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Grandparent Visitation

Can the Fit-Parent Presumption Be Overcome? Part Two of a Two-Part Article

By Barry Abbott and Alton L. Abramowitz

Last month, we looked at how a grandparent may establish standing to seek visitation with a grandchild over the objections of the parent. Once this predicate showing is made, the grandparent must next overcome the presumption in favor of the fit parent if he or she wants to get court-ordered visitation rights.

The Presumption in Favor of the Fit Parent

Prior to the enactment of Domestic Relations Law (DRL) Section 72 and Family Court Act (FCA) 651, grandparents had no standing to seek visitation against the wishes of a custodial parent. *Matter of Emanuel S. v. Joseph E.*, 78 NY2d 178, 180 (1991). Now, if a court concludes that a grandparent has established standing — and, thus, has the right to be heard — then it may move forward with a best-interests determination. *Wilson v. McGlinchey*, 2 NY3d at 380. (1991).

Following the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), regarding grandparent visitation and its impact on the right of a fit parent to make custodial decisions, the New York Court of Appeals, reiterating its

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A Negotiation Tool for Spousal Maintenance

The 'Need-Ability Exercise'

By Scott M. DeMarco

The temporary spousal maintenance law that became effective in New York State on Oct. 12, 2010, provides formulas for calculating temporary maintenance guidelines. While these relatively new formulas determine temporary maintenance amounts until the final resolution of the divorce, final maintenance (*i.e.*, maintenance resulting from a divorce decree) has long-lasting effects on both parties. There is no one correct answer to the question how to determine the amount of final maintenance.

If the intent of both parties is to settle the dispute, reasonable income and expense forecasts must be made so that both parties understand the range of potential outcomes of a particular maintenance amount and duration. Knowing the range of likely outcomes based upon a particular amount and duration of spousal maintenance provides a framework for negotiations. Forecasting each spouse's financial future is an exercise in determining the "need" of the non-monied spouse, and the "ability to pay" of the monied spouse. We will call this forecasting process a "Need-Ability Exercise."

Temporary Maintenance

Temporary spousal maintenance, according to DRL § 236 (B)(5-a)(c)(1), can easily be calculated in most cases by visiting the calculator on the NYCourts.gov website. Temporary Spousal Maintenance Guidelines Calculator: http://bit.ly/1aOFNRZ (accessed October 2013). By simply converting the temporary maintenance payment to final maintenance, the formulas may leave the payor with significantly less after-tax income than the payee, or vice-versa. Careful attention to the details of the case must be taken to ensure that the children's needs are met, and that each spouse has enough after-tax income to pay for his/her own living expenses.

This specific issue was addressed by the Hon. Jeffrey Sunshine in the case of *Scott M. v. Ilona M.*, 2011 NY Slip Op 21026 (Sup. Ct., Kings Cty.); "Judge

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Deviates from Formula Under New Divorce Laws," D. Wise, *NYLJ*, Feb. 1, 2011. In that case, the husband's gross income was approximately $155,000 and the wife's income was $34,000. Applying the temporary maintenance guidelines, in addition to a deduction for child support, would have left the husband with approximately $40,000 in disposable income to meet his living expenses, and the wife and child would have been left with $78,000 to meet their living expenses. Justice Jeffrey Sunshine, exercising the judicial discretion permitted by the rules, reduced the prescribed calculation of temporary maintenance by one-third, so that the husband could "meet his pre-divorce household expenses and taking into account the parties' expenses, child care costs, and net available resources."

The new law provides such flexibility in awarding temporary maintenance based upon consideration of certain factors, including the standard of living of the parties, the care of the children or stepchildren, in addition to others.

Temporary spousal maintenance calculations provide a data point for final maintenance negotiations, but the formulas are not meant to be applied to final maintenance.

Final Spousal Maintenance

Now, let's analyze certain final maintenance scenarios, to provide an understanding of how that determination can have significant long-term financial impacts on both ex-spouses.

Once agreement has been reached regarding the equitable distribution of the marital assets, spousal maintenance may be considered. Spousal maintenance is meant to help rehabilitate an ex-spouse who will not have sufficient assets or income to support his or her lifestyle, and will therefore need time to become financially self-sufficient, if possible.

The determination of the amount and duration of final spousal maintenance is a critical component of a divorcing couple's financial well-being. However, many divorcing couples do not have the detailed personal budgets or firm grasp on personal expenses necessary to make informed decisions regarding the fairness of final maintenance. In many cases, final maintenance is arrived at through intense negotiation and, possibly, as part of a global financial settlement. The final resolution may not be informed by facts and reasonable assumptions about the future, but rather driven by emotion, gut-sense or *quid pro quo*. However, reasonable and equitable settlements may result when experienced attorneys represent each respective spouse and, in addition to providing informed guidance, analyze relevant case decisions and consult with financial experts.

The Need-Ability Exercise

One way to help ground final maintenance in reality is to not only analyze historical information from statements of net worth, but to create financial forecasts of each spouse's income, expenses and net worth. This exercise will generally be done for settlement purposes, and it will help determine the amount and duration of the spousal maintenance obligation/entitlement. The types of forecasts presented in this article are well suited for alternative dispute resolution methods, such as mediation and collaborative divorce.

The following steps are included in a 'Need-Ability Exercise':

1. Settle the equitable distribution of marital assets and liabilities. Develop assumptions as to investment rates of return on liquid investments, real estate, and retirement assets, etc. At the very least, there should be agreement on a range of settlement options on equitable distribution.

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U.S. Tax Court Trumps State Family Court

By Julia Swain

Family law judges and lawyers need to be aware that in assigning the dependency exemption to a non-custodial parent, Form 8332 releasing the exemption must be secured from the custodial parent. In *Shenk v. Commissioner*, 140 T.C. 10, filed May 6, 2013, the U.S. Tax Court disallowed a non-custodial father's dependency exemption claim due to the mother's failure to sign Form 8332, despite a state court's divorce decree providing the dependency exemption would be divided between the parents.

Background

Assignment of the dependency exemption is a useful tool for courts and lawyers in structuring support orders, divorce orders, and, overall, effectuating equitable relief. Many states specifically authorize courts to award the federal child dependency tax exemption to the noncustodial parent, or to either parent in a shared custody arrangement.

The U.S. Tax Court's recent opinion emphasizes the importance of requiring one parent to sign and deliver Form 8332 in a timely fashion to the parent who is assigned the dependency exemption. If the family court in *Shenk* had done just that, then the terms of its divorce decree related to the assignment of dependency exemptions would not have been essentially overturned by the U.S. Tax Court.

The family court in *Shenk* issued a Judgment of Absolute Divorce in 2003 that awarded the mother primary physical custody of the parties' three minor children. The Judgment went on to provide that in odd years, if mother was employed, she could claim the two younger children; and, if father was current on his child support, he could claim the oldest child. This scheme was to reverse in even years. The court did not include terms requiring the mother to sign and deliver Form 8332 to the father.

In 2009, the father claimed two children on his tax return because the mother was unemployed. He also claimed the child tax credit and filed as head of household. The mother claimed two children as well, because it was an odd year. The IRS examined both returns because one of the children was claimed by both parents. The IRS approved the mother's return because the children had lived with her more than 50% of the time. It disallowed the father's dependency exemption and, consequently, also his child tax credit and head of household status, assessing over $3,000 of tax against him.

The father filed a petition for relief with the U.S. Tax Court in 2012. When the case was called for trial a year later, the father sought a continuance so that he could apply to the family court for an order requiring the mother to sign Form 8332 to perfect his claim for the dependency exemption. His continuance request was denied. Because the IRS has a three-year period of limitations to assess taxes, the delay would put it outside the assessment period against the mother and, therefore, it would not be able collect the necessary tax.

At trial, the father asserted that he was entitled to a dependency exemption for all three children because the mother was not employed in 2009. The mother's 2009 tax return did not show any earned income. The father further contended that although the mother did not sign Form 8332, she should have done so.

Tax Law

A taxpayer is entitled to one exemption for each person that can be claimed as a qualified dependent. Under Section 152 of the IRC, the five-part test for a qualified dependent child is: 1) the child must be the taxpayer's son, daughter, stepchild, foster child, brother, sister, half brother, half sister, stepbrother, stepsister, or a descendant of any of them; 2) the child must be: (a) under age 19 at the end of the year and younger than the taxpayer (or the taxpayer's spouse, if filing jointly), (b) under age 24 at the end of the year, a full-time student, and younger than the taxpayer (or the taxpayer's spouse, if filing jointly), or (c) any age if permanently and totally disabled; 3) the child must have lived with the taxpayer for more than half of the year; 4) the child must not have provided more than half of his or her own support for the year; and 5) the child is not filing a joint return for the year (unless that joint return is filed only as a claim for refund).

In the case of divorced parents, there are special rules that determine which parent can claim the dependency exemption. Typically, due to the 50% or more residency requirement, a child of divorced or separated parents is the qualifying child of the custodial parent. However, the child will be treated as the qualifying child of the noncustodial parent if the parents: 1) are divorced or legally separated under a decree of divorce or separate maintenance; 2) are separated under a written separation agreement, or lived apart at all times during the last six months of the year, whether or not they are or were married; 3) the child received over half of his or her support for the year from the parents; 4) the child is in the custody of one or both parents for more than half of the year; and 5) the custodial parent signs a written declaration that he or she will not claim the child as a dependent for the year, and the noncustodial parent attaches this written declaration to his or her return.

What Happened in *Shenk*

The father in *Shenk* failed to meet not only the residency requirement, but also the requirement for the written declaration. As a result, his dependency exemption was disallowed. As the child tax credit and head of household filing status are

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Tax Law

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contingent on having at least one dependency exemption, those claims were also disallowed. Clearly, this result was contrary to the family court's judgment, but as set forth by the U.S. Tax Court, " … ultimately it is the Internal Revenue Code and not State court orders that determine one's eligibility to claim a deduction for Federal income tax purposes, and Mr. Shenk does not meet the criteria of the Code for claiming the disputed dependency exemption deduction."

The IRS has prescribed Form 8332 to make the necessary declaration, which states in pertinent part that "I agree not to claim" a child as my dependent. Although the Form is not specifically required, best practice would be to use this form, which can be downloaded from the IRS website at www.irs.gov. Another very useful resource for understanding tax rules for divorced or separated parents is IRS Publication 504, which can be downloaded from the same site.

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2. Create an expense budget/forecast for each spouse based upon his or her needs post-divorce. This should be a long-term expense budget, possibly decades long, with an adjustment for inflation each year. Include expenses for occupational training/education.
3. Create an expense budget/forecast for the children, if any. Ideally, the spouses should jointly develop this budget. This forecast will be the basis for the determination of child support.
4. Develop a forecast for each spouse's income, which is independent of any spousal maintenance. This income may be low in the first couple of years as the non-monied spouse receives additional education to re-enter the workforce. Once that occurs, his or her income should increase. Also include income from defined benefit pensions and Social Security during retirement.
5. Once each spouse's expenses, income and net worth have been established, the non-monied spouse's monetary needs will be obvious, and the monied spouse's ability to pay spousal maintenance will be assessed.
6. Iterate. Revisit budgets, income forecasts, and assumptions. Estimate the low and high ends of the range of spousal maintenance, which will be the basis for negotiations. Be transparent with facts, assumptions and intentions during negotiations. The exercise is as much about creating a dialogue concerning the future intentions of the spouses as it is about "crunching the numbers."

This Need-Ability Exercise can be performed on a simple or detailed basis. In some cases, a simple exercise involving a forecast of one to five years is all that is needed; however, many engagements require detailed forecasts through a person's life expectancy.

Example: Mr. and Ms. Smith's Divorce

The following detailed example of the need-ability exercise is the hypothetical divorce of Mr. and Ms. Smith, who have two children.

When Ms. Smith gave birth to their first child, the Smiths decided that she would leave her full-time job as a manager at an international corporation to be home with their child. Leaving her job greatly affected Ms. Smith's career path and future earning potential. Ten years later, at age 38, Ms. Smith thinks that she can reenter the workforce in a full-time capacity and earn approximately $35,000 in her first year. Mr. Smith's income as a general manager of a beverage distributor primarily supported the financial needs of the family over the past 10 years.

Mr. Smith proposed the following division of marital assets and liabilities, which they both ultimately agreed to.

Mr. Smith proposed paying Ms. Smith taxable spousal maintenance of $60,000 for a period of three years, and to base child-support payments on the New York Child Support Standards Act. Mr. Smith's annual income was approximately $210,000 on the planning date. Mr. Smith estimated that his annual expenses would be $114,000, and Ms. Smith estimated that her annual expenses would be $79,000 (exclusive of mortgage payments).

Mr. Smith expects that he may not have any discretionary income remaining after paying spousal maintenance to Ms. Smith. However, he thinks that it is fair to pay her the $60,000 in spousal maintenance for three years, even though the spousal support may be overly burdensome on him in the short term. Ms.

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Figure 1: Proposed Division of Marital Assets

Description	Ms. Smith	Mr. Smith	Total
Cash	$ 10,000	$ 70,000	$ 80,000
Brokerage Account	240,000	240,000	480,000
Marital Residence	450,000	-	450,000
Mr. Smith's 401(k) Plan	75,000	75,000	150,000
Mortgage on Marital Residence	(390,000)	-	(390,000)
Credit Card Debt	(8,000)	(8,000)	(16,000)
Net Worth	**$377,000**	**$377,000**	**$754,000**

NJ & CT NEWS

NEW JERSEY

Judge Orders State to Permit Same-Sex Marriage

In September, a New Jersey judge determined that the State's offer of civil union status to same-sex couples simply does not compare to the status of "married," because although the State of New Jersey treats married persons and those in civil unions equally, only "married" couples have access to federal marriage benefits. Therefore, Judge Mary Jacobson of Mercer County Superior Court ordered the State to begin permitting same-sex couples to marry as of Oct. 21. The judge explained why she was moved to issue the order, stating, "If the trend of federal agencies deeming civil union partners ineligible for benefits continues, plaintiffs will suffer even more, while their opposite-sex New Jersey counterparts continue to receive federal marital benefits for no reason other than the label placed upon their relationship by the state." On Oct.1, Governor Chris Christie's administration asked for a stay of the order pending appeal, which it does not want to take to the Appellate Division but to New Jersey's Supreme Court.

A Fully Performed Palimony Agreement Is Upheld, Despite Lack of a Writing

When legislation went into effect three years ago requiring all palimony agreements to be in writing if they are to be enforceable, all those who had entered into oral palimony agreements prior to the legislation but separated after it were left without recourse in case of breach. Or were they?

Not necessarily, according to a recent decision issued by Superior Court Judge Ned Rosenberg in a case involving actor Roscoe Orman, best known for playing the role of Gordon on Sesame Street. Orman and his partner, Sharon Joiner-Orman, began living together in the early 1970s, but they did not memorialize any agreements concerning their obligations to one another. They had four children together. Orman moved out of their shared house in 2010 and continued to pay some financial support to Joiner-Orman until 2012, when he married someone else. She sought a declaratory judgment that Orman must continue to support her, as he had promised, for the rest of her life; the court granted it, finding that by giving Orman 39 years of companionship, taking care of the home and raising the couple's four children,

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Smith agrees that Mr. Smith cannot afford to pay her much more than what he is offering, but she is not sure that even with the maintenance payments and working full time, she will be able to retire at age 65, at which point she will begin collecting Social Security payments.

In a situation like this, Mr. and Ms. Smith's income, expenses, and net worth should be forecasted into the future and presented to them to aid all parties in negotiations. The projections are based on various assumptions, such as growth rates for retirement assets, income, and expenses. The assumptions should be grounded in professional research and common sense. The forecasted balance of liquid net worth (*i.e.*, working capital) and retirement assets should be the primary focus when attempting to determine if a person is financially solvent. Figure 2, right, shows the forecast of Mr. and Ms. Smith's working capital and retirement assets through Ms. Smith's age of 77, based upon Mr. Smith's settlement proposal.

As shown in the Figure 1 on page 4, during the three years that Mr. Smith is paying maintenance to Ms. Smith, his working capital and retirement asset balance declines, since his income is not sufficient to meet his forecasted expenses. Once he makes his final maintenance payment, his net worth increases for the remainder of his life expectancy, which is age 77.5. Ms. Smith's working capital and retirement asset balance remains steady for the first few years while

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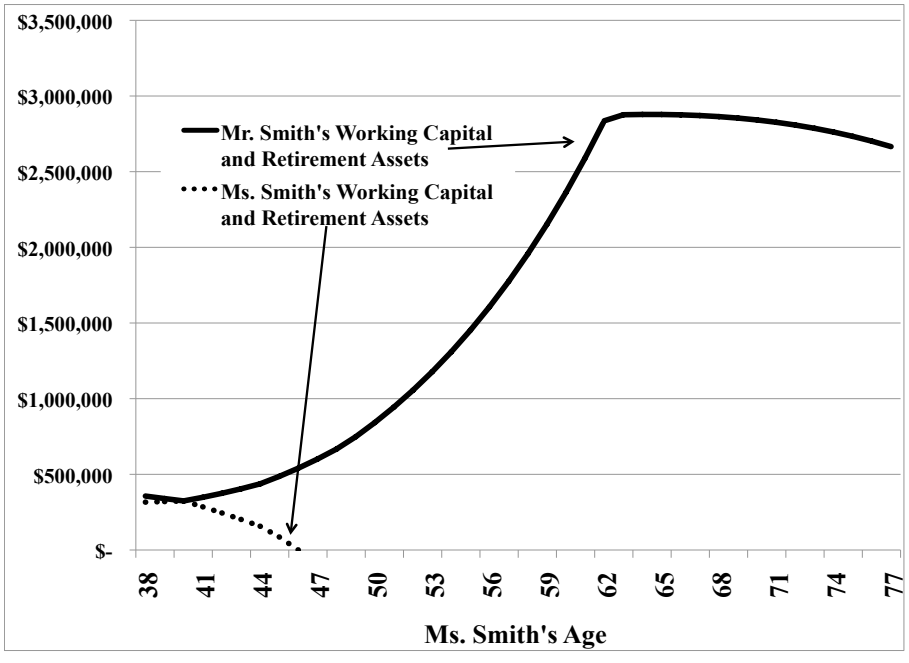
Figure 2: Forecasts Based on Mr. Smith's Proposal



Grandparents

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holding in *Bennett*, upheld the constitutionality of DRL Section 72(1) because it accords "deference" to a parent's decision. The court warned that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one." *Matter of E.S. v. P.D.*, 8 NY3d 150, 157 (2007).

Three years before its decision in *E.S. v. P.D.*, the Court of Appeals, in stressing the deference that a state must give to the child-rearing decisions of fit parents, took the following excerpt from the *Troxel* decision:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision [restricting visitation] becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.

Matter of Wilson v. McGlinchey, 2 NY3d 375, 380 (2004), quoting *Troxel*, 530 U.S. at 70.

(The issue in *Wilson* was whether an existing grandparent visitation order should be modified based upon the parents' allegation that the visits were not going well and were causing the children and the parent a significant amount of stress and anxiety.)

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'Strong Presumption'

In the seven-year period between *Troxel* and *E.S. v. P.D.*, a fit parent's decision, in the context of a grandparent visitation dispute, moved from having "some special weight" (*Troxel*) to the Court of Appeals' imposition of a strong "presumption" in favor of that decision. The law in New York is clear: The court must not interfere with the decision of a fit parent in the absence of proof that rebuts the presumption.

The proof required to rebut the presumption must rise to the level of a compelling State purpose that furthers the child's best interests. The burden is a heavy one. ("To compel visitation over the [parent's objections] does raise serious constitutional and human rights issues as it invades the rights of the parents to rear their children without state interference. For the courts to invade parental rights, the case must be clear-cut and compelling. Not surprisingly, few cases are." Scheinkman, Supp. Practice Commentaries, McKinney's Cons Laws of NY, Domestic Relations Law C72:2).

Best Interests: Review of The Equitable Circumstances

Courts faced with making a best interests determination must review the equitable circumstances, which include the nature and basis of the parent's objection to visitation as well as the nature and extent of the grandparent-grandchild relationship. *Matter of Emanuel S. v. Joseph E.*, 78 NY2d 178 (1991). The circumstances bearing upon the best interest determination include "the reasonableness of the [parent]'s objections to grandmother's access to the child, her caregiving skills and attitude towards [the parent], the law guardian's assessment and the child's wishes." *E.S. v. P.D.*, 8 NY3d at 160-161.

The circumstances to be weighed by the court are similar to those in an inter-parent visitation or custody dispute; however, although enmity between parents of a child may not affect a parent's visitation right, grandparent visitation under Domestic Relations Law § 72 implicates different equitable concerns. *Wilson v. McGlinchey*, 2 NY3d at 382. S*ee Emanuel S. v. Joseph E.,* 78 NY2d at 181-182. The Court of Appeals "made clear in *Wilson* [that] the problems created by parent-grandparent antagonism cannot be ignored." *E.S. v. P.D.*, 8 NY3d at 157.

Parent-grandparent antagonism, standing alone, is not sufficient reason to deny visitation. Rather, it is the impact on the child that is determinative, and denial of visitation is appropriate when animosity is "coupled with family dysfunction" that "infect(s) visitation." *Gloria R. v. Alfred R.*, 209 AD2d 179 (1st Dept. 1994). Courts may deny visitation where the child has "obvious psychological difficulty dealing with the polarization of his family." *Wenskoski v. Wenskoski*, 266 AD2d 762 (3d Dept. 1999).

Best Interests: the Children's Wishes

The children's preferences, if they are capable of verbalizing them, are a relevant factor to the court's best-interests determination. *See Koppenhoefer v. Koppenhoefer*, 159 AD2d 113, 116-117 (2d Dept. 1990). While the children's wishes are not determinative (*Wenskoski*, 266 A.D.2d at 763), their wishes are "entitled to greater weight." *Matter of Jennifer G. v. Benjamin H.*, 84 AD3d 1433, 1434 (3d Dept. 2009). *See also Matter of Decoursy v. Poplawski*, 61 A.D.3d 974 (2d Dept. 2009).

What to Tell the Client

In the introductory paragraph of Part One of this article, which appeared in last month's Issue, we posed a hypothetical fact pattern of a recently widowed mother whose mother-in-law has sued for visitation. She wants to know: Can she resist the grandmother? Should she offer visits in the meantime? Will the court mandate visits over her objection? Although all family law cases are fact-specific, you can confidently advise a fit parent that a reasoned refusal to agree to a schedule of grandparent visitation, whether on an interim or final basis, must be respected by the court. Although the court may, in its initial reaction to the dispute, put

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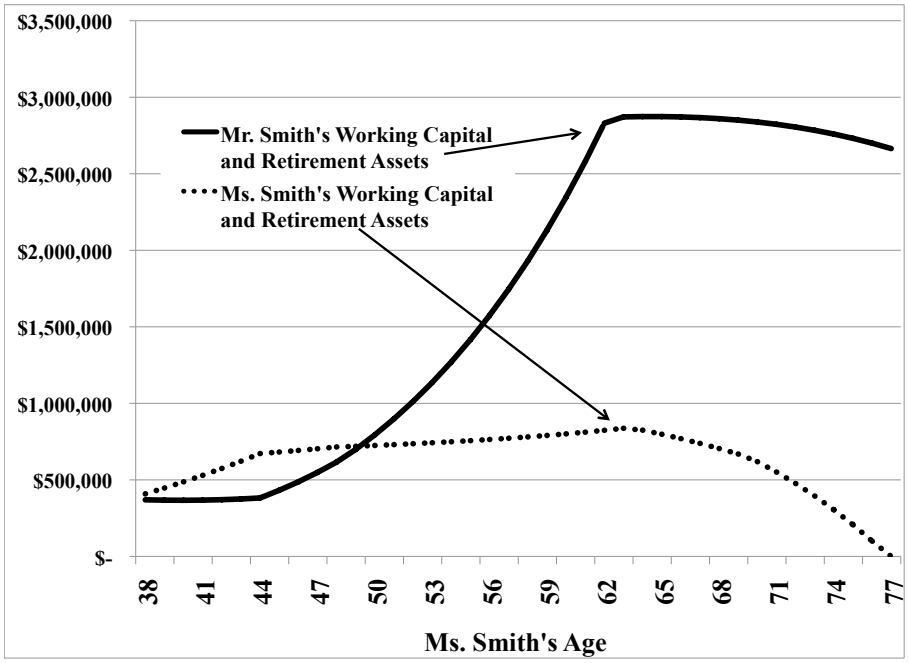
she receives maintenance payments, but then the balance decreases to zero by age 47, at which time she would most likely need to sell her house and live on the proceeds.

Following a review of multiple scenarios that were used for negotiations, Mr. and Ms. Smith arrived at a settlement agreement, as depicted in Figure 3, right: In this settlement agreement, rather than pay $60,000 per year for three years, Mr. Smith will pay Ms. Smith $40,000 per year for seven years.

During the negotiation process, Ms. Smith decided that she will need to modify her lifestyle, and also sell the marital residence to downsize to a less expensive house. The settled amount and duration of spousal maintenance helps Ms. Smith become reasonably self-sufficient, and Mr. Smith agrees that it is not overly burdensome on him in the short or long term.

Figure 3: Forecasts Used as Basis for Settlement



Conclusion

The formulaic approach in New York's temporary spousal maintenance guidelines may provide reasonable results for many divorcing couples; however, blindly applying the formula to final maintenance may result in unworkable rigid results. Justice Sunshine identified a situation where the formula was inappropriate, and he clearly articulated a workable solution that was an exception to the formula.

The "Need-Ability Exercise" should be undertaken so that negotiations are taking place based on facts and reasonable assumptions as to the future. It also facilitates discussions as to future earning potential, child support needs and anticipated lifestyle changes. If performed correctly, the process will help the professionals and spouses curb emotions and focus on the realities the couple must face.

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Joiner-Orman had "fully performed her end of the bargain." Thus, the court found that the oral agreement must be enforced because Joiner-Orman had fully performed her side of the agreement and failure to enforce the agreement now would create an inequity. "There is no good reason why a partial — or at the very least — full performance exception should not apply to the context of palimony agreements," Rosenberg concluded.

CONNECTICUT

Woman Whose Daughter Was Abducted During Supervised Visit Will Get Day in Court

A mother whose daughter was abducted by the child's father during a supervised visit overseen by the mother's lawyer may go forward with her suit against the lawyer who was supposed to be supervising the visits, Connecticut's Supreme Court has declared. The trial court had originally thrown the case out, although that decision was overturned by a mid-level appeals court.

The Iranian mother, Leyla Mirjavadi, and her daughter were granted political asylum in the United States. When the father moved to the United States, he gained visitation rights. The mother feared that he would try to kidnap their child, so she hired a lawyer to supervise the father's visits. One day in 1996, while one of these scheduled three-hour visits was taking place at a Stamford mall, the father took the child to the airport and was headed toward Turkey before the supervising lawyer even knew that they had gone. The child remains out of the mother's reach to this day. When the mother sued the lawyer for negligence, the trail court threw the suit out, concluding that the kidnapping was not foreseeable. That decision was turned over on appeal.

The State Supreme Court affirmed. It found the trial court's conclusion unsupportable in light of the fact that supervised visits were ordered, at least in part, for the express reason that there was evidence that the father might pose a flight risk if given unfettered access to his daughter.

"We're happy with an affirmance," said the mother's lawyer, Brenden P. Leydon, of Tooher Wocl & Leydon in Stamford. "We're looking forward to going back to [the trial court] to prove our case. The heart of the matter … is the reason that the [lawyer] was there for the supervision in the first place — risk of flight."

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DECISIONS OF INTEREST

Suicide Before Final Order Will Not Deprive Wife Of Assets

A husband who committed suicide prior to distribution of a couple's assets could not thereby remove them from the jurisdiction of Supreme Court. *AC v. DR*, xxxxxx, *NYLJ* 1202618541795, at *1 (Sup. NA, Decided Aug. 29, 2013)

On Sept. 11, 2012, the court granted the husband a Judgment of Divorce on the grounds of constructive abandonment, pursuant to Domestic Relations Law § 170(2). Trial on economic issues ensued, with the final day being Feb. 11, 2013. On that date, the parties agreed to a date by which to submit post-trial memoranda concerning the economic issues and to enter into a stipulation concerning custody and visitation. Prior to these events, however, the husband committed suicide. The husband's mother, FC, was appointed as the Executrix of the husband's estate.

The wife sought to have FC substituted as a party to the divorce; FC moved for abatement of the matrimonial action. The predicate question thus became whether Supreme Court retained jurisdiction over the husband's assets that were to have been the subject of the marital property settlement, or whether they now had passed to his estate. The court noted that an action for divorce generally abates upon the death of party prior to the granting of a divorce (*See Matter of Forgione*, 237 AD2d 438, (2d Dept., 1997)), but courts have recognized an exception when a court has issued a written or oral decision granting a divorce. In such cases the formal execution and entry of a judgment may be performed even after a matrimonial litigant's death. *Cornell v. Cornell*, 7 NY2d 164 (1959); *Brown v. Brown*, 208 AD2d 485 (2d Dept., 1994).

The court observed that throughout the previous proceedings, the wife had been cooperative and truthful, while the husband had been combative and had done everything he could do to keep his substantial assets from his wife and child, including by refusing to abide by *pendente lite* orders. He also showed a very advanced knowledge of the divorce legal system. With this background, the court stated, "[T]he instant matter appears to involve an issue of first impression. Here, the husband did not die of natural causes, but rather by his own calculated act of suicide, and as such, this case is distinctly different from those cited by [the estate's] counsel. ... This Court cannot ignore the husband's unfortunate actions and testimony which consistently demonstrated a clear and deliberate intent on his part to do anything in his power to try to deprive the wife from receiving any monetary benefit from him. The manner of the husband's death, is deserving of due consideration with regard to the issue of abatement."

Looking at the husband's serial examples of "nefarious conduct," along with his substantial knowledge of the law, the court made the inference that the husband's intent in committing suicide was to have his estate seek an abatement of the matrimonial action, in order to try to deprive his wife and children of marital assets. "As this is a court of equity, the conscious, deliberate and calculated actions of the husband, prior to his intentional death, are factors that cannot be ignored," in determining the wife's and the estate's motions, the court stated.

"Suicide, like murder, is an intentional act, and the husband's estate should not be able to benefit from it by seeking an equitable remedy []. Husband's estate should not benefit from his intentional misconduct and abhorrent behavior," concluded the court. It therefore sided with the wife and ordered the substitution of the Executrix for the husband in the matrimonial action while denying the motion for abatement.

Alternatively, because the Judgment of Divorce was granted during the husband's lifetime, and all testimony regarding the economic issues had been completed by the time of his death, the court found that, "in the interests of justice, equity and the efficiency of the Court system," the wife's right to equitable distribution in the matrimonial action survived the husband's suicide.

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Grandparents

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pressure on the parent to allow some access, it must respect a fit parent's decision — whether on pre-hearing or final access — and withhold its own subjective opinion as to what is in the child's best interests.

Conclusion

A court deciding a petition for grandparent visitation must undertake a two-part inquiry. First, it must determine whether the grandparent has standing to petition for visitation rights based on the death of a parent or equitable circumstances. If the court concludes that the grandparent has established the right to be heard, then it must determine if visitation is in the best interests of the child, with significant weight given to a fit parent's wishes, which are strongly presumed to be in the child's best interests.

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