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Psychological Effects of International Child Abduction

By John Daignault, Psy.D.

Research demonstrates that child abduction often results in substantial psychological harm to the child victim. Child abduction of the international type brings with it additional areas of substantial concern. A number of serious psychological symptoms and disorders have been correlated with international child abduction.

To begin with, consider the true story of 9-year-old Sean, his father David, and his mother Bruna, as presented by CBS New York in May 2011:

David believed he had a terrific life in New Jersey with his Brazilian wife Bruna and their son Sean. In 2004, Bruna took Sean, then 4, to her native Brazil for what David believed would be a two-week visit.

But once in Brazil, Bruna called David and said was staying, and so was Sean.

David began trying to use the Hague Convention dealing with child abductions to try to get Sean back. The international treaty, of which the U.S. and Brazil are signatories, seeks to ensure that custody decisions are made by the courts in the country where a child originally lived — in this case, the United States. However, for years, during David's trips to Brazil to try to enforce his rights, he wasn't even granted visits with Sean.

The tale took a tragic twist in 2008: Bruna died while giving birth to a baby by her new husband in Brazil. Sean was then cared for by his Brazilian stepfather. It was after this that David's story began getting the attention of the media.

Bruna's death and David's continuing legal fight made the case perhaps a more compelling drama — but it's hardly a unique situation. Advocates say there are some 3,000 abducted U.S. children currently in other countries.

The television accounts of David's plight got the attention of officials who had the power to do something about it.

U.S. Rep. Chris Smith, a New Jersey Republican, traveled to Brazil with David, and President Barack Obama and Secretary of State Hillary Clinton spoke with their counterparts in Brazil. Eventually, Sean was returned — over the steadfast objections in court of his stepfather and maternal grandparents in Brazil, even though David repeatedly said he would allow his son's Brazilian grandparents to see the boy. David has said his son was the first U.S. child returned from Brazil under the Hague Convention.

On Dec. 24, 2009, the turnover finally happened. On that day, Sean and his Brazilian family marched a few blocks through a crowded street to their meeting at a U.S. consulate in Rio de Janeiro. It was live on television in Brazil and the United States. Sean cried as his Brazilian relatives and family lawyer tried to get him through the scrum of journalists in front of the consulate. Guards had to violently push back photographers and TV cameramen.

The boy carried his luggage and wore a gold shirt with the Brazilian flag and Olympic rings underneath.

The boy didn't say anything as he was led from a black SUV across the street to the consulate. His maternal grandmother said in tears simply that "this is a very difficult moment."

Sean was brought into the U.S. consulate by his maternal grandmother and his stepfather; David was waiting for Sean inside.

David felt this was a way for the family in Brazil to exploit their heartache. "They dragged him through the streets, for God's sake." David's father said. "That shows what they care about — and it wasn't him."
Once he was reunited with his dad, witnesses say, Sean calmed down, ate a hamburger,

and talked about how much snow there might be in New Jersey.

"It is now time for our new beginning, the rebirth of our family at such a special time of the year," David said in a letter to reporters after his departure. However, the boy's maternal grandmother said: "My heart is empty and broken because our love is missing. To take the boy on Christmas Day is a heinous crime."

David said, once Sean was on a private jet and heading to the U.S., he finally relaxed.

So far, visits with his grandparents in Brazil haven't happened. To make matters more complicated, in March 2011, the boy's maternal grandfather died of lung cancer in Rio de Janeiro, and his widow said he died "with immense sorrow in his soul" because he never got to see his grandson again.

David says he's willing to grant the maternal grandmother time with her grandson so long as she follows his conditions — including that she drop her appeals in Brazilian court seeking to have the boy returned there. A New Jersey judge sided with David on the matter.

David says he does his best to speak only kindly to Sean about his mother and maternal grandparents.

David offered Sean to call Brazil to speak with his grandmother after her husband died. However, according to David, Sean decided to send a card instead. Relatives in Brazil put too much pressure on the boy when they've talked on the phone in the past, David explained.

David reports he's mostly concentrating on his son.

David has taught Sean to ride a bike and swing a baseball bat and has worked with Sean on a lot of homework. Despite not having used English regularly for years, Sean is getting A's and B's, his father said.

During this interview, David wells up with pride when he holds up a small video camera to show footage he took of Sean playing with his puppy and Sean whacking a base hit in his first time at the plate in organized baseball.

But besides being a dad, David is also continuing to work on the issue of international child abductions. He has written a book that he hopes will bring attention to the cause, and he was scheduled to testify about it before a Congressional hearing later this month.

In April, when Brazilian inspectors came to check up on Sean and the condition of their home, David presented them with a letter from parents from six countries whose children have allegedly been abducted to Brazil.

Attachment

In the late 1940s and 1950s, psychologist Dr. John Bowlby[1] began questioning the prevailing Freudian viewpoint, which held that the infant develops his tie to the mother as a result of the pleasure he experiences when her hunger is satisfied by maternal feeding, the so-called secondary drive theory. Drawing upon animal research that showed how infant geese could become attached to even objects that did not feed them[2] and how monkeys could prefer cloth-covered caretakers that provided contact comfort to food[3], Bowlby developed the idea that ties to caretakers result from a unique, evolutionary, biologically-based drive for proximity. The genesis of attachment theory was therein spawned, a school of thought that has been the subject of intense research in the psychological community for the past 60 years, culminating in the recognition of attachment in the DSM-III[4] in 1980 with the identification of Reactive Attachment Disorder. Bowlby hypothesized that attachment was grounded in evolution insofar as proximity to the caretaker was designed to ensure the survival of the species. According to Bowlby's train of thought, attachment provided a number of important benefits to the infant, including being fed, learning about the environment, social interac-

tion, and protection, since infants that remained close to their caretakers were unlikely to be killed by predators.

However, by the age of 3 or 4, the child was obviously not so reliant on physical proximity, and so Bowlby and other researchers expanded attachment theory to recognize the developing cognitive abstract ability of the child to predict the future beyond immediate concrete physical occurrences. Bowlby proposed a "working model" of attachment, wherein human beings learned a cognitive expectation of safety and security through their accessible and responsive attachments, based on the success – or lack thereof – of their earlier experiences of physical proximal attachment. As human matured, mental representations of attachment safety and security replaced some of the needs for physical proximity.

In the development of attachment theory, Bowlby and other researchers relied on experimental observations of the reactions of young children when they were subjected to separation from their caretakers. It became clear that separation was experienced by the child as a fundamental threat to her well-being, as manifested by such emotions as extreme fear and anger, followed by sadness and despair. Eventually, the child became detached and less emotionally expressive with a notable lack of joy or enthusiasm. These processes were codified into three phases of attachment separation – Protest, Despair, and Detachment. Further, this grief process was considered to be a natural course of separation and loss, and interruption of or interference with it could result in psychological or physical illnesses.

According to Shaver and Fraley[5], Bowlby pointed to his hero Charles Darwin as an illustration, postulating that the perplexing set of symptoms from which Darwin suffered from for most of his life, including recurrent hyperventilation, fainting spells, gastric pains, nausea, and heart palpitations, were related to suppressed and unresolved grief surrounding the premature death of his mother when Darwin was 8-years-old, in light of the fact that Darwin's father forbade his children to speak about their deceased mother.

Through numerous research ventures, various psychological disorders, such as conduct disorders, anxiety disorders, depressive disorders, and post-traumatic stress disorders, have been implicated in cases of insecure attachments or pathological grief experiences.

Attachment theory holds direct relevance to an understanding of a child's reaction to his or her adduction. The abrupt loss of a significant attachment figure, along with the abductor's prohibition against normal grief and mourning, present the child with a highly abnormal life experience and can create serious psychological vulnerabilities in the child. Abduction can cause serious emotional, developmental, and psychological harm to the child.

International Child Abduction

In FY 2009, the Department of State received requests for assistance in the return of 1,621 children from foreign countries to the United States. Although this is a relatively small proportion of the total number of reported missing children, which was 600,000 in 2002, according to the Department of Justice, it represents a significant increase from previous years[6]. The 10 countries with the highest incidence of reported abductions, accounting for 623 cases, were: Mexico (309), Canada (74), Germany (50), United Kingdom (48), India (34), Brazil (24), Japan (23), Columbia (23), Philippines (20), and Australia (18).

Of these, 436 abducted or wrongfully retained children were returned to the United States in FY 2009 with the five most successful countries being Mexico (125), United Kingdom (28), Canada (18), Australia (13), and El Salvador (12). However, it is apparent that many children who are abducted to other countries by parents are never returned to the United States.

According to the Department of Justice, parents who abduct their children to other countries are not that different from parents who abduct their children to other states. Although abductors may be other family members or their agents, in most cases the abductor is the child's parent. The abducting parents often have young children. They

usually have support from family or other individuals for what they are doing. They generally do not value the other parent's relationship with the child. Some are convinced that their actions are justified because they believe they rescued their child from the hands of an abusive parent. Many feel disenfranchised from American society, and separation and divorce have intensified their sense of alienation. Some are fleeing domestic violence, whereas others are controlling and abusive themselves. For most international abductors, home is in another country with a different legal system, social structure, culture, and language. These differences, plus physical distance, make locating, recovering, and returning internationally abducted children especially complex and problematic.

A Department of Justice-commissioned research study [N=97][7] found significant differences in several demographic features between abductors and left-behind parents:

83% were of different nationalities
69% were of different ethnicity
58% were of different religions

62% of the abductors were citizens of another country only, whereas 23% held U.S. citizenship only, and approximately 15% held dual citizenship. The greatest number of abductors had family in the destination country and had grown up there. About one-third had employment or business interests in the destination country. About one-third had made a preparatory visit to the country where the child was subsequently abducted, and about one-third had received visits from friends or family members from the other country prior to the abduction. It was concluded that most abductors did not act alone.

Left-behind parents generally had more education than abductors, whereas only 50% of the abductors had a high school degree, its equivalent, or some college credits.

Left-behind parents generally had better economic standing than abductors. Many more left-behind parents had full-time employment, and nearly twice as many abductors were unemployed.

Mother and fathers were equally likely to be abductors, although their patterns of destination differed. Mothers were more likely to take their children to Latin America, and fathers were more likely to take their children to the Middle East. Europe was a common destination for both mothers and fathers.

One-third of the abductions took place during court-ordered visitations. About one-quarter had kept the child late after a visit prior to the abduction, perhaps to reduce concern in the left-behind parent when the actual abduction occurred. 20% may have actually involved the child in preplanning.

Left-behind parents reported serious threats prior to the abduction, including in 80% of the cases that the left-behind parent would never see their child again.

Most abductions were premeditated, and abductors saved money, waiting for tax refunds, liquidated assets, and quit or changed jobs. Abductors had gathered legal documents, such as birth certificates and school records.

This DOJ-commissioned research study found certain characteristics regarding the child victims:

In 70% of the cases, only one child was taken, although the range was 1-3 children per incident.

Gender did not appear to be a factor, since the children were nearly equally divided between girls and boys.

Abducted children tended to be young, ranging from 5 months to 12.5 years old. The mean age was 5 years. It is speculated that abductors perceive younger children as more controllable and less resistant during the abduction. However, very young children present a separate set of challenges for the abductor in terms of the child's physical needs, such as bottle-

feeding and changing diapers, and attracting attention at the airport.

Finally, this DOJ-commissioned research study found the following data regarding recovery of the children:

70% of the children were recovered.

There was a significant correlation between recovery and the length of separation in that there was more recovery in cases of significantly shorter separations. In 50% of recovered cases, the separation lasted less than a year. However, in 50% of the cases where there was no recovery, the separation had lasted for more than 5 years. In 88% of recovered cases, the separation had lasted at least 6 months.

In general, separation was significantly shorter in abductions to Hague convention countries.

According to another DOJ report[8], one of the primary obstacles to the recovery of parentally abducted children is the general public's perception that children are not at risk of harm if they are in the physical custody of a parent, even if the parent is an abductor. Even some law enforcement personnel view parental abduction as "civil" in nature or a private family matter that is best handled outside the realm of the criminal justice system. This is a serious misperception, as the experience of abduction can be emotionally traumatic to children.

In her review of the literature, Chiancone[9] notes it is particularly damaging in cases in which force is used to carry out the abduction, the child is concealed, or the child is held for a long period of time. Children held for shorter periods of time (less than a few weeks) did not give up hope of being reunited with the other parent and, as a result, did not develop an intense loyalty to the abducting parent. Some of these children were able to view the experience more as an "adventure." Victims of long-term abduction, however, seem to fare much worse.

According to a recent study[10], the following characteristics define family abductions. Children who are abducted are often:

"Groomed" by the abducting parents prior to the abduction. In an attempt to weaken the bond between the child and the other parent, the abductor may spend weeks or even months grooming or brainwashing the child prior to the abduction. And the brainwashing may continue well into the abduction, making reunion with searching parent more difficult when the child is recovered. The feeling that he "agreed" to go with the abductor may cause issues for the child later. The child may feel guilty for leaving the other parent or blame himself for going with his abductor.

Forced to go into hiding with the abductor, thereby placed into a situation of living an fearful, abnormal existence.

Made to fear discovery. The child may be taught to fear the very people whom she had previously been taught to trust – police, teachers, doctors, etc. The child may be deprived of proper educational, medical, and social services and support. The safety and welfare of the child become compromised, and the child comes to rely solely on the abductor.

Given a new name, birthdate or birthplace, and identity. Some have their looks altered or are even forced to masquerade as the opposite gender. Many are under strict instructions not to reveal their true identities or circumstances. This can ultimately lead to significant identity confusion when the child is recovered. For children who were very young at the time of the abduction, their confusion revolves around being reunited with a searching parent whom the child does not even remember or know.

Not encouraged or allowed to grieve their losses. The abductor's focus is on creating a new identity for the child, so often the child is forbidden to speak of the past or grieve for lost family and friends. However, the child's felt loss is total, so trusting and loving the searching parent may be rendered much more difficult, when the child is recovered.

Required to lie about their past. The abductor usually teaches the child to conceal the truth

about his identity and circumstances. The child may be forbidden to answer the door or play outside with other children, to keep the blinds closed, to hide while riding in the car, to avoid authority figures, to evade personal questions, and to lie. Distrust of authority may become the child's norm.

Told lies about the searching parent. The child is often deceived about the searching parent. The child may be told that the searching parent was so dangerous or violent or abusive that the abductor fled to save their lives, or that the searching parent did not love him or want him, or that the searching parent and/or siblings had died. The child has no way of finding out the truth, and the only information the child receives comes from the adbuctor.

Coerced and emotionally blackmailed. The abductor may tell the child that, if she tells anyone their secret, the abducting parent will be taken away to jail and the child will never see him again. The child's reality and viewpoints are shaped only by what the abductor tells the child. Thus, following recovery, the child may trust no one for a long time.

According to the Department of State[11],

Recovered children often experience a range of problems, including anxiety, eating problems, nightmares, mood swings, sleep disturbances, aggressive behavior, resentment, guilt, and fearfulness.

As adults, individuals who were abducted as children may struggle with identity issues, personal relationships, and possibly experience problems in parenting their own children.

Individuals who were abducted and recovered must also face the task of redefining their relationship with the abducting parent.

There is often the perception that since the abductor is a parent, he or she must have acted in the child's interests in taking the child away.

If and when children are reunited with their LBP, the reunification process may be difficult. They may find that they no longer have a relationship with that parent or even a common language.

Children who are reunited with their LBP may be distrustful of the LBP and question why that parent did not try harder to get them back. They may find that the LBP has remarried and that they have a new, unfamiliar stepparent or siblings. Children who were abducted when they were very young may not even remember life with the LBP.

According to a British study [N=30][12], 72% thought there had been effect on the children from abduction, and 24% did not think so. Effects included:

physical symptoms of stress, such as sickness, headaches, alopecia, clinginess, rashes, crying, stomach pains, bed-wetting, nervous coughs, and high temperatures

lack of faith as a result of having been failed by the legal system and the involved adults

feeling of helplessness

unwillingness to take risks and needing everything to "feel safe"

unwillingness to sleep alone

adoption of such coping strategies as "blanking out" or distancing from unhappy circumstances and the ability to cut off from those they love so they are not missed and affection is not demonstrated to them

guilt toward one of both parents for not "choosing" to be with that parent

loss of childhood that was "stolen"

inability to deal with stress

a lack of trust

difficulties with schooling

extremely bad behavior with regression to toddler-type temper tantrums

nightmares and disturbed sleep

apprehension toward males when the abductor had been a male parent

hostility toward the nationality and things associated with the nationality of the abductor

general lack of confidence and a need for constant reassurance

need to be fully aware at all times of the movements and whereabouts of caretakers

general insecurity, a need for acceptance, and a need to be the center of attention

One of the most prominent researchers in the area of the effects of parental kidnapping on children is Geoffrey Greif. According to Greif[13], the children's emotional harm includes nightmares, fears of doors and windows, bedwetting (depending on age), fear of authority and strangers, anger at the abductor and the left-behind parent, depression, anxiety, and school and peer problems. Further, states Greif, for many individuals, their emotional problems extend into their 20s, 30s, 40s, and 50s (the oldest person Greif has interviewed was 53).

Conclusion

In sum, given the attack it presents on the child's attachment bonds, international child abduction is highly likely to cause serious psychological impairment in the child victim.

Mental disorders that have been associated with this crime include Identity Problem, various Psychosomatic Disorders, Posttraumatic Stress Disorder, Dissociative Disorder, Generalized Anxiety Disorder, Panic Disorder, and Major Depressive Disorder.

Cases of international child abduction must be prioritized for attention within the mental health community.

(Endnotes)

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Examining Service: Your Only Chance to Make a First Impression

By Wendy O. Hickey, Esq., and John A. Fiske, Esq.

When counsel for plaintiff chooses how to serve the defendant in a divorce, the decision has huge implications for the rest of the divorce, psychologically as well as legally. Rule 4 of the Rules of Domestic Relations Procedure ("RDRP")allows for different methods, and it is fitting that counsel explain to her (includes "his") client the implications of each. For the bellicose example,: one of the most intimidating moments in the entire divorce process occurs when the big burley constable rings the doorbell to serve the divorce papers, or worse shows up at defendant's place of work for all to see. For the defendant who does not have a clue that plaintiff wants a divorce, it may take weeks to recover from the shock . By contrast, in a recent case of John's counsel for plaintiff began the divorce by calling the defendant husband on the phone and informing him as tactfully as she could that her client wanted a divorce, and then explaining the alternatives for service. She asked the defendant if he would accept service, he said he would and subsequently did. The lesson: the manner one chooses to go about serving the divorce papers can and often does have a huge impact on the overall tone of the case, for a long time and maybe even "After-marriage," to quote Anita Robboy.

Two of Wendy's more difficult current cases got off on the wrong foot just because of the manner in which the clients were served. In one instance, the husband, an Orthodox Jew, was served with the divorce complaint and summons in Temple. Needless to say, he could not have been more offended by the manner in which his wife chose to initiate the divorce proceedings. In another instance, the wife was served by the standard big, burley constable (are there others?) ringing her doorbell however, there was a twist. The husband was out with the parties' 13 year old special needs son. The husband instructed the son to call his mother and ask her to open her front door to let him in. While the wife thought that request was strange, she did just that only to find the constable standing there with papers and the husband and son sitting in the husband's car a few houses away. Both of the above scenarios left the parties so angry about how they had been served that they have each had trouble getting over that initial anger to deal with negotiating a global resolution of the dispute outside of court.

Rule 4 of the RDRP allows for two basic methods of service of the summons and complaint for divorce: service by a sheriff or other designated officials (section c) and acceptance of service by the defendant (section d) (1). The difference is night and day in many cases. Since every action has an equal and opposite reaction in life, probably magnified in divorce, the choice sets a tone for the entire divorce. The defendant served by the burly sheriff may decide to change the locks in response, or take funds from a joint account, or lie awake at night categorizing all the things he can do to upset the aggressor spouse. The defendant who is consulted in advance and given the opportunity to accept service is allowed to save face and to have some sense of control over his own life and the divorce process.

Clients are coming to recognize the value of alternative dispute resolution or negotiating settlements through counsel prior to taking any court action more and more often. This constructive realization is cutting down on the number of cases becoming difficult over the manner in which the initial service of process is made, since a joint petition obviates the need for any summons in the first place.

What About the Alimony Reform Act?

We wonder if this fateful choice of how to start a divorce will change on March 1, 2012 when the Alimony Reform Act (hereafter Act) is implemented.

The Act re-defines the length of marriage to be "from the date of legal marriage to the date of service of a complaint ... for divorce or separate support duly filed in a court in the commonwealth or another court with jurisdiction to terminate the marriage". Does that language mean there is no legal effect when the defendant accepts service of the complaint instead of being served? The question is important because of so much current concern about the race to the courthouse by payors desiring to limit the number of months of the marriage. O tempore! O mores! When in doubt about your marriage, hurry to the courthouse.? When general term alimony is going to come into play, Section 49 of the Act also specifically defines the scope of how the duration of alimony will be calculated. This means we may soon be faced with litigants who, while on the one hand recognize the benefit of alternative dispute resolution, will have a legitimate concern about increasing the amount of time they are obligated to pay alimony if they go the "nice" route and try to negotiate before filing for divorce. This Hobson's choice is especially true if someone is on the cusp of the next step up and wants to get their divorce filed while they have still been married for less than 5 years or less than 10 years. So, Wendy wonders, if the deadline is close enough to the anniversary date, she can only imagine the lengths people will go to in order to effectuate good service before that anniversary date meaning more stories like the two mentioned above.

This dilemma is not unfamiliar and totally new territory after March 1, 2012. For over five years we have had time standards applying to divorces (since April 2006). The standards make problematic the practice of filing a section 1B divorce to get the attention of the defendant and then undertake a lengthy mediation process, since the court may be sending out pesky notices of conferences, discovery deadlines, etc. Mediation and litigation do not mix well. Once the complaint is served, we have to exchange self-disclosure and financial statements and then, depending on what county you are in, you either get a notice of pre trial conference, status conference or case management conference. At a recent CLE program on Alimony Reform Chief Justice Carey made clear that the time standards are still going to apply so if people want to mediate, they can certainly do so but it must be within the parameters of the time standards. John wonders how serious this problem is, since overburdened courts do not seem to be interfering with many of his mediations with a section 1B divorce on file, but Wendy is right to point out that it can and does happen.

Sowhat Sowhat?

From our different viewpoints, we converge: please think twice about how you serve the defendant. As you are required by Rule 5 to discuss ADR with your client, please discuss also the implications of how and when you commence the divorce in court. The psychological and tactical issues surrounding this decision may be as important or more so than the strictly legal ones. As George Burns says as God, "I try not to allow wars and disease, but everything I do has all these side effects."

Partnership Interest in *Adams v. Adams*: A Continuing Discussion on Division of Assets Pursuant to Divorce

By Abby Morrison

Introduction

How a court divides assets in a divorce proceeding has been continually evolving for many years. For example, in Massachusetts women have gone from having virtually no property rights in a divorce to the situation today where women can be given a share of almost all assets during a marriage using the multi-factor guide found in Massachusetts law. However, due to the wide variance of assets accumulated during marriage, and the extreme complexity of many of them, courts are constantly trying to deal with how this division is made when the marriage is broken.

When one spouse is involved in a business or partnership, the division of assets can be even more difficult. Not only does the court have to determine what can be divided, but it also has to determine the value of the business or partnership interest. Courts have tried many different approaches, including cash flow methodology and the direct capitalization of income approach, to varying degrees of success.

These issues were seen most recently in a Massachusetts Supreme Judicial Court ("SJC") case titled *Adams v. Adams*.[1] Here, the husband was involved in a management and investment partnership which was the primary source of income for the family. When the marriage ended after more than a decade, the Court was left to determine what financial support the wife was entitled to. The Court was forced to confront the difficulties of the division of assets, and in doing so seems to have both affirmed past precedent on how to deal with income from a partnership as well as creating some new guidelines for how courts can determine the value of a partnership interest.

II. Current Property Division in Massachusetts

What is part of the marital estate?

Because the Massachusetts statute gives courts such discretion in making property divisions and alimony decisions, the law is constantly developing on how assets should be fairly divided. Section 34 expressly lists a number of things that should be considered part of the marital estate, including "all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance."[2] However, the statute adds that property to be divided isn't limited to those items listed.[3] The court has interpreted this list very broadly and has included many different types of property in the marital estate that is to be divided.[4]

This doesn't mean that everything can be included in the marital estate. The court has found that some interests are so speculative that they are "nothing more than expectancies" and therefore are not included in the marital estate.[5] One example of this has been with professional degrees.[6] In *Drapek v. Drapek*, the SJC found that a professional degree, and the future income that may be earned with that degree, is not subject to division under §34.[7] To hold otherwise the court would have to determine the present value of the degree by looking at its capacity to earn future income.[8] Property division is not subject to modification, unlike alimony, so this means the court would not be able to consider future events that may affect an individual's earning capacity.[9] So although the judge can consider the earning capacity of both spouses, it will not include a degree in the marital estate and assign a present value to it.[10]

The Massachusetts law also gives courts discretion in including things in the marital estate regardless

of when they were acquired.[11] Courts have determined that the legislative history to §34 does not indicate a legislative intent to exclude non-marital property.[12] This very broad discretion has been deemed necessary because the court must be able to approach a wide variety of factual scenarios in different cases and reach a fair financial resolution in the end.[13] The courts typically rely on several different factors when determining if non-marital property should be included in division of the marital estate, including the contributions of the parties, length of the marriage, and the needs of the family.[14]

Valuation of the marital estate

Once the court decides what constitutes the marital property it then must assign values to the different assets so that they can be divided. This can be an even more difficult issue than determining the scope of the marital estate.[15] Deciding on the value of a business can be particularly difficult because there is not one set value of the company before divorce proceedings start, but the court must still arrive at one by the end of the case. Especially when the business is closely held by one of the spouses, finding the value is "not an exact science."[16] As a result of the complexity, a number of different approaches have been used to determine value.

The majority approach to determining the value of a business has primarily used some variation of the "income approach."[17] This assumes that the value of the business is determined by finding the future economic benefits the business will bring and valuing them according to their present rate using an appropriate discount rate.[18] Within this method there are two varying approaches: direct capitalization and discounted cash flow. Direct capitalization works by determining the average normalized pretax income of the business, including any adjustments for risk and other factors, and then dividing that by an appropriate capitalization rate to discount it to present value.[19] Discounted cash flow differs from direct capitalization in that it doesn't assume a perpetual stream of income.[20] Instead it uses a complicated equation to reduce a finite period of future income to present value.[21]

Determining the value of a business can also be done using a variety of factors suggested by the Internal Revenue Service. These include:

1. The nature of the business in general and the history of the enterprise from its inception;
2. The economic outlook in general and the condition and outlook of the specific industry in particular;
3. The book value of the stock and the financial condition of the business;
4. The earning capacity of the company;
5. The dividend-paying capacity;
6. Whether or not the enterprise has good will or other intangible values;
7. Sales of stock and the size of the block to be valued;
8. The market price of stocks of corporations engaged in the same or similar line of business having their stocks actively traded in a free and open market, either on an exchange or over the counter.[22]

The court should also take into account any tax consequences that could result from the division of a business.[23] However, if neither party requests that the judge consider specific tax consequences and does not introduce evidence to support its arguments, the judge is not required to deal with the tax issues.[24]

To determine these values, parties and the court often rely on expert witnesses. Many different people can serve as expert witnesses including people directly involved in the business in the case or outside professionals who are given information regarding the business in question.[25] These outside professionals could be certified public accountants, professional business appraisers, brokers, or auctioneers.[26] Although the judge has broad discretion, if the judge allows one party's expert to testify as to the value of a business, the judge should allow the other's party's expert to testify as to the same issues if his/her qualifications are similar.[27] If there are two expert witnesses in a case who place different values on a business the judge can "accept one reasonable opinion and reject the other. Or the judge may reject expert opinion altogether and arrive at a valuation on other evidence."[28] However, the judge may not find

a value that is "materially at odds with the totality of the circumstances or ... at variance with the requirements of the equitable distribution statute."[29] The value given by the judge will not be overturned by a higher court unless it is clearly erroneous.[30]

III. Adams v. Adams

In late 2005 the Adams' once-happy marriage began to fall apart. On December 31, 2005 the husband told his wife that he intended to leave her and the next month he moved into his sister's home and contacted an attorney. In February 2006 the wife learned about his extramarital relationship and filed for divorce on February 15, 2006, claiming that the marriage had suffered an irretrievable breakdown.

The divorce proceedings were complicated primarily because of the large amount of assets at stake. Many of the assets were stipulated to by the parties, however some of them remained contested. One of these contested assets was the husband's Wellington partnership interest. While in divorce proceedings the trial court judge appointed a special master to determine the value of the husband's Wellington partnership interest. Both parties agreed to this appointment. The special master found that the value of the husband's partnership was $80,956,975. The husband strenuously objected to almost every one of the special masters' findings, both that the partnership interest was even included in the marital estate and the value assigned to it. Despite this, the trial court judge incorporated the report in his judgment. He also approved of the special master's use of the direct capitalization of income method to determine the present value of the Wellington profits and the present value of the withdrawal payments he would receive upon leaving the partnership. He also found that the wife would receive one-half of the assets acquired during the marriage, regardless of how they were acquired.[31]

Inclusion of the Wellington partnership in the marital estate

The husband's first objection was that the partnership interest should not be included in the divisible marital estate because it is just an expectancy of future income, so cannot be reduced to a present value. He compared this to the division of a professional degree in *Drapek v. Drapek*, and argues that like that case, this future earned income is not subject to division under §34.[32] The Court disagreed with the husband, however, and found that the Wellington interest should be included in the marital estate.

The Court begins its analysis with the plain meaning of the equitable distribution statute seen in the Massachusetts General Laws.[33] The language of the statute gives judges broad discretion with a sweeping list of factors to consider and many different types of assets that can be included in the marital estate.[34] Under this analysis, in *Adams* the Court found that the Wellington interest fit clearly within the types of assets that §34 lists as part of the divisible marital estate under "profit-sharing."[35] The Court held that §34 must include distribution of the partnership's surplus profits which the husband receives under the return on capital and merit distribution aspects of his salary.[36] It also looked at the Massachusetts law under which the partnership is organized, M.G.L.A. c.108A, §26, and when it read this section in conjunction with §34 it found that the partnership interest again fits under "profit-sharing" because §26 defines the partnership interest as a share of the profits and surplus of the partnership.[37]

The husband tried to argue that his case is like *Drapek v. Drapek*, in that the court is unfairly including future earned income in the present value of the Wellington interest.[38] However, the Court disagreed and pointed out that the special master only used the first two components of his Wellington income (the salary and incentive compensation) to calculate the present value of the partnership interest and specifically left out the other aspects of his income because they represent more future earned income.[39] The Court also made a point to differentiate things such as a medical degree and a partnership interest.[40] A medical degree is more of an "expectancy" in that it is expected that with it will come the possibility of future income.[41] It is also hard to measure because there is no record of past income distributions that could make it easy to reflect its value. The degree simply gives the right to practice medicine and not the right to share in profits from some medical organization.[42] A partnership interest, on the other hand, has, according to the Court,

more "theoretical value" and, although its earnings can be uncertain and can fluctuate based on the economic markets or performance of the interest-holder, there is more of a guarantee of income than with something like a professional degree.[43]

Just because the asset valuation may be uncertain or difficult does not mean that the asset should not be included in the marital estate.[44] In *Bernier v. Bernier* the Court met the difficult task of valuing two supermarkets that were owned by both spouses but almost entirely controlled by the husband.[45] Although valuation and division were difficult, the Court constantly reminded itself of the goal to have an equal division of the value of the corporation at the end of the day.[46] The court has also divided noncorporate business interests in the face of a divorce where valuation was a difficult problem.[47] In *Adlakha v. Adlakha* the Court attributed the wife's private practice as a physician to the marital estate to be divided.[48] And in *Sampson v. Sampson* the marital estate included the fair market value of the wife's insurance agency, which was valued with the direct capitalization of income method.[49]

The Court also routinely includes other assets in the marital estate that are subject to a contingency of continuing employment or are "subject to fluctuations in value based on varying economic factors beyond either party's control", and this case proves to be no exception.[50] Moreover, it seems simply unfair to deny a spouse a "right to share in what 'may be the most valuable asset between the spouses'" if that spouse contributed to acquiring that asset, just because the asset is subject to some future contingency.[51] Based on the above analysis by the Court, it held that the partnership interest should be included in the marital estate because it gives both a "reasonably predictable stream" of future income based on past patterns (through the return on capital and merit distributions portions) and an enforceable contract right to income (through the salary and incentive compensation portions).[52]

Finding the value of the partnership interest

To determine the value of the partnership interest, the Court had to examine the different valuation methodologies discussed above, namely the direct capitalization and discounted cash flow methods.[53] In the *Adams* case the wife's expert used the discounted cash flow method and fixed the present value of the partnership interest from the date he prepared his report until the date the husband retired from the firm.[54] The husband did not present an expert to determine a present value of the partnership interest because he first maintained that it should not even be included in the marital estate. In the event that this line of reasoning failed (which it did), then he argued that he should only pay out an equitable distribution of the partnership interest when the income was actually received by him. Using more conservative projections of the husband's future income than the wife's expert, the special master used the direct capitalization method to come up with his estimated present value of the partnership interest.[55]

The three parties also had differing values placed on the present value of the withdrawal payment that the husband would receive if he left the partnership. The wife's expert assumed that the withdrawal payment would come after the husband retired at age 62 and that it would be paid out over ten years, as provided by the partnership agreement. He also made this projection by valuing Wellington as a whole over the ten year period it would be making withdrawal payments.[56] The special master supported the wife's expert's valuation of the withdrawal payment. The husband's expert determined the value of the withdrawal payment by valuing it from the time of the trial and not 14 years later, as the wife's expert did, when the husband retired at age 62.[57]

In examining the valuations done by all three parties involved, the Court was acting under the standard that it would only reverse the trial judge's decision if there was a clear error or a methodology that would produce an arbitrary result.[58] The Court first found an issue with the method the trial judge used to value the Wellington interest.[59] The trial judge had accepted the special master's use of the direct capitalization method. The SJC believed this was a mistake because the direct capitalization method is preferable for those assets that have a perpetual future income stream, including things such as corporations or stocks.[60] In this case, however, the Wellington partnership interest has a finite cash flow: it pays until the husband with-

draws from the partnership. Therefore, because the trial judge's method assumed an infinite cash flow, he may have overvalued the Wellington partnership interest by not taking into account that the husband's time at Wellington had an end-point and was not infinite.

The Court also found error in the trial court's valuation of the withdrawal payment. When the special master was determining the value of the partnership interest he rejected some of the assumptions and variables used by the wife's expert, thereby coming up with his own value for the partnership interest, differing from the wife's expert. However, when determining the value of the withdrawal payment, the special master simply accepted the wife's expert's valuation even though this number was determined using some of the same assumptions and variables that the special master had rejected before when looking at the partnership interest. The Court found that the withdrawal payment valuation should be re-done using the same assumptions and variables the special master used to value the partnership interest. Therefore, in the end the Court remanded the case to re-determine the value of the Wellington interest based on the suggestions concerning the proper method for valuing the partnership interest and the withdrawal payment.

Division of Assets post-Adams

Because the *Adams* case primarily reiterated many of the same themes courts have seen time and again in property division, it is unlikely that this decision will make a monumental change in divorce law. One of the ideas that the Court continually reiterated was that just because division and/or valuation of an asset is difficult does not mean that it cannot be included in the marital estate.[61] This may be particularly important as time progresses and people's financial assets become more and more complicated and diverse. It will push courts to find new ways to value complicated assets and possibly increase the use of expert witnesses as the courts and legal professionals may be ill-equipped to handle valuation issues.

Another familiar theme seen in *Adams* is that the Court keeps in the back of its mind a fair division of the assets.[62] For example, in *Adams* it would feel very unfair for the Court to completely deprive the wife of any share of the partnership interest, primarily because the partnership interest had supported almost all of their upper-class lifestyle. Allowing the husband to keep the entirety of the proceeds, particularly in light of the fact that he was not awarded custody of the children, would have virtually doubled his income while leaving the wife with very little in terms of liquid income while supporting four young children. In light of this sentiment, it seemed for the court that the central issue was not whether the wife would get a share of the partnership interest, but how much she would get.

One possible way in which the *Adams* case may start to shift some thinking in terms of property division is when there are assets that have some kind of future expected income component. Although the Court did continue to recognize that some assets, such as professional degrees, will continue to be excluded from the marital estate, it did seem to be less sympathetic to the argument that an expected future income should not be included in the value of an asset. This may be due to the increasingly complexity of one's financial assets or to the idea that the Court recognizes that some assets can change their value dramatically over time and the Court wants to take this into account. It will be interesting to see whether cases come up in the future that try to stretch this further than a partnership interest. Will the courts give the same treatment to something that also has a future income stream but feels less like a standard "job" than a partnership does?

As many lawyers read this case they may be asking what will happen when there is a division of assets and one spouse is a partner in a law firm. Will this be treated the same way as a management and investment firm? Based solely on the reading of this case, it seems as though the Court would look to the partnership contract in each case. If the contract contains similar payment mechanisms to those seen in the Wellington contract and the party can demonstrate that there is some guarantee of a future income based on the existing contract, and not merely an expectancy, such as seen with an advanced degree, then perhaps this analysis could be extended to a legal partnership. However, there

may have to be a similar fact pattern here, where the partnership interest is clearly the primary financial support for the family and the other spouse provided some help or support with the work for the partnership, as the wife here provided a small amount of initial administrative support.

Conclusion

Courts have struggled for years with how to divide a couple's assets upon divorce. Evolving perceptions of what constitutes property, who is able to own property, and what marriage means to the individuals involved have influenced many of the changes in the judicial landscape over the years. In *Adams v. Adams* the Court took on one of these difficult assets, an interest in a partnership, and included it in the marital estate, continuing to affirm a judge's broad discretion in these types of cases. It also continued to defer to the expertise of expert witnesses in the valuation of the assets, as long as the valuation seemed reasonable and was consistent for each asset in question. With the changing make-up of the Supreme Judicial Court and a more stressful economic climate than has been seen in recent years, property division issues could become even more important and heavily litigated in the years to come.

(Endnotes)

1 *Adams v. Adams*, 459 Mass. 361, 945 N.E.2d 844 (2011).

2 Mass. Gen. Laws ch. 208, § 34 (2008).

3 Mass. Gen. Laws ch. 208, § 34 (2008) ("including, but not limited to . . .").

4 *Lauricella v. Lauricella*, 565 N.E.2d 436, 438 (Mass. 1991) ("In the past, in considering whether particular interests constitute part of the property of the marital estate of a party to a divorce, this court has not been bound by traditional concepts of title or property") . Some examples of things the court has found includable in the marital estate are unvested pension rights, rights in pending lawsuits, rights under a contingent fee agreement. *Hanify v. Hanify*, 526 N.E.2d 1056, 1059 (Mass. 1988); Lyons v. Lyons, 526 N.E.2d 1063, 1063-64 (Mass. 1988); *Dewan v. Dewan*, 506 N.E.2d 879, 880-81 (Mass. 1987).

5 *Adams,* 459 Mass. at 374.

6 *See Drapek v. Drapek*, 503 N.E.2d 946, 949 (1987). Another example of this was seen in *Yannas v. Frondistou-Yannas*, where the Court refused to find that the grant of a patent had present value that was divisible in the marital estate just because it may have enhanced the holder's earning potential. *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153, 1160 (Mass. 1985). In yet another case the Court found that an anticipated inheritance from a living testator could not be assigned to the marital estate. *Davidson v. Davidson*, 474 N.E.2d 1137, 1145-46 (Mass. App. Ct. 1985).

7 *Drapek*, 503 N.E.2d at 949. This decision has also been in line with other jurisdictions. *See, e.g.*, *Graham v. Graham*, 574 P.2d 75, 77 (Colo. 1978); *Hughes v. Hughes*, 438 So.2d 146, 150 (Fla. Dist. Ct. App. 1983); *Marriage of Janssen*, 348 N.W.2d 251, 253-54 (Iowa 1984); *Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1983); *Olah v. Olah*, 354 N.W.2d 359, 361 (Mich. Ct. App. 1984); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984). The court cites only one jurisdiction that has considered a professional degree as part of the marital estate and this was due to a clear legislative mandate. *O'Brien v. O'Brien*, 489 N.E.2d 712, 715-16 (N.Y. 1985); N.Y. Dom. Rel. Law § 236(B) (McKinney Supp. 1986) (permitting consideration of "any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party . . .").

8 *Drapek*, 503 N.E.2d at 949.

9 Mass. Gen. Laws ch. 208, § 37 (2008); *Drapek*, 503 N.E.2d at 949.

10 *Drapek*, 503 N.E.2d at 949.

11 *See Rice v. Rice*, 361 N.E.2d 1305, 1307 (1977); Kindregan & Inker, *supra* note 7, at 20-21.

12 *Id.*

13 *Id.*

14 Kindregan & Inker, *supra* note 7, at 21.

15 *See Adams,* 459 Mass at 375. Determining the value of an asset, such as a business, is a question of fact. *See Bernier v. Bernier*, 873 N.E.2d 216, 227 (Mass. 2007); *Demoulas v. Demoulas Super Mkts., Inc.*, 677 N.E.2d 159, 186 n.47 (1997).

16 Goldberg, Valuation of Divorce Assets (1984), 1987 Supplement at 74.

17 *Adams,* 459 Mass. at 381.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Rev. Rul. 59-60, 1959-1, 1 C.B. 237.

23 *See, e.g.*, Sheskey v. Sheskey, 450 N.E.2d 187, 189 (Mass. App. Ct. 1983); *Robbins v. Robbins*, 453 N.E.2d 1058, 1060 (Mass. App. Ct. 1983).

24 *See Bennett v. Bennett*, 448 N.E.2d 77, 78 (1983).

25 *See, e.g.*, *Kudarauskas v. Kudarauskas*, 530 N.E.2d 1251, 1252-53 (Mass. App. Ct. 1988), review denied 536 N.E.2d 1093 (Mass. 1989) (allowing chief financial officer of husband's business to testify as to the value of the husband's business).

26 Charles P. Kindregan, Jr. & Monroe L. Inker, *Valuation and Identification of Assignable Property*, 2A Mass. Prac., Family Law & Practice § 45:8 (3d ed.) (2010).

27 *See Foley v. Foley*, 537 N.E.2d 158, 160-61 (1989), review denied 541 N.E.2d 344 (1989) (holding that it was "error not to treat witnesses with similar

qualifications in the same way").
28 *Fechtor v. Fechtor*, 534 N.E.2d 1, 4 (Mass. App. Ct. 1989); *see Robinson v. Contributory Retirement Appeal Bd.*, 482 N.E.2d 514, 518 (1985).
29 *Bernier*, 873 N.E.2d at 227; *see, e.g.*, *Caldwell v. Caldwell*, 461 N.E.2d 834, 837 (1984) (finding that where the court double-counted and assigned value to property that had been declared not have a rational basis it was found to be clearly erroneous).
30 *Id.*
31 *Id.* The judge came to the conclusion to make an equal distribution of the assets based on the length of the marriage, the husband's financial contributions, and the wife's homemaking contributions, as well as the other factors listed in §34, including the wife's extended parenting role of the four children. *Id.* The awarded physical custody to the wife and shared legal custody to both parents. *Id.* He also held that there would be no alimony awarded because the division of assets would be enough for the wife to maintain her previous lifestyle. *Id.*
32 *Id.*; *Drapek*, 503 N.E.2d at 949.
33 *See Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."); *Gurley v. Commonwealth*, 296 N.E.2d 477, 479-80 (Mass. 1973) ("Where the language of a statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words.").
34 Mass. Gen. Laws ch. 208, § 34 (2008).
35 *Id.*; *Adams,* 459 Mass. at 373.
36 Mass. Gen. Laws ch. 208, § 34 (2008); *Adams,* 459 Mass. at 373.).
37 Mass. Gen. Laws ch. 108A, § 26 (2008); Mass. Gen. Laws ch. 208, § 34 (2008); *Adams* 459 Mass. at 373.
38 *Drapek*, 503 N.E.2d at 949; *Adams,* 459 Mass. at 372. The husband is also ignoring that there are numerous assets that are included in the marital estate but do not provide income until the future, such as retirement or pension plans. *See Baccanti v. Morton*, 752 N.E.2d 718, 726 (2001).
39 *Adams,* 459 Mass. at 394.
40 *Id.*
41 *Id.*; *Drapek*, 503 N.E.2d at 949-50. *But see Woodworth v. Woodworth*, 337 N.W.2d 332, 336 (Mich. App. 1983) (arguing that future value of a degree is not just an expectation, it is the desire of the wife to share in the profits of the asset she helped her husband earn). The court in *Woodworth* sees no difference between awarding the wife for the degree she helped him earn than if it were to award her for the house she helped him buy. *Id.*
42 *Id.*
43 *Id.*
44 *See Bernier*, 873 N.E.2d at 226 n.16; *Adams,* 459 Mass. at 376. The broad nature of §34 also supports the idea that many different types of assets, including those where the determination of value is difficult, should be included in the marital estate. *See* Mass. Gen. Laws ch. 108A, § 26 (2008); ch. 208, § 34 (2008); *Adams,* 459 Mass. at 376.
45 *Bernier*, 873 N.E.2d at 221.
46 *Id.* at 778; *Adams*, 459 Mass. at 375.
47 *See, e.g.*, *Adlakha v. Adlakha*, 844 N.E.2d 700, 705-06 (Mass. App. Ct. 2006); *Sampson v. Sampson*, 816 N.E.2d 999, 1005-07 (Mass. App. Ct. 2004).
48 *Adlakha*, 844 N.E.2d at 705-06.
49 *Sampson*, 816 N.E.2d at 1005-07.
50 *See Adams*, 459 Mass. at 376.); *Baccanti*, 752 N.E.2d at 726-27 (finding that just because a stock option vests in the future does not mean it should be excluded from the marital estate).
51 *See Baccanti*, 752 N.E.2d at 727 (quoting Lynn Curtis, *Valuation of Stock Options in Dividing Marital Property Upon Dissolution*, 15 J. Am. Academy of Matrimonial Law 411, 411-12 (1998).
52 *Adams*, 459 Mass. at 377.
53 *Id.*
54 *Adams*, 459 Mass. at 382The wife's expert assumed that the husband would retire at age 62, which the husband does not dispute. *Id.* The wife's expert found that the present value of the Wellington interest was between $134,000,000 and $145,000,000. *Id.*
55 *Id.* The special master found the value of the Wellington interest to be $80,956,975. *Id.*
56 *Adams*, 459 Mass. at 383. The wife's expert found that the value of the withdrawal payment was $11,580,000. *Id.* at 384.
57 *Id.*at 384. The husband's expert valued the withdrawal payment between $28,453,000 and $39,713,000. *Id.*
58 *Id* at 386.; *Bernier*, 873 N.E.2d at 221.
59 *Id.*at 386-87. In addition to problems with the valuation of the partnership interest and the withdrawal payment, the Court also heard argument concerning the appropriate tax rate to apply to the partnership interest. *Id.* However, these arguments will not be examined by this paper.
60 *Id.*at 382. Corporations have a perpetual future income stream based on the fact that corporations are defined by the fact that they live into infinity. *Id.* at 387; *see Associated Indus. of Mass. v. Attorney Gen.*, 636 N.E.2d 220, 224 (Mass. 1994).
61 *Id.*; *Bernier*, 873 N.E.2d at 226; Gross v. Commissioner of Revenue, 272 F.3d 333, 355-56 (6th Cir. 2001).
62 *Adams*, 459 Mass. at 378.("the judge concluded 'an equal division of marital assets is the most equitable'"); *see* Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce?: The Fairness of Property Divison in American and English Big Money Divorce Cases*, 86 N.D. L. Rev. 115, 119 (2010) (describing the American system of divorce law as seeking an equitable, not necessarily equal, division of assets). *But see* Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Incomes?*, 8 Duke J. Gender L. & Pol'y 119, 124 (2001) (favoring equal division of assets over an equitable division).

Spotlight on Pro Bono Opportunities: Volunteer Lawyer Project

By Brian McLaughlin, Esq.

Finding Inspiration in Unexpected Places

As a divorce and family law lawyer, sometimes you see people at their very worst as they navigate through one of the most difficult experiences of their lives. All too often, lawyers can get swallowed up in all the negativity that can surround a divorce. In one of my recent Volunteer Lawyer Project cases, I had the opposite experience, and was amazed by the civility and love of the parties involved.

Due to life's undulations and the terrible economy, a long-term marriage recently came to an end. I took the case expecting the worst. As I navigated my VLP client through the divorce process I realized this was going to be a "simple divorce" with uncontested issues as we drafted the agreement. However, as all lawyers can tell you, simple divorce does not always mean easy divorce. In this case, you could tell that these individuals cared about each other very very deeply, and despite the fact that their marriage was unraveling, they wished the best for each other. In fact, as we walked into the mediation room, wife wiped shaving cream off husband's face so that he would look appropriate in front of the judge. Once the mediation was concluded, they shook hands and wife offered to give husband a ride home. It was gratifying to help these inspiring people through a very difficult situation, although sad to see such a beautiful relationship come to an end. At the end of the day, although painful, both parties left the courthouse knowing this was the right decision for themselves as individuals and for their family. Please consider taking a VLP case.

Rule 1:28 Decision Case Summaries

By Melinda J. Markvan, Esq., Patricia A. O'Connell, Esq., and Alexis B. Kaplan, Esq.

Uliano v. Tartarian, 10-P-1980
October 25, 2011
After a seven month dating relationship and two incidents of physical violence, the plaintiff obtained a 209A order against the defendant. The defendant subsequently broke into plaintiff's home and was incarcerated for violation of the restraining order. Thereafter, the defendant was present at the hearing and the restraining order was extended. Contrary to the defendant's position, the record supported the judge's determination that the plaintiff's fear was reasonable and his due process claim failed.

Ostroff v. Ostroff, 10-P-1782
October 24, 2011
A sixty-five year-old emergency room physician retired after a long career in the ER, which ended due to severe back and neck problems and a failing memory. At trial on a complaint for modification to terminate his $500 per week alimony and medical and life insurance obligations, the probate and family court judge determined that plaintiff's retirement was voluntary. Plaintiff's ex-wife offered no evidence on the issue of retirement at trial. The trial judge ordered that alimony be reduced to $250 per week; his obligation to maintain medical insurance be terminated; and life insurance of $50,000 be maintained so long as he has an alimony obligation. In the Discussion section of the order, the judge opined that "it is anticipated by this trier of fact that the Plaintiff's obligation would continue for no more than (3) years, i.e. [Betsy's] attaining the age of sixty-five." The Appeals Court found the judge's decision was without legal effect. Under current law, a modification action would be necessary to terminate the ordered alimony obligation. The order was vacated and the case remanded for further reconsideration of those issues.

Morales v. Morales, 10-P-2122
October 17, 2011
Wife's complaint for modification of child support, filed a year after the divorce decree, was dismissed when she failed to show that Husband's $34.80 per week raise was a material and substantial change in circumstances. The Wife relied upon G.L. 208, §28, which provides in part for a modification of child support if there is an *inconsistency* between the amount of an existing order and the amount that would result from application of the Guidelines. The Appeals Court affirmed the long-standing standard derived from statute and case law that in modifying alimony and child support that the plaintiff must demonstrate a material change in circumstances since the earlier judgment. The Wife's decreased income was not offset by her decrease in monthly expenses, nor was Husband's overtime pay to be a significant factor in modifying the support order.

S.C. v. M.C., 11-P-2.
A 209A, § 3 abuse prevention order was extended for one year following a hearing where both parties testified. At the hearing, the judge had listened to the parties' testimony and stated, "I am going to extend the restraining order. I do find based on the testimony here that [the plaintiff] is in fear of imminent serious physical harm from the defendant"; she issued no further findings of fact or conclusions of law. The defendant appealed the extension, claiming that (i) the lower court did not specifically find that the plaintiff's fear was reasonable, and (ii) that the plaintiff's fear was not, in fact, reasonable. The Appeals Court held that "where we are able to discern a reasonable basis for the order in the judge's rulings and order, no specific findings are required." It affirmed the extension [b]ecause the judge, in issuing the extension, implicitly found that the statutory requirements were met

and credited the plaintiff's testimony, and her testimony, if believed, was sufficient to establish reasonable fear."

Eugene F. McCarthy v. Margaret A. Hale, 11-P-96.

The Probate and Family Court found the defendant mother to be in civil contempt for failing to execute IRS Form 8332 upon plaintiff father's request, as required by the parties' agreement, and ordered the defendant to pay the plaintiff's counsel fees. While the father's counsel represented to the judge that the father had asked the mother to execute the form in March 2009 (i.e., prior to the time for filing the 2008 returns), neither party elicited testimony on this issue. The only evidence actually introduced was a collection of six letters, including a June 2009 letter (i.e., after the deadline for filing 2008 taxes) from the father's counsel to the mother's counsel requesting "the tax releases" necessary to claim the child as a dependent; said letter did not refer to any previous request for the execution of the form. Upon mother's appeal, the Appeals Court found that the parties' agreement called upon the mother to execute the form only when specifically requested to do so, and that there was no clear and convincing evidence before the trial court that such a request was made in time for filing the 2008 returns.

Daniel Harrington v. Dorothy Gibson, 10-P-1530.

During the plaintiff's divorce proceedings, Judge Gibson found him in contempt of court for violating a sanctions order and incarceratd him for ten days. He thereupon brought suit against Judge Gibson for intentional infliction of emotional distress and false imprisonment. The Appeals Court affirmed the Superior Court's Mass. R. 12(b)(6) dismissal of the plaintiff's complaint on the basis of the doctrine of judicial immunity, finding that Judge Gibson acted within her judicial discretion and was therefore exempt from liability. The Appeals Court also upheld the lower court's denial of the plaintiff's motion to amend his complaint to include additional claims against Judge Gibson and other defendants (Judge Gibson's husband, her attorney, the Attorney General of the Commonwealth, the Superintendent of the State Police, and two State Troopers); the motion judge did not abuse his discretion in denying the motion to amend, as the plaintiff's proposed amended complaint did not specify any legally redressable misconduct by the defendants sought to be added.

Deborah A. Scaccia v. Liborio W. Scaccia, 10-P-1972.

The parties were divorced in 1999, and the judgment provided for the husband to pay of child support and alimony. In 2005, the court entered a modification judgment, whereby the husband was to pay $75/week in child support and $450/week in alimony. In 2007, the wife filed a second complaint for modification (along with a complaint for contempt) to increase alimony; the husband filed an amended counterclaim to reduce alimony and eliminate child support due to a reduction in his income and the fact that all of the children now resided with him (in addition to a complaint for contempt). The court entered a temporary order in August 2008, which eliminated the husband's obligation to pay child support and reduced alimony by $100 to $350/week. Following a three-day trial, the Court issued a decision on May 20, 2010 that "increased" alimony to $400 per week (i.e., an amount that was an increase from the temporary order, but less than the alimony ordered in the 2005 modification judgment). The Appeals Court agreed with the wife that "the judge's finding that an increase in alimony was warranted appears to be inconsistent with his judgment effectively decreasing the amount of alimony by $50 per week from the prior modification judgment." The Appeals Court noted that "the judge clearly found the husband to be not credible regarding his finances, implicitly calling into question the basis for the temporary order" and that the lower court found the husband's income at trial to be more than twice that of his reported income at the time of the prior modification judgment. Since the particular Probate and Family Court judge who had entered

the judgment had retired by the time the Appeals Court reached its decision, the Appeals Court vacated the alimony provisions of the judgment and remanded the matter for a new trial on the alimony issue (taking into account the parties' current circumstances).

Walter Altherr v. Chieko Altherr, 10-P-2144.
The Probate and Family Court ordered the plaintiff husband to pay alimony to the wife of approximately $1,187.10 per week. The Husband argued on appeal that the alimony award constituted an abuse of discretion insofar as the judge failed to adequately consider the wife's need and simply made an award equal to one-third of the husband's adjusted gross weekly income. The Appeals Court rejected the husband's implicit argument that the judge "failed to consider and determine the wife's reasonable expenses or income required to maintain an appropriate living standard comparable to the husband" as required by G.L. c. 208, sec. 34. Affirming the award, the Court found that "the judge's order clearly reflects an intention to provide the wife with a standard of living comparable to what she enjoyed during the marriage....and the award, which in fact is less than one-third of the husband's weekly adjusted income of $3,957, represents a reasonable means of accomplishing this goal."

Jennifer Coalter v. Christopher Coalter, 10-P-2216.
The parties received a judgment of divorce nisi in 2005, which granted the parties shared legal custody of their two children and granted the husband primary physical custody. The husband filed a complaint for modification in 2010, alleging changes in circumstances regarding the mother's parenting time with the children; the wife was now employed by a church, was in a "communal living situation" at the church, and had the children stay overnight with her in this communal setting. The father sought changes in the wife's parenting to address his safety concerns relating to the church setting. In its modification judgment, the Probate and Family Court ordered that the father would have sole legal and physical custody of the children because "the evidence was clear that the parties are unable to communicate effectively"; it also ordered that the children could attend religious services with their mother only in the event that the father, as sole legal custodian, did not object. The mother appealed, claiming that (i) the lower court erroneously awarded legal custody to the father when the complaint for modification did not raise the issue of custody, and (ii) no showing was made to warrant a change in custody; she also appealed the order allowing the father to have "veto power" over the children's attendance at her religious services. The Appeals Court found that the evidence before the judge—including the mother's admission at trial that the parties had a "severe lack of communication"—likely supported his custody order on the grounds of the parties' inability to communicate. However, it concluded that "a change of legal custody ahould not have been made without first bringing the issue to the attention of the parties. The issue of legal custody is nowhere to be found on the record, save for the judge's order. The complaint for modification does not raise the issue, the parties did not raise it at the hearing or argue it in their closing arguments, and the judgment never informed the parties during the proceedings that legal custody was at stake." As such, the Appeals Court vacated the judgment insofar as it modified legal custody and governed the children's attendance at religious services and remanded the matters for a new hearing.

Colleen McCabe v. Patrick McCabe, 10-P-2270.
The District Court extended a G.L. c. 209A abuse prevention order for one year, and the defendant appealed. The Appeals Court rejected the defendant's argument that his constitutional right to due process and statutory right to a hearing pursuant to G.L. c. 209A, § 4 were violated when the order was extended without an evidentiary hearing, noting that the defendant was indeed granted a hearing but did not request that he be allowed to cross-examine his daughter or call

witnesses. The Appeals Court also rejected the defendant's argument that the evidence was insufficient to support an extension of the 209A order, noting that the judge's decision was made on the basis of the plaintiff's affidavit, prior c. 209A findings made by other judges, and the judge's personal observations of the demeanors of the parties in court.

Patricia Grady v. Albert Grady, 10-P-1218
12/2/2011

After a marriage of 34 years, homemaker wife with only a high school degree appeals that she did not receive the proper amount of assets from husband, with a law practice and a significant portfolio of real estate assets, as well as a manager of financial investments. Husband appeals that judge failed to take into account all required factors, and that judge wrongly found that husband attempted to hide some of his current income as well as artificially lower his future earning capacity.

In these matters the judge was upheld as having taken into account all required G. L. c. 208, § 34 factors as well as sufficiently noting her reasoning in her findings and rulings based on the record.

The husband also appeals because the judge did not allow in the wife's deposition testimony. While the husband was correct, what the judge did in this matter did not harm his case and instead strengthened it, so the court finds no merit to the argument.

The husband additionally argues that a complaint charge against him was incorrect. The court disagrees and instead finds that not only did husband not comply with the judge's orders, but that the judge was lenient in allowing the husband extra time to do so.

Due to husband's delays in the proceedings, wife is permitted to request appellate attorney's fees.

Nancy Smith v. Stephen Smith, 10-P-2146
12/6/2011

Father appeals that modification of child visitation arguing there had been no substantial change in circumstances and the judge failed to make findings of fact to make a sufficient determination that the modification was in the thirteen year old child's best interest.

At the time of the parties' divorce, their respective schedules based on their occupations were taken into account in determining a unique visitation arrangement, due to father being an independent fisherman and mother as a registered nurse. The modification was brought pro se by mother who argues that the original parenting plan did not permit her enough time with the child, as well as a change in her work schedule to work an additional day each week should allow her more parenting time. The modification judge found the original parenting plan to be "out of the ordinary" and agreed with mother that the plan, which allowed mother parenting time from Tuesday at 7 p.m. to Saturday at 3 p.m. and father from Saturday at 3 p.m. to Tuesday at 7 p.m., did not allow mother sufficient weekend time and he increased her parenting time with the child.

The court finds that the modification judge did not make adequate findings that the change in modification would be in the child's best interest, and has remanded the original modification judgment.

Christine Kuzmitski v. Kenneth Kuzmitski, 10-P-2212
12/7/2011

Wife appeals from the judge's division of inherited assets. This was a long term marriage with adult children, and the parties agreed by stipulation to an equal division of all of the parties' assets except inherited assets. The judge in his discretion chose to divide the inheritance assets equally between the parties, with one exception that he did not include in the marital estate. The judge's considerations for G. L. c. 208, § 34

factors are evidenced in his seventy-two findings of fact, and his division of assets was not plainly wrong or excessive.

Though the wife considered the inherited assets to be her property and not marital property, a judge has the discretion to assign to one spouse property of the other. The timing of receiving the inheritances near the end of the parties' marriage also does not keep it from being evaluated among other assets in a divorce. The judge also properly took into consideration other matters that the wife takes issue with, such as the amount each spouse contributed to the marriage, husband's relationships with other women, husband's pornography which husband purchased with his own credit card and is responsible for paying out of his own money, and purchase of a car. The judge also acted acceptably in discounting a written agreement between wife and her brother regarding her payment to the brother to equalize their inheritances from their mother's estate, as he considered the agreement and chose not to take it into account as it is in no way legally enforceable and merely an informal agreement.

Christopher Medeiros v. Paula Coleman, 10-P-1948
12/13/2011

Defendant mother appeals from a modification of a divorce judgment and transferring of legal and physical custody of the parties' two children to father after a finding of significantly changed circumstances as well as a GAL report.

Parties were divorced in June 2003, and mother had legal and physical custody of the children at the time by agreement. Around that time mother also filed for and received a 209A restraining order against father. The children were four and six years old.

DCF has been involved with the parties, in 2003 claiming that father abused the son, and again in 2010 for father's abuse of the son and mother's neglect for both of the children.

Father requested the modification in the divorce judgment seeking custody due to a significant change in circumstances, in that the children were routinely tardy or absent from school, and the son appeared disheveled at school and regularly did not complete his homework or do his schoolwork. School officials' attempts at contacted mother in order to work with her and discuss the children's situation fell on deaf ears.

Father, however, had changed his own life around, showing that he had been sober for a number of years, was engaged with the school district, had moved out of his father's home and bought a two-family house, and was gainfully employed in a position which allowed him a lot of flexibility in his schedule.

No error was found in the change of custody due to the parties' respective changes in circumstances, despite mother's contention that the judge failed to take into account father's prior alleged abuse, as evidence about the 209A was part of the trial and mother had the opportunity to testify to any abuse during the trial though she did not. Additionally, the amount for mother to pay father in child support is according to the child support guidelines and without error.

Janice Cocomazzi v. Michael Cocomazzi, 10-P-1971
12/14/2011

Husband appeals from the divorce judgment alleging that the marital property division was inequitable and an abuse of the judge's discretion. The appeals court found that the judge did not abuse his discretion in the property division in any matters, including regarding jewelry in question to have been a gift from husband and wife, a division of assets as according to the parties' prenuptial agreement, and in ordering husband to pay for a painting contractor.

The divorce judgment was also upheld in that there was a permanent domestic relations protective order against husband, as the judge

made findings as to wife's "reasonable fear of an imminent threat to bodily injury."

Additionally, the judge was within his rights to order the husband to pay wife's attorney's fees for "excessive discovery" which was done in the case.

Jean Chronowski v. John Chronowski, 11-P-244 12/19/2011

Husband appeals after judgment of divorce alleging that the judge incorrectly accepted wife's value given to a marital property. Husband did not appeal the judge's 50/50 split of marital assets, but believes wife's estimation of the property was too high. At trial, husband gave no valuation for the property, leaving the judge to accept the amount wife noted on her financial statement for the property. Only on appeal does husband bring a valuation claiming a lower assessment. Nothing in the trial judge's decision of dividing the marital assets, including the value of the home, is found to be plainly wrong or excessive, and the husband's valuation was only submitted post-judgment, and does not now have to be accepted by the court.

Husband argues that the judge did not properly take into account wife's self-help in marital assets after the filing of the divorce complaint. The court finds, however, that the judge properly took into account marital assets used by both parties after the filing of the divorce complaint.

The husband also challenges judge's determination that the dog was wife's dog and award of the dog to wife, which was based on wife's court testimony. Husband did not testify at trial. Again, the judge acted permissibly, though if husband's contention that the dog lives with him and he cares for the dog is true, then there may be no reason to change the current situation with regards to the dog.

Mary Kirson v. David Satloff, 10-P-2043 12/20/2011

Father appeals from a judgment for attorney's fees in regards to a modification of child visitation. He claims that the judge's failure to conduct an evidentiary hearing with regards to the reasonableness of the fees was error, and that the fees awarded to mother were excessive. The court finds them acceptable.

The parties' divorce agreement allowed for a monthly visitation for father with son, and that if that specific time did not work then they could meet one week before the scheduled time. At one point, mother emailed father to inform him that the scheduled dates would not work, and with a list of alternate times that son would be free to meet with father. Father responded that he could not choose an alternate time, as it would go against the divorce judgment, and that mother would have to go to court to change the time for visitation. Due to this, mother filed a complaint for modification with the court.

The trial judge found father to be unreasonable and inflexible, and in addition to granting the modification, also granted mother attorney's fees due to this along with father's apparent prior misuse of the courts.

The court did not award either party appellate attorney's fees, as neither side's arguments appeared to be too egregious.

Caren Acheson v. Kevin Acheson, 11-P-539 12/21/2011

The plaintiff wife appeals from the divorce judgment under a rule 60(b)(1) motion for mistake or inadvertence in the division of the marital assets. While in court with a separation agreement the parties agreed that a provision in the agreement misstated the division of the husband's IRAs, because wife did not believe it to be based on then current values of the accounts, and because the language could be read to transfer all of husband's IRAs to the wife. The judge suggested the parties rewrite the section

of the agreement to incorporate those values. While still at court the parties took the judge's suggestion, crossed out the original language in the agreement, and wrote in mutually agreed upon language.

Wife argues that she believes under the separation agreement she should have received the entire amount of husband's IRAs, about $132,000, plus 50% of the increase in value from the time of husband's previous financial statements. Husband believes that what was agreed to in the separation agreement was for a total 50/50 split of the assets, which would have him transferring $18,000 from his IRAs to the wife.

Wife claims that there was a mutual mistake in the specific change in language in the agreement, though the judge who suggested the original change disagreed, and stated that the parties' intention in the 50/50 split was clear, as was the language that they agreed to in court. Additionally, wife's counsel had requested the $18,000 from husband after the agreement was signed, evidencing that wife's counsel also believed the amount to be $18,000, rather than $132,000 plus half of the increase in value.

Given the circumstances of the change, the judge's suggestion, the language in the signed document, and wife's lawyer's letter, the wife's motion for relief from the divorce judgment is denied.

Rebecca Dakessian v. Garo Dakessian, 11-P-496
12/29/2011

The defendant husband appeals from a district court judgment granting his wife a one year extension of a 209A order requiring him to leave the marital home, not have any contact with her, and to stay at least 100 yards away from her at all times. Husband claims both that he was not provided a fair hearing for the initial order, and that there was not sufficient evidence for the extension of the restraining order. The extension of the restraining order is affirmed.

The lower court judge properly allowed the original restraining order due to wife's detailed affidavit. Though husband did not have much opportunity at the original hearing to introduce evidence, as the hearing was only two days after the 209A was filed, he never contested this in an appeal from that hearing, and so effectively waived any objections. The appeal on the second hearing is not the appropriate venue to bring an objection to a previous judgment.

As far as the restraining order extension, the judge is permitted to review not only current evidence about the parties' relationship, but also previous evidence in order to determine whether or not wife is still in reasonable fear of imminent serious physical harm from husband. From the evidence provided to the judge, including wife's affidavit from the initial 209A hearing, as well as witnessing the husband's demeanor in court, and some other evidence, the judge's findings of a reasonable basis to extend the order were implicit in granting the extension, and therefore allowable.

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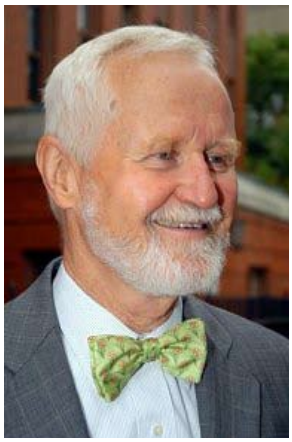

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