Common Pleas of Chester County, Pennsylvania, where she also presided over equitable distribution matters, for eight years. She joined the firm of Momjian Anderer LLC, located in Philadelphia, more than five years ago, where she practices family law, and acts as an arbitrator, mediator and parenting coordinator. Carolyn authored the book, Family Law Arbitration: Practice, Procedure and Forms, published by the American Bar Association in August 2020. A link to this publication is found here: https://www.americanbar.org/products/inv/book/402949740/ Carolyn can be reached at czack@momjiananderer.com or 267-546-3712.

Addressing Flow-Through Income and Burden of Proof

***Robert A. Sichelstiel, Jr. v . Victoria L. Sichelstiel,* 272 A.3d 530 (Pa. Super. 2022)**

By Stephanie Stecklair Tarantino

Relevant Facts:

Appellant, Robert A Sichelstiel, Jr. ("Father") challenges the trial court's child support order and specifically disputes the calculation of his monthly net income available for support. In May 2019, Mother filed a Complaint for Child Support and the matter was scheduled before a Hearing Officer. The Hearing Officer calculated Father's monthly net income based on three sources of income: (1) salary from employment, (2) performance bonus and (3) "flow through"/ "pass through" income from various businesses. This case specifically addresses inclusion of Father's flow-through income from various businesses, Father's retained and distributed earnings, and Father's burden of proof with respect to retained earnings.

Father is a minority owner in 9 separate businesses. According to Father's 2018 income tax return, Father received $155,014 in flow-through income from the businesses. Father received distributed earnings totaling $23,041 and the rest of the businesses retained the balances of his flow-through income. In calculating Father's net income, the Hearing Officer included both Father's retained and distributed earnings.

Father filed exceptions to the support order on the basis that the Hearing Officer misapplied the law on flow-through income. Father argued that none of the flow-through income should have been included as the majority of Father's flow-through income was retained by the businesses, and the amounts distributed to Father were used to pay the tax liabilities associated with the flow-through income. Father's exceptions were dismissed. In dismissing Father's support exceptions, the trial court reasoned that even if the Hearing Officer was incorrect, the support award was appropriate in considering the child had no overnights with Father and, thus, the Hearing Officer could have awarded an upward deviation and the obligation would have been essentially the same.

On appeal, Father raised four issues, three of which the Superior Court addressed contemporaneously as they related to flow-through income and Father's burden of proof related to retained earnings. The Superior Court declined to issue an advisory opinion with respect to Father's fourth issue: whether the trial court erred and committed an abuse of discretion by finding that the hearing officer could have included an upward deviation.

Relevant Issues/Holding:

Whether all of Father's flow-through income, including both retained and distributed earnings, should be included as income available for support, and whether Father met his burden in showing he had no control over the businesses' retention of earnings.

Relying on *Fennell v. Fennell,* 753 A.2d 866 (Pa. Super. 2000), Father argued that the retained and distributed earnings could not be included in his obligation because he was not able to keep any distributions and he had no ability to control whether the companies would retain or distribute his earnings. On appeal, Father argued that he met his burden of proof regarding whether he had any control over business funds simply by showing he was a minority owner. The trial court disagreed because the Hearing Officer found Father's testimony and evidence lacked credibility. The Superior Court determined the recommendation contained no factual findings or credibility findings. Father's testimony about his flow-through income and use of distributed funds was not contested by Mother or further investigated by the Hearing Officer. Father substantiated his testimony with appropriate documentation. With respect to Father's burden of proof, the Superior Court determined Father provided uncontested testimony and evidence that he was a minority owner; and there was no finding nor evidence to support the inference that the businesses retained earnings in an attempt to shield income from support. It is important to note that the Superior Court is not suggesting or agreeing with Father's position (that a minority owner, by definition, cannot control retention or distribution of corporate earnings). In this instant case, Mother had an opportunity to challenge Father's ability to control distribution of funds; further investigation to Father's income could have been done. That simply did not occur at the hearing. The Superior Court reasons that that all of Father's testimony and evidence showed he was a minority owner, there was nothing in the record to suggest anything to the contrary and thus Father had no further burden to show that the businesses' retention of their earnings were "necessary to maintain or preserve the business." Thus, the Superior Court held that the trial court erred by considering the retained portion of Father's flow-through income. The Superior Court disagreed with Father that the trial court should not have

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No Mutual Mistake in Equitable Distribution Agreement

***Colton v. Colton*, 558 WDA 2021 (Pa. Super. 2022)**
By Yoninah Orenstein

Relevant Facts:

Husband and Wife were involved in a contentious divorce that proceeded to an equitable distribution hearing before a divorce hearing officer. Following the hearing, the hearing officer issued a Report and Recommendation ("Report") to which neither party filed Exceptions. The Report was then incorporated into the final Decree in Divorce. After the Report became a final Order, Husband withdrew $75,000 from a home equity line of credit (HELOC) on the former marital residence to purchase a new house. Wife was aware of the HELOC during the equitable distribution hearing, but it had a zero dollar balance at that time. She only learned Husband drew on the HELOC at closing on the marital residence, which occurred following the entry of the final Order. Wife immediately filed for relief, seeking, among other things, full reimbursement of the HELOC and $10,000 in attorneys' fees. The parties reached a global settlement agreement at the time of the hearing pursuant to which Husband agreed to pay Wife $67,000, which reflected the $75,000 Husband took out of the HELOC minus the lump sum amount Husband was awarded off the top of the proceeds from the sale of the former marital residence per the Report, plus counsel fees. It was further agreed that Wife would receive all the remaining proceeds from the sale of the former marital residence that were being held in escrow. Payment to Wife was to be made within 14 days.

Shortly after reaching the above agreement, Husband requested a status conference and argued there was a mutual mistake regarding the distribution of the proceeds from the sale of the marital residence. According to Husband, he should have received 25% of the proceeds of the sale, in addition to the lump sum payment from the proceeds per the Report. While Wife agreed with Husband's interpretation of the Report, she maintained that the terms of the settlement agreement were reached regardless of the Report. The trial court requested that the parties brief the issue as to whether there was a meeting of the minds and whether the parties agreed to the terms of the settlement. Following oral argument, the trial court determined there was no factual error, Husband was ordered to pay Wife the $67,000 within 120 days and Wife would receive all of the proceeds from the sale of the marital residence. Husband timely appealed.

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Addressing Flow-Through Income and Burden of Proof

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considered any of his flow-through income; even if distributions are used to pay a tax liability it is income available for support. *Spahr v. Spahr*, 869 A.2d 548 (Pa. Super. 2005); 23 Pa.C.S.A. 4302. The case was remanded with specific direction that the trial court may only consider that portion that was distributed to him.

Take Away:

This opinion reads like a refresher course on flow-through income and retained/distributed earnings. On that basis alone, it is worth the read-through. The case also informs practitioners that the burden of proof is not solely on the business owner; the opinion suggests that it is possible Father may not have met his burden of proof if there was more exploration into the information provided.

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No Mutual Mistake in Equitable Distribution Agreement

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Issues on Appeal:

On appeal, Husband reiterated his argument that the settlement was based on a mutual mistake, or in the alternative, it was a result of his own unilateral mistake of which Wife was aware, or should have been aware. Based on the foregoing, Husband sought to revise the settlement agreement and have the proceeds from the sale of the marital residence distributed in accordance with the Report.

Holding:

In a non-precedential decision, the Superior Court affirmed the lower court's ruling. The Superior Court ruled that the record was clear – Wife negotiated the settlement for a lump sum amount which was not based on the Report. While Husband's argument assumed Wife calculated the terms of the settlement based on the Report, the Court reasoned that the settlement addressed more than just the division of the proceeds of the sale of the marital residence. It also addressed division of marital debt (which did not exist as of the time of the Report), Wife's equitable interest in Husband's new home and her attorneys' fees. Consequently, Husband failed to demonstrate by clear and convincing evidence that there was a mutual mistake as to an essential element of the settlement agreement. The Court also rejected Husband's alternate argument that he was entitled to reformation of the settlement because Wife knew, or should have known, he was mistaken about the terms of the Report. The Court concluded that Husband's argument incorrectly assumed that the global settlement agreement was based on the terms of the Report and there was no indication that Wife knew or should have known Husband thought the settlement agreement was simply reinforcing the terms of the Report. Instead, the settlement agreement reflected a global settlement resolving all pending claims.

Author's Comments:

The Court's decision affirmed the established legal principle that a contract can only be rescinded based on mutual mistake if that mutual mistake formed the inducement to the contract and the parties can be placed in their former position. Here, Husband failed to demonstrate a mistake induced Wife into the global settlement. A finding in favor of Husband in the instant case would have rewarded his bad behavior and allowed him to avoid his contractual obligations under a validly formed agreement.

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Assigning Student Loan Debt to the Non-Student Spouse in Equitable Distribution: Evidence Regarding Use of Loans for Household Expenses

***Clark v. Clark,* 586 MDA 2021 (Pa. Super. 2022)**

By Vasiliki Gouliaberis

Summary:

In this unpublished opinion, the Superior Court provides guidance on the assignment of student loan debt and its repayment to the non-student spouse in equitable distribution. The Court confirms prior precedent wherein a non-student spouse is held responsible for a portion of the other party's student loan when the funds from the loan were used for household expenses. The Court found that while the trial court did not abuse its discretion in holding Husband responsible for Wife's loans, further evidence was needed to show the amount of the loans used for household expenses. The Court remanded the matter for additional evidence on that issue.

Facts and Procedural History:

Husband and Wife ("the parties") were married for 16 years and had three children together. During the parties' marriage, Wife worked as a schoolteacher, but the parties later mutually decided that Wife should attend nursing school. While their marriage was intact, Wife attended nursing school and took out student loans to help facilitate her education and also to contribute to

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Assigning Student Loan Debt to the Non-Student Spouse in Equitable Distribution: Evidence Regarding Use of Loans for Household Expenses

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household expenses.

An equitable distribution hearing was held on Feb. 4, 2020, and the court issued an Equitable Distribution Order, wherein Husband was to pay $19,884.97 of Wife's student loans and Wife was ordered to pay $14,077.20 of the student loans. ("Of the three student loans in play, this court assigned the full portion of Wife's NelNet account to [Husband] in the amount of $16,601.05, and half of the portion of Wife's [Geisinger] student loan in the amount of $3,283.92. Wife was assigned half of the portion of Wife's [Geisinger] student loan in the amount of $3,283.92 and the full amount of her Pennian student loan in the amount of $10,404.00." Trial Ct. Op., 7/15/21, at 1-3.)

Husband filed a motion for reconsideration and a reconsideration hearing was held on Nov. 16, 2020. At that hearing, Wife provided credible testimony that portions of her student loans were used for household expenses. On April 15, 2021, the trial court issued an Order wherein Husband was once again held responsible for repayment of the student loans in the amount of $19,884.97. Husband appealed the April 15, 2021, decision.

Issue:

Whether the trial court abused its discretion in directing Husband to pay a portion of Wife's nursing school tuition loans.

Holding/Analysis:

In this non-precedential decision, the Superior Court vacated and remanded the matter to the trial court for further proceedings, but concluded that the trial court did not abuse its discretion in directing Husband to pay a portion of Wife's nursing school loans.

The Court drew parallels to its decisions in *Mundy v. Mundy*, 151 A.3d 230 (Pa. Super. 2016) and *Hicks v. Kubit,* 758 A.2d 202, 205 (Pa. Super. 2000) and confirmed that the non-student spouse is in fact responsible for repayment of this marital debt when there is evidence that a portion of the loan funds were used for household expenses. As in *Hicks*, the student spouse in this matter provided credible testimony that she used a portion of the loans for household expenses. Unlike *Hicks*, the student spouse did not provide evidence of depositing surplus loan funds into a joint bank account. Unlike *Mundy*, there was no testimony that the student spouse's loans were paid by her employer.

The Superior Court explained that the lower court failed to "differentiate between student loan proceeds that went directly to Wife's education expenses or surplus proceeds used for noneducational expenses" thereby necessitating further proceedings. *Clark v. Clark* at 10.

The Court also pointed to its *Hicks* decision and its reliance on the trial court's record, which included evidence that a portion of that loan was deposited in a joint account and used for household expenses.

Takeaway and Impressions:

The Superior Court confirmed prior precedent, wherein a non-student spouse was held responsible for repayment of a student loan, but also provided guidance to the lower court regarding evidence needed for such a finding. It provides best practice guidance for practitioners attempting to assign student loan debt repayment to the non-student spouse. Specifically, the student spouse needs to provide evidence and testimony regarding the existence of surplus funds and the specific use of those funds for household expenses, along with other evidence such as depositing the funds into a joint bank account.

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Is the Entry of a PFA Order a Deviation Factor Under the Support Guidelines?

***Dunn v. Van Eck*, 710 WDA 2021, 2022 WL 684578 (Pa. Super. 2022)**
By Alexa Terribilini

Factual Summary:

The parties were married when Wife filed a protection from abuse ("PFA") petition in November 2019 in Allegheny County. After a hearing in March 2020, Wife was granted a final PFA for three years and Husband was evicted from the home.

While the PFA was pending, Husband filed for APL in December 2019. At the APL hearing in August 2020, Wife argued that Husband was not entitled to support because he abused her, as demonstrated by the PFA order. The hearing officer, however, recommended that Husband's claim for APL be granted.

In September 2020, Wife filed exceptions, claiming that the hearing officer erred by failing to make a downward deviation under Rule 1910.16-5. Wife's exceptions regarding APL were denied by the trial court in November 2020. The parties litigated support and divorce matters for several months until the divorce decree was entered in June 2021. Wife appealed, challenging the trial court's award of APL to Husband.

Key Issues:

Wife raised two issues on appeal. First, she argued that Husband forfeited his entitlement to APL by committing "abuse" under the PFA statute. To award APL to a party who committed abuse under the PFA statute would be against public policy. Second, Wife argued that the trial court erred and/or abused its discretion by failing to deviate from the support guidelines when determining Wife's APL obligation.

Legal Analysis:

In her first issue, Wife argued that Husband should not receive APL as a matter of public policy because of the personal injury crime exception to APL in 23 Pa.C.S.A. § 3702(b). Under 23 Pa.C.S.A. § 3702(b), a party who has been convicted of certain personal injury crimes against the other party is not entitled to APL. The definition of a personal injury crime is set forth under 23 Pa.C.S.A. § 3103. The Superior Court, in this non-precedential decision, noted, "[W]hile a personal injury crime includes a violation of a PFA order, it does not include the issuance of a PFA order." In her brief in support of exceptions, Wife argued that 23 Pa.C.S.A. § 3702(b) was designed to prevent the possibility of the abused spouse having to pay APL to their abuser. On appeal, she argued that allowing the victim to pay APL to their abuser frustrates the purpose of the PFA statute.

The trial court stated that putting a PFA order on the same level as a personal injury crime would create new law and it, "would be an inappropriate expansion of the application of the exception beyond the legislative intent." The Superior Court agreed that a plain reading of the statute and the definition of a personal injury crime do not exclude Husband from being awarded APL because a PFA order was entered against him.

In her second issue, Wife argued that, if Husband is not precluded from receiving APL, then the trial court abused its discretion in failing to deviate downward from the guidelines in determining the APL obligation. Wife cited to the APL guidelines under Pa.R.C.P. 1910.16-5(b)(1-9) and relied on factor nine, "other relevant factors," in her argument to deviate downward.

The Superior Court stated that an award of APL is meant to "equalize" the parties so that they are able to effectively participate in the divorce proceedings. Further, the guidelines are based on economic circumstance and available resources, so the trial court should focus on economic considerations when deviating from the guidelines. Otherwise, it would defeat the purpose of APL.

At the time of the hearing, Husband was not employed and had not worked in several years. Husband's behavior that led to the PFA order was nonviolent; it was a singular event; and Wife was not physically harmed. The trial court stated that this does not mean a PFA order is unimportant, but it is only one factor to consider when awarding APL. Under these facts, the Superior Court held that there was no abuse of discretion in awarding APL without a downward deviation.

In a dissenting opinion, Judge Murray found that the trial court abused its discretion by disregarding Husband's abuse and the PFA order. He noted that, in addition to the "catch all" provision in 1910.16-5(b), the rule includes other non-economic factors, such as number eight, the length of the marriage. Judge Murray also stated that the exceptions for APL under 23 Pa.C.S.A. § 3702(b) include non-economic considerations, including the exception for personal injury crimes. Finally, he cited to *Childress v. Bogosian*, 12 A.3d 448, 463 (Pa. Super. 2011) for the proposition that courts should consider several other factors when ruling on a claim for APL, including "the character, situation, and surroundings of the parties." Judge Murray would have reversed the trial court and deviated downward from the guidelines.

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Is the Entry of a PFA Order a Deviation Factor Under the Support Guidelines?

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Comments/Impressions:

The definition of a personal injury crime is clear that violating a PFA order, not just having one issued, is required for disentitlement of APL. Perhaps the Pennsylvania General Assembly should consider amending Section 3103 of the Divorce Code to include the entry of a PFA order to its list of ten personal injury crimes. However, this could discourage parties from entering into PFAs and potentially prevent victims from obtaining protection. The trial court stated that the entry of a PFA order was just one factor to consider in making an APL award, but if that is the case, then how will PFA orders be evaluated in future cases? Either APL is based on economic factors, or on the parties' behavior, or on both. But if behavior can be considered, then it is likely that another PFA case will result in a possibly different adjudication. A more powerful case for downward deviation from the factors could arise where the abuse had a financial impact on the victim, such as having to take off work, losing a job or having to move. This case is non-precedential; it remains to be seen if a case is decided where the facts are so egregious that the trial court denies APL based in part on the entry of the PFA order.

Alexa is an associate at Momjian Anderer LLC in Philadelphia. Alexa previously served as a law clerk to the Honorable Viktoria Kristiansson in Philadelphia Family Court. She can be reached at aterribilini@momjiananderer.com or 215-546-3707.

What to Expect in Partition Actions Involving Unmarried Couples

***Theirry v. Yamulla,* 272 A.3d 477 (Pa. Super. 2022)**

By Jordan M. Gregro

Summary of Facts/Procedural History:

In September 2017, Ms. Yamulla purchased real property known as the "Charter Club Property" in Doylestown, Pa. At the time of the purchase, the parties were unmarried, although contemplating marriage. Ms. Yamulla purchased the Property with her separate funds and the Charter Club Property was initially titled in her individual name.

In October 2017, the parties executed a deed transferring title of the Charter Club Property from Ms. Yamulla's individual name to both of their names, as joint tenants with right of survivorship. Ms. Yamulla paid all costs associated with the title transfer, including recording fees and the transfer tax. Ms. Thierry did not contribute any funds to the purchase of the Charter Club Property or to the maintenance and upkeep of the Charter Club Property following the transfer.

Because of the turbulent nature of their relationship, Ms. Thierry never actually moved into the Property. She also was never given free access, and Ms. Yamulla changed the locks and the security codes numerous times.

The parties separated approximately one year later, in November 2018. Shortly thereafter, Ms. Thierry filed a complaint in equity requesting partition of the Charter Club Property and 50% of the total value of the Charter Club Property due to her 50% ownership interest. Ms. Yamulla answered, arguing Ms. Thierry was not entitled to any monies as the transfer of title into joint names was a gift conditioned upon marriage. Ms. Yamulla also sought reimbursement of the costs she incurred for the acquisition, transfer, repair, maintenance, preservation and upkeep of the Charter Club Property, as well as for the

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What to Expect in Partition Actions Involving Unmarried Couples

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expenses paid. Notably, at the time of Ms. Thierry's filing, the Property had increased in value by $20,000.

A hearing was held in October 2020, after which the hearing officer recommended the partition of the Charter Club Property. The hearing officer also recommended Ms. Thierry be awarded 50% of the increase in value of the Charter Club Property in the amount of $10,000, rather than fifty percent of the total value, based upon principles of equity. Further, the hearing officer denied Ms. Yamulla's request for reimbursement. The trial court affirmed the Master's recommendation, and both parties appealed.

On appeal, Ms. Thierry argued the trial court erred by "using equitable principles to override her legal right to 50 percent of the Charter Club Property's net value as a joint tenant with right of survivorship pursuant to the terms of the deed." Ms. Yamulla argued the trial court erred by awarding Ms. Thierry 50% of the increase in value of the Charter Club Property, as the condition of the gift transfer was never met. Ms. Yamulla also argued the trial court erred in denying her request for reimbursement of the costs she incurred with respect to the Charter Club Property.

Issue:

1. Whether the trial court abused its discretion in awarding Ms. Thierry fifty percent of the increase in value of the Charter Club Property in the partition action.

2. Whether the trial court abused its discretion in denying Ms. Yamulla reimbursement for the costs she incurred in the acquisition, transfer, repair, maintenance, preservation and upkeep of the Charter Club Property.

Holdings/Analysis:

In a non-precedential decision, the Pennsylvania Superior Court affirmed the trial court's award of fifty percent of the increase in value of the Charter Club Property to Ms. Thierry. In doing so, the Court held that pursuant to Pennsylvania Rule of Civil Procedure 1557, "the entry and recording of an order directing partition…terminates a joint tenancy." See Pa. R.C.P. 1557; see also *Kapscos v. Benshoff*, 194 A.3d 139,142 (Pa. Super. 2018). Further, once the joint tenancy is terminated, then the trial court is free to "balance the equities to decide what form the partitioning will take," and to "calculate owelty based on the equities of what each person invested in the subject real property." Id. at 142-143; Pa. R.C.P. 1570. Therefore, in this case, the Court found that once the trial court entered the order partitioning the Charter Club Property, the joint tenancy was terminated, and the trial court could award Ms. Thierry an equitable share of the Charter Club Property based on her contributions. Because Ms. Thierry contributed "next to nothing towards the [p]roperty, nor could she freely access the property," the Court concluded the trial court did not abuse its discretion in awarding Ms. Thierry only 50% of the increase in value.

The Court denied Ms. Yamulla's claim that Ms. Thierry should not even receive 50% of the increase in value of the Charter Club Property, on the basis that Ms. Yamulla failed to prove the transfer of title was a conditional gift. Specifically, there was nothing in the deed setting forth conditions of the transfer of ownership, and the trial court made appropriate credibility determinations as to the existence of the conditions of the transfer based upon the live testimony of the parties.

The Superior Court also affirmed the trial court's denial of Ms. Yamulla's request for reimbursement for the costs and expenses she incurred on the Charter Club Property, on the basis that it is well-settled that neither party is entitled to reimbursement for acquisition costs in a partition action, and the record was devoid of any evidence to support recovery of expenses necessary to preserve and protect the Charter Club Property. Thus, the Superior Court upheld the trial court's decision.

Comments/Impressions:

This case provides unique insight into the court's ability to divide real property in partition actions between unmarried couples. Through this case, it is clear that legal title does not necessarily guarantee an individual a corresponding share of the value of the property, should the parties separate. This is contrary to popular belief as most unmarried couples expect to receive a share proportionate to their ownership if the relationship ends. Therefore, it seems prudent for attorneys to place any agreement on the division of the value of the property, or conditions of transfer, directly into the deed, should a separation occur.

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Bar Review

By Adam H. Tanker

Congratulations to **Gerald L. Shoemaker,** shareholder at Hangley, Aronchick, Segal, Pudlin & Schiller in Plymouth Meeting, on receiving the 2022 David M. Rosenblum LGBTQ+ Public Policy Award from the Pennsylvania Bar Association LGBTQ+ Rights Committee.

Kindly submit all news, updates, firm additions or moves, life events, and anything else that you would like considered for inclusion in Bar Review to Adam Tanker at Adam.Tanker@obermayer.com.

Adam H. Tanker, an attorney at Obermayer Rebmann Maxwell & Hippel, focuses his practice on all aspects of family law matters. He is a former deputy district attorney for the Bucks County District Attorney's Office, where he served as chief of the Asset Forfeiture Unit and was assigned to the office's gangs, guns and drug unit. He also acted as the office's community liaison for gang violence. After graduating from George Washington University with a degree in criminal justice, he went on to earn his juris doctor from Widener University School of Law, where he was a member of the Trial Advocacy Team. His email is Adam.Tanker@obermayer.com and his phone is 215-606-0754

Case Notes

What to Expect in Partition Actions Involving Unmarried Couples

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Jordan M. Gregro is an associate at Shemtob Draganosky Taylor PC in Blue Bell, Pennsylvania. She concentrates her practice exclusively in the area of family law and related issues. A graduate from Franklin and Marshall College, she received her Juris Doctor from Villanova University School of Law in 2016. Ms. Gregro was selected as Pennsylvania Super Lawyers Rising Star for the years 2020 through 2022. She is a member of the Doris J. Freed American Inn of Court, the Pennsylvania Bar Association Family Law Section and the Montgomery Bar Association Family Law Section. She is also a past board member of the organization formerly known as Pennsylvania Lawyers for Youth. She can be reached at (215) 542-2105 or jgregro@shemtoblaw.com.

Mark Your Calendars!

Family Law Winter Meeting

Jan. 13-15, 2023

The Hotel Hershey

Hershey, PA

Get to Know a Member: Abigail C.S. Bukowski

By Adam H. Tanker

Abigail C.S. Bukowski

1. Full name?
Abigail Claire Schiela Bukowski

2. How did you become interested in family law/why did you choose this area of law?
While I didn't consciously know I would be a family law attorney from a young age, I should have. I was always mediating disputes between my friends growing up, and as a resident assistant in college, one of my favorite parts of the role was guiding my residents through interpersonal conflicts. As an attorney, I love having the opportunity to constantly meet new people and to guide people through what is generally a difficult time to help set themselves up for joyful futures.

3. How long have you been practicing and where?
I've been practicing since October of 2021 in Doylestown at Eastburn and Gray PC.

4. Why did you choose to live and practice in Bucks County?
I grew up in Bucks County and I graduated from CB West. While I did move to Western Pennsylvania for college (Grove City College), Bucks County has and always will be home.

5. What's your favorite thing about Bucks County?
The people and the memories. Most of my major life events happened in Bucks County, and it's really fun to be able to walk around town and reminisce about each of those. I also love living in a place where I have long-term connections with so many people and have also had the opportunity to enjoy and celebrate their major life events with them for a long period of time.

6. What's your perfect vacation?
I don't know that I have an idea of one perfect vacation. I have rarely been on a vacation to the same place more than once, and I enjoy vacations that include a lot of sight-seeing, walking, and learning as much as vacations that include a lot of lounging and reading.

7. What's your favorite book?
Either *Jane Eyre* or *Harry Potter and the Order of the Phoenix*.

8. What's your favorite TV show?
"How I Met Your Mother"

9. What's your favorite movie?
"Miss Congeniality"

10. What's your favorite quote?
"There are far, far better things ahead than any we leave behind." – CS Lewis

11. What's one thing that we don't know about you?
I studied entrepreneurship in college and participated in several mini-startups each year. I don't think any of them have made it big yet, but I know some are still being pursued by my classmates and I'm excited to see what they all become.

12. What are your pet peeves in terms of practicing family law?
When lawyers contribute unnecessarily to conflict between parties.

13. Who would play you in a movie about your life?
Anne Hathaway