The Down Town Association
60 Pine Street
New York, NY 10005

International Family Law

April 20 - 21, 2018

Friday Program

8:45 – 10:50 Prenuptial/Postnuptial Agreements 1
Jill Blomberg, Old Greenwich, Connecticut
Charlotte Butruille-Cardew, Paris, France
William Longrigg, London, England
Thomas Sasser, West Palm Beach, Florida
Sandra Verburgt, The Hague, Netherlands
Oren Weinberg, Toronto, Canada

10:50 – 11:15 Discussion and Break

11:15 – 12:30 Hague and UCCJEA and Mirror Orders 27
Patricia Apy, Red Bank, New Jersey
Nancy Zalusky Berg, Minneapolis, Minnesota
Melissa Kucinski, Washington, DC
Katharine Maddox, Falls Church, Virginia
David Schaffer, Naperville, Illinois

12:30 – 12:55 Interview
Cheryl Hepfer, Bethesda, Maryland
William Longrigg, London, England

12:55 – 2:00 Lunch at The Down Town Association

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Daniela Horvitz Lennon, Santiago, Chile
Katharine Maddox, Falls Church, Virginia
Harold A. Mayerson, New York, New York
Bernice Schaul, Ph.D. New York, New York
Elliot Wiener, New York, New York

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PRENUPTIAL/POSTNUPTIAL AGREEMENTS

- Jill Blomberg, Old Greenwich, Connecticut
- Charlotte Butruille-Cardew, Paris, France
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International Academy of Family Lawyers

Prenuptial and Postnuptial Agreements in Connecticut

Presented by: Jill H. Blomberg, Esq.
Partner
Schoonmaker, George, Colin & Blomberg PC, Old Greenwich, CT

First Steps

- Initial client meeting
  - 3 month rule
  - Wedding date
  - Terms of agreement
  - Recommending a lawyer on the other side

Due Diligence

- Keep communications in writing
- Discovery
  - Informal
  - Cover letters to keep record of sending
  - If representing monied spouse: create binders of documents
  - If representing non-monied spouse: request documentation to support financial disclosure
  - Appraisals – real property or businesses

Drafting the Agreement: Example of Whereas Clauses

- **WHEREAS**, Harry and Meghan intend to marry in the near future, and in contemplation of such marriage wish to fix and determine the rights and claims that will accrue to each of them in the income and property of the other by reason of their marriage and to accept the provisions of this Agreement in full discharge and satisfaction of such rights which otherwise each might have, in the event their marriage ends in divorce, dissolution of marriage, annulment or judgment of legal separation or as the result of the death of one of them; and
- **WHEREAS**, each of the parties presently has his or her own Separate Property which he or she acquired prior to their contemplated marriage without contribution of the other party; and
- **WHEREAS,** Meghan has been married before, and has no children from the prior marriage;
- **WHEREAS**, each desires to keep all of his or her own Separate Property income and property and appreciation thereof, whether now owned or hereafter acquired, free from any claim of the other by virtue of their forthcoming marriage, except as otherwise herein provided; and
- **WHEREAS**, the parties expressly acknowledge that this Agreement is not entered into for the purpose of facilitating a separation or dissolution of marriage, but is entered into for the sole purpose of setting their property affairs and support rights. The parties further acknowledge that this Agreement is conducive to the welfare of the parties and the best purpose of the marriage relationship, and is entered into to prevent strife, and to settle questions of marital rights and property, thus removing a frequent cause of family dispute, and to secure peace and enhance the prospects for marital harmony; and
- **WHEREAS**, each party has been fully informed of the advisability of being represented by separate independent legal counsel regarding his or her rights, liabilities and obligations hereunder and have retained counsel of his or her own selection; and
- **WHEREAS**, each party enters into this Agreement with full knowledge of the extent and approximate value of all the property and income of the other, as presented in Meghan's statement of income, assets, and liabilities attached as Schedule A and in Harry's statement of income, assets, and liabilities attached as Schedule B, and of all the rights and privileges in and to such property and income which would be conferred by law upon each in the property and income of the other by virtue of the consummation of the proposed marriage; and
- **WHEREAS**, the parties are unwilling to enter into their contemplated marriage unless provisions as set forth herein can be made for financial arrangements in the event of a future judgment of legal separation, dissolution of marriage, divorce, annulment, or death of one of the parties; and
- **WHEREAS**, the parties are desirous of making financial arrangements in the event of a future death, divorce, dissolution of marriage, annulment, or judgment of legal separation, which arrangements they desire to provide for by choice and agreement, and not as a matter of law, statute or otherwise.

Drafting the Agreement: Main Provisions

- Separate Property
- Marital Property
  - Capital improvements to marital property
- Definition of Termination of the Marriage
- Distribution of Property On Termination of the Marriage
- Spousal Support/Alimony
- Debts and Liabilities
- Pension and Retirement Plans
- Estate and Death
- Counsel Fees
- Medical Insurance/COBRA Costs

Drafting the Agreement: Example of Separate Property Clause

- A party's "Separate Property," as that term is used in this Agreement, is the following:
- Except as otherwise specifically set forth in this Agreement, all property now owned or acquired either directly or indirectly by the party up to the Date of Marriage, except that property acquired jointly by Meghan and Harry;
- All property listed on that party's statement of income, assets, and liabilities, except that property held in joint name or acquired jointly by Meghan and Harry;
- All income (whether earned or unearned and whether due to either party's, both parties' or neither party's efforts), rents, proceeds and profits derived from the party's Separate Property;
- All inheritances received by a party;
- Interests in trusts whether now owned or acquired after the execution of this Agreement, and any distributions of income and/or principal received as a result of such interest;
- All increments and appreciation in value of the party's Separate Property;
- All gifts received by a party;
- All property acquired in exchange for such property and income identified in this Paragraph 2.1, the proceeds of sale thereof and property acquired with such proceeds or with other Separate Property;
- Any and all retirement accounts and/or pension plans listed on the parties' financial statements, subject to Article IX.
- Any increase in value, appreciation, or income from Separate Property shall remain Separate Property.
  - Harry expressly agrees that any and all business interests that Meghan acquires using her Separate Property shall remain her Separate Property. Harry hereby renounces, disclaims and releases and covenants to renounce, disclaim and release any and all claims to, interest in, or share of any such business interest. This paragraph shall remain in effect regardless of whether or not Meghan and/or Harry is ever employed by, or works in any capacity for, any business in which Meghan holds an interest."
  - Meghan expressly agrees that any and all business interests that Harry acquires using his Separate Property shall remain his Separate Property. Meghan hereby renounces, disclaims and releases and covenants to renounce, disclaim and release any and all claims to, interest in, or share of any such business interest. This paragraph shall remain in effect regardless of whether or not Harry and/or Meghan is ever employed by, or works in any capacity for, any business in which Harry holds an interest.
  - In the event that Husband acquires a monetary interest in an asset owned by Wife, then at the time of an annulment, legal separation, or dissolution of marriage, the parties shall divide such asset on a pro-rata basis.

Drafting the Agreement: Example of Separate Property Clause

- Meghan hereby agrees that under no circumstances shall Harry's Separate Property be considered marital property or otherwise be subject to any claims or rights of Meghan but shall remain the Separate Property of Harry in the event of the separation or divorce of the parties, notwithstanding any contrary provision of the law of any Jurisdiction.
- Meghan hereby waives, renounces and releases any and all rights which she may have under the laws of any Jurisdiction to Harry's Separate Property in the event of the separation or divorce of the parties, including, without limitation, rights to marital property, a distributive share, community property, quasi-community property, maintenance, alimony, support, curtesy, dower, exempt property, homestead property, statutory right of election or any other rights, whether they be vested, contingent or inchoate.
- Harry hereby agrees that under no circumstances shall Meghan's Separate Property be considered marital property or otherwise be subject to any claims or rights of Harry but shall remain the Separate Property of Meghan in the event of the separation or divorce of the parties, notwithstanding any contrary provision of the law of any Jurisdiction.
- Harry hereby waives, renounces and releases any and all rights which he may have under the laws of any Jurisdiction to Meghan's Separate Property in the event of the separation or divorce of the parties, including, without limitation, rights to marital property, a distributive share, community property, quasi-community property, maintenance, alimony, support, curtesy, dower, exempt property, homestead property, statutory right of election or any other rights, whether they be vested, contingent or inchoate.
- Each party acknowledges that none of the property titled in the name of the other party's sole name shall be deemed to be "marital property," whether acquired before or during the marriage.
- Each party shall during his or her lifetime keep and retain sole ownership, enjoyment, management, control and power of transfer and disposal of all Separate Property of every kind and nature whatsoever, now owned or hereafter acquired by such party in the party's name alone either prior to or during the marriage and all increases and appreciation thereto, free and clear of any interest, rights, or claims of the other.
- Notwithstanding the provisions of this Agreement, both parties shall have the right to voluntarily transfer or convey to the other, in any amount, any property or interest therein which may be lawfully transferred during her or his lifetime or by Will or otherwise upon death. Neither party intends by this Agreement to limit or restrict in any way the right and power to receive any such transfer or conveyance from the other. The provisions of this paragraph 2.11 shall not be construed as a promise of representation that any gift, bequest or devise shall be made by either party. No such gift, devise, bequest, appointment, or joint acquisition shall be deemed to modify, abridge, or affect this Agreement, or be construed as a waiver, release or extinguishment of any right or rights of either of the parties to this Agreement.
- If either party makes any contribution whatsoever to the other party's Separate Property, whether such contributions be to the acquisition or maintenance of the other party's Separate Property, or whether such contributions be direct or indirect, or cause the other party's Separate Property to increase or appreciate in value, such contributions shall not change the character of property as Separate Property or convert it to Marital Property (as defined in Article III of this Agreement). Nor shall any increase or appreciation in the value of Separate Property be treated as Marital Property.

Drafting the Agreement: Example of Marital Property Clause

- Except as otherwise provided in this Agreement, "Marital Property," as that term is used in this Agreement, shall mean only the following:
- All property purchased and/or acquired jointly by the parties after the Date of Marriage and held in joint name.
  - In the event of the "Termination of the Marriage" as defined in Article IV below, Meghan and Harry shall equally divide by mutual agreement all "Marital Property," as defined above. In the event the parties are unable to agree on the values of the Marital Property and/or how to effectuate the division of the Marital Property, the issue shall be submitted to a mutually acceptable arbitrator for determination. The decision of the arbitrator shall be final and binding on the parties. The parties shall equally pay the fees of the arbitrator.

Drafting the Agreement: Example of Fees Clause

- In the event of the commencement of an action for divorce, dissolution of marriage, annulment, or legal separation, Harry shall provide Meghan with ten thousand dollars ($10,000) for legal fees upon commencement of the action. Each party shall be responsible for the payment of his or her own attorney's fees after the initial $10,000 has been expended, and shall not seek reimbursement or contribution from the other party for same.

Drafting the Agreement: Boilerplate and Unique Provisions

- **Boilerplate Provisions**
  - Disclosure – attaches the financial affidavits
  - Legal representation
  - Governing law
  - Proceeding to set aside agreement or obtain different relief
  - Acknowledgments
  - Breach consequences
- **Unique Provisions to Consider**
  - Sunset Clause

Financial Disclosure

- Sworn affidavits of both parties
- Must include:
  - Assets
  - Liabilities
  - Income
- Important to make full financial disclosure so that other party is fully informed

Signing the Agreement

- 5 original copies
- Canvass both clients
- Consider videotaping
- Witnesses

Connecticut Prenup Fun Facts

- If the agreement is silent on a certain issue (i.e. alimony), then that issue is left open for litigation as part of the divorce.
- There is no summary judgment.
  - Advise clients that the agreements are not definitive
- Pendente lite fees and alimony are not dispositive.
  - Even though you negotiate and sign, more often than not it does not occur.

Postnuptial Agreements

- Rarely done
- When do they happen?
  - Marriage is already rocky
  - Divorce is already pending

The French Approach To International Pre/Post Nuptial Agreements

IAFL – New York 20 April 2018

Charlotte Butruille-Cardew,
Partner CBBC
PARIS - FRANCE

Contrat de mariage – international pre and post nuptial agreements

- French Law has a long established tradition in recognising the validity and enforceability of "**contrat de mariage**" the goal of which is to organise the matrimonial regime of the parties. **The matrimonial property regime (MPR)** of a married couple is set by rules which organise the asset administration and entitlement within the marriage, both during the marriage and if the marriage terminates. It is often referred to in Common Law countries, (where the notion does not exist) as matrimonial property rights.
- At today's date, French Law does not recognise the validly and enforceability of a **French pre-agreement ruling on full ancillary relief** (matrimonial regime and financial compensations on divorce based on the notion of needs), **as those are considered as being contrary to French public policy.**
- In some circumstances however, **French Law may recognise the enforceability of a foreign pre-nuptial agreement covering all theses financial aspects**.

Primary / secondary regime

- The MPR of a couple is determined either by a contract entered into by the spouses (*contrat de mariage* or a foreign pre – post nuptial agreement) or by virtue of the law, in the absence of a contract.
- **Most common MPR in France** : regime of community of assets, separation of property, universal community and participation.
- Those MPR are often referred to in comparative law studies as a **secondary regime**.
- A **primary regime** applies to any married couple residing in France regardless of the matrimonial regime chosen by the spouses: it is a set of mandatory rules which apply automatically to all married couples and organises their *minima* duties and rights in respect of the management of assets and the administration of their estate for the purpose of protecting their family life [art 214 to 226 of the French Civil Code (FCC)].
- It is important to notice that the **primary regime** applies automatically to married couple residing in France, regardless of their respective nationality [*Civ. 1re, 20 october 1987, Cressot*].

Difference bewteen MPR and Financial compensation

- When the marriage terminates, the matrimonial property regime (MPR) of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets accrued during the marriage.
- This allocation of assets is determined by the matrimonial regime chosen by the spouse and is independent from the cause of the dissolution of their marriage. Therefore if the marriage is dissolved by divorce, the allocation of assets as determined by their matrimonial regime will be combined with the divorcing financial rights of the spouse (*prestation compensatoire*).
- This aspect has to be born in mind when drafting international pre-nuptial agreements because any financial compensation provided by in the agreement and based on the notion of needs /compensation for the breakdown of marriage will be regarded as a compensatory benefit and consequently not part of the matrimonial regime of the parties. Hence the condition of validity and enforceability will be different to those ruling pre-nuptial agreement on matrimonial regime.

Foreign pre-nuptial or post-nuptial agreements and international prenuptial or postnuptial agreements

In the last fifteen years, it has become more and more frequent for future spouses to enter an international marriage contract (prenuptial agreement) before their marriage. The goal of such agreement is to determine their financial rights and duties during the marriage and to organise all the financial consequences of their divorce to the inclusion of Maintenance obligations as understood in the light of the ECJE definition. Clauses as to the applicable law and jurisdiction are also often integrated so that such agreements are valid and recognised in more than one countries.

Traditionally in France

- If the description of the matrimonial property rights of the parties complies with the Hague convention 14 march 1978 on matrimonial property rights and the requirements of French public policy to the inclusion of the primary regime requirements.
- If the applicable law on divorce of the parties is a foreign law which recognizes the validity of an agreement dealing with matrimonial property rights and financial adjustments on divorce, the French Court would apply the agreement in its integrality. Consequently it is possible for the parties to include financial compensations on divorce in pre or post nuptial agreements by submitting them to a Foreign Law which will recognise their validity. For example : German Law,

European instruments

Recently, the new Europeans instruments have reinforced the possibility to enter such prenuptial agreement increasing the freedom of the parties to agree on various aspects of their future separation such as :

- article 4 of the **Council Regulation (EC) n°4/2009 of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligation** providing that the parties can choose the court which will have jurisdiction over matters relating to maintenance obligations;
- or articles 7 and 8 of the **Hague Protocol on the Law Applicable to Maintenance Obligations (concluded on 23 November 2007) enable to designate the applicable law to maintenance obligation**,
- article 5 of the **(EU) Regulation n°1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, "Rome III**" equally permits to designate the applicable law to divorce,
- Articles 7 and 22 of the new **EU Regulation n°2016/1103 on matrimonial property rights** will apply to spouses married after the 29th January 2019 also provides for applicable law and jurisdiction choices by the parties.

Principle of fairness

Although by way of combination of applicable law choices and the matrimonial property regime chosen, such international prenuptial agreements could result in an outcome which on divorce will be depriving completely one of the spouses from any financial compensation (either resulting from the matrimonial property rights of the parties or maintenance obligation on divorce – Californian waiver on maintenance), many practitioners advised that such prenuptial agreement should not be advised or entered by client if they do not conduce to a fair and equitable outcome for both spouses in case of divorce.

On a pragmatic level, it is obvious that an unfair agreement will trigger, as opposed to prevent, acrimonious litigation in case of divorce. On a more legal level, numerous countries such as for example in the US the State of California consider that an agreement should comply with the elementary financial rights of the divorcing spouses to be binding or for example in France that such agreement should not be contrary to French international public policy requirements.

In concreto Fairness

The fairness and public policy requirements have been mirrored in the recent instruments mostly for example in relation to the applicable law choice of the Hague protocol 2007 article 8(5) provides "*Unless at the time of the designation the parties were fully informed and aware of the consequences of their designation, the law designated by the parties shall not apply where the application of that law would lead to manifestly unfair or unreasonable consequences for any of the parties*" and again in article 13 "*The application of the law determined under the Protocol may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum*".

Such approach has been again adopted by the French Supreme court in a ruling dated 8 July 2015 in which the Court refers to the articles 8 and 13 of the Hague Protocol and article 15 of the Council Regulation (EC) 4/2009. In this decision, the Court of Cassation clearly states that the Court of Appeal should have tested whether, *in concreto*, the application of the foreign law chosen by the spouses in their marriage contract was not leading to a violation of the French Public Policy Requirements.

The choice of law which should not be looked at in isolation, but it is rather the combination of this choice of law with all the other provisions of the agreement in order to ensure *in concreto* the the outcome of the agreement is not manifestly unfair,

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Pre-Nuptial Agreements in England and Wales

WILLIAM LONGRIGG

FRIDAY 20 APRIL 2018

Marital Property Regimes

- Mostyn J: "There is a marked difference between a negotiated pre-nuptial agreement which specifically contemplates divorce and which seeks to restrict or influence the exercise of discretion to which the law gives access, and an agreement made in a civil jurisdiction which adopts a particular marital property regime".
- This suggests that a matrimonial property regime (of whatever type) will be given less weight by the English court than a tailor-made nuptial agreement.

Points set out in B -v- S by Mostyn J (Financial remedy: Matrimonial Property Regime) [2012] EWHC 265

- The court should give effect to a nuptial agreement which is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement.
- Each party must have all the information that is material and the agreement must be freely entered into by each party with a full appreciation of its implication.

Points set out in B -v- S by Mostyn J Cont'd

- Undue pressure will be likely to eliminate the weight attached to the agreement.
- The agreement must not prejudice the reasonable requirements of any children.
- Unfair if one spouse is left in real need while the other enjoys a sufficiency.

Meaning of a full appreciation of its implications

- It does not necessarily require specific advice as to the operation of English law.
- More than a mere understanding that the agreement would just govern in the country in which it was made is required – intention for the agreement to have effect wherever they might divorce.
- Potentially specifically exclusion of sharing and compensation principles.
- A question over whether needs should be assessed generously in some circumstances and at a lower level in others.

Radmacher -v- *Granatino* [2010] UK SC42

- "Appropriate weight should be given to the terms of a nuptial agreement by the court and the court should give effect to a nuptial agreement if:
  - (a) it was freely entered into by each party;
  - (b) the parties fully appreciated the implications of the agreement; and
  - It would be fair in the circumstances prevailing to uphold the agreement.

Kremen -v- *Agrest* 2012. Mostyn J

- H had failed to disclose £20-£30 million when he entered into a post nuptial agreement. The court gave no weight to the agreement. The husband had applied undue pressure. The wife had not received independent legal advice. There was no financial disclosure and W did not understand the implications of the agreement. The agreement was unfair as it gave a wife a small percentage of the assets and did not meet her needs.

Z -v- Z 2011

- A French marital agreement provided for separation of goods regime rather than the default community of acquest regime.
- Assets were £15 million. W accepted that she had fully understood the implications of the agreement.
- No disclosure, no independent legal advice and only 10 days before the wedding.
- Moore J upheld the agreement and excluded the sharing principle. There would have been equal division without agreement.
- But W still got £6 million (40%) on a needs basis.
- They also knew at the time of the marital agreement what each other had.
- If parties have enough information to enter into the agreement freely and with a full appreciation of its implications, lack of independent legal advice and financial disclosure may not be fatal.

GS -v- L 2011

- £4 million worth of assets. Wife got £2.01 million on a needs basis. King J gave no weight to the post nuptial agreements. H had sought to ring fence £1.49 million on the basis of 2 Spanish post nuptial agreements.

Francis -v- Francis 2010

- Pre-nup 4 days before the marriage.
- No disclosure and no legal advice.
- They did not understand the implications.
- No weight given to the agreement (entered into in France).

Z -v- A 2012

- Part III application – Middle Eastern wife and European husband. H said there was an oral pre-nuptial agreement here. Coleridge J found no express oral agreement.

V -v- V 2011

- Short marriage, two children.
- H had significant assets and was older than W.
- On appeal, this pre-nup was seen as valid. It had been entered into in Sweden, H had provided a list of assets although no values were inserted, the agreement was executed 12 weeks prior to the marriage, they did not receive independent legal advice but they did understand the implications. This was, however, only one element which the judge took into account.

B N -v- M A 2013

- Mostyn J "it must be obvious that the principle object of the exercise in this case ….. is to avoid subsequent expensive and stressful litigation; and it is for this reason, as will be seen, that the law adopts a strict policy of requiring the demonstration of something unfair before it will open the Pandora's box of litigation where there has been an agreement of this nature".
- Mostyn J followed the guidance in Granatino.

A H -v- P H 2013

- The court largely disregarded a marriage settlement agreed by a Scandinavian couple when determining financial remedies. W had her needs met despite the marriage settlement.

Y -v- Y 2014

- French marriage contract – separation of goods. The English court on divorce held that she was entitled to a share in the matrimonial assets because she did not have a proper understanding of the financial consequences of what she was signing.

Luckwell -v- Limata 2014

- 2 pre-nuptial agreements and 2 supplemental agreements saying that H would not make any claim to W's separate property.
- Holman J set the agreements aside because the husband's needs were not met by the terms of the agreements but the husband got less than he otherwise would have done.

Hopkins -v- Hopkins 2015

- W argued she should not be held to a pre-nup because of duress and unconscionable conduct.
- The post nuptial agreement was upheld.
- W had signed against legal advice.
- The court said: "would the agreement leave her in real need which was not to be equated to reasonable need?"

Gray -v- Work 2015

- Post nup was signed in anticipation of H renouncing his US citizenship providing that their property and future earnings would be kept separate.
- H amassed a fortune of £140 million. W sought half.
- The underlying reason for the post nup was the husband's proposed renunciation of his US citizenship in order to save tax. The husband had provided an addendum to the post nup saying that she would continue to have the right to seek a wide range of financial remedies. Therefore the agreement did not limit the wife's rights to seek remedies.

D B -v- P B 2016

- A prorogation clause in a pre-nup which conferred exclusive jurisdiction on the Swedish court was valid and thereby excluded the English court's jurisdiction to deal with W's claims for maintenance.
- Francis J rejected the wife's assertion that she did not understand the terms of the agreement.
- The prorogation clause was valid under the maintenance regulation and the court had no power to make maintenance orders.
- The court's jurisdiction was confined to financial provision under Schedule 1 of the Children Act 1989.

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Pre-Nuptial Agreements in England and Wales

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Pre-Nuptial Agreements in The Netherlands

SANDRA VERBURGT

FRIDAY 20 APRIL 2018

Civil Law in Europe and MPR's

- **Hague Convention of 14 March 1978** on the Law Applicable to Matrimonial Property Regimes
- **Council Regulation (EU) 2016/1103** of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (entry into force: 29 January 2019)
- **Council Regulation (EU) 2016/1104** of 24 June 2016 implementing … in matters of the property consequences of registered partnerships (entry into force: 29 January 2019)

Hague Convention of 14 March 1978 on the law applicable to matrimonial property regimes

- France, Luxemburg and The Netherlands
- (Austria and Portugal signed but did not ratify)
- Hierarchy in conflict rules applicable law (artt. 3, 4 and 5)
- Change of applicable law according to the "carriage" system (artt. 7 and 8)
- Requirements on validity (artt. 11 -13)

Hague Convention of 14 March 1978: applicable law rules (artt. 3, 4 and 5)

- Choice of applicable law (art. 3)
- Law of State in which both spouses establish their first habitual residence after marriage (art. 4) *(marital domicile),* unless…
- …declaration art. 5: law of the State of the common nationality of the spouses
- None of the above: internal law of the State with which, taking all circumstances into account, MPR is most closely connected.

Hague Convention of 14 March 1978: "Carriage" system (artt. 7 and 8)

- Change of applicable law (art. 7):
  - habitual residence is established in State of their common nationality,
  - None of the above: internal law of the State with which, taking all circumstances into account, MPR is most closely connected.
  - Establishing marital domicile under art. 4 (vs law of nationality under art. 5 para 2 under 3
- Effect only for the future (art. 8)

Hague Convention of 14 March 1978: Requirements on validity (artt. 11 - 13)

- Validity choice of law:
  - by express stipulation (as to form art. 13), or
  - arise by necessary implication from the provisions of a marriage contract. (art. 11)
- Validity Marriage contract as to form (art. 12)
  - If it complies either with the internal law applicable to the matrimonial property regime, or
  - with the internal law of the place where it was made
  - writing, dated and signed by both spouses

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- Hierarchy jurisdiction rules:
  - Choice of law by express stipulation (art. 7)
  - In case of divorce: jurisdiction on basis of residence (art. 5 para 2 sub a and b), choice of law clause (art. 7) or appearance respondent (art. 8)
  - In case of succession (art. 4 and 6)
- Subsidiary jurisdiction *(lex rei sitae) (*art. 10)
- Forum necessitatis (art. 11)

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- Scope applicable law rules (artt. 20-21):
  - Universal application (art. 20)
  - Unity of the applicable law (art. 21): shall apply to all assets falling under that regime, regardless of where the assets are located.
- Choice of Law *(*artt. 22-25)
  - Choice of law (habitual residence either spouse/both or common nationality) (art. 22)
  - Formal validity on choice of applicable law (art. 23) and contract itself (art. 25): in writing, dated and signed by both spouses + formal requirements habitual residence

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- Applicable law in the absence of choice by the parties (art. 26 para 1):
  - a. Law of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
  - b. Law of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
  - c. Law with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.
- Double common nationality (art. 26 para 2)

Council regulation (EU) 2016/1103 and Council regulation (EU) 2016/1104

- By way of exception and upon application by either spouse, law of another State, provided that (art. 26 para 3):
  - the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1;
  - both spouses had relied on the law of that other State in arranging or planning their property relations.

Nature of marital contracts in civil law system vs. common law systems

- Civil law system:
  - Primary function of a Dutch pre-marital agreement is to provide for rules on how the spouses shall deal with capital and wealth during their marriage.
  - Secondary function of a Dutch pre-nuptial agreement is how to deal with capital and wealth after marriage, either through death or divorce / separation (estate planning).

Nature of marital contracts in civil law system vs. common law systems

- Common law system:
  - to anticipate on a future divorce.

Requirements for a Dutch pre-marital agreement

- Marriage contracts may both be made prior marriage (pre-nuptial agreements) and during marriage (post-nuptial agreements).
- In order to be valid, that marriage contracts will be entered into by notarial instrument, signed by parties and notary.
- Pre-nuptial agreements are enforceable and fully binding the parties. The agreement will also be binding third parties, provided that the pre-nuptial agreement has been entered into the Matrimonial Property Registry (article 1:120 paragraph 2 BW Dutch Civil Code).

Requirements for a Dutch pre-marital agreement

- Registration is also possible when a choice has been made for a foreign matrimonial property system and when there is a foreign marital contract, which applies to the parties' matrimonial system (article 10:45 Dutch Civil Code).
- If there is no registration of the foreign marital contract creditors may assume that the parties are subject to the Dutch statutory community of property.
- Be aware that the statutory matrimonial system in the Netherlands has changed since 1 January 2018.

Requirements for a Dutch pre-marital agreement

- Statutory matrimonial system prior 1 January 2018:
  - All assets (also inherited property), all debts of both parties, both pre-marital and post-marital assets do be part of the community of property
- Statutory matrimonial system since 1 January 2018:
  - Limited community of property. Excluded from the community are inherited property, pre-marital property, excluded gifts
  - Three different capital systems during marriage: private capital husband, private capital wife and community of property

Deviation of the statutory system

- By pre- or post-marital agreement
- Variety of options; allowed as long as the agreement is not contrary to bonos mores and public policy
- Since the change of the matrimonial regime since 1 January 2018 spouses shall also enter into a pre-nuptial agreement if they wish to marry in a full community of property (regime prior 2018)
- Government: legislation to make this easier (tick a box on the application to marry at the City Hall)

International Academy of Family Lawyers
International Family Law Conference
The Down Town Association
New York, New York

Pre-Nuptial Agreements in The Netherlands
SANDRA VERBURGT

FRIDAY 20 APRIL 2018

DOMESTIC CONTRACTS AND THE ONTARIO MATRIMONIAL PROPERTY REGIME – IN TEN MINUTES OR LESS

Oren Weinberg

Boulby Weinberg LLP

The Framework

1. In Ontario, matrimonial property is governed by the *Family Law Act*. Each of the provinces of Canada have family property legislation, some similar to Ontario and some provinces with different regimes. I will speak to the Ontario family property regime.

2. Separating spouses are required to share the growth in value of their assets accrued during the marriage.

3. A spouse must calculate the net value of his or her assets at the date of marriage and deduct that from the value of his or her net assets at the date of separation or, if the marriage ends by death, the day before death – the valuation date. It is a straightforward accounting exercise.

4. The legislation provides for certain exclusions from the calculation such as:

    a. Property other than a matrimonial home acquired by gift or inheritance during the marriage;
    b. Income from gifts or inheritances if the donor expressly stated that it was to be excluded;
    c. Damages for personal injuries, nervous shock, mental distress or loss of care and companionship;
    d. Proceeds of or the right to proceeds of a policy of life insurance; and
    e. Property other than a matrimonial home into which property referred to above can be traced.

5. The matrimonial home held at the valuation date is given special treatment under the legislation. A spouse who might bring in the asset into the marriage must share the full value as at the date of separation – whether or not the matrimonial home was gifted or purchase with gifted funds. Furthermore, a spouse cannot dispose of or encumber a matrimonial home without the consent of the non-owner spouse or court order.

6. Spouses can have more than one matrimonial home. Any real property that is ordinarily occupied by the parties can be considered a matrimonial home.

7. The legislation defines property expansively and includes any present or future interest, vested or contingent that a person has starting at the date of marriage and ending at the date of separation.

8. Spouses can by agreement contract out of all or part of the legislated equalization regime and they can do so before marriage by co-habitation agreement, during the marriage by marriage contract and on separation, by separation agreement. Collectively these agreements are defined in the *Family Law Act* as domestic contracts.

9. Parties to a cohabitation agreement may contract about their respective rights to ownership and division of property, support obligations, the right to direct the education and moral training of their children (but not the right to custody and access). If they marry, the cohabitation agreement will be deemed a marriage contract governing the parties' rights on separation. Even if a couple is not cohabiting, they may enter a marriage contract in contemplation of their marriage.

10. If parties contract to have the law of another jurisdiction apply to the determination of their property rights on separation, the Ontario court will apply that law as long as the contract itself is valid and enforceable under Ontario law.

<u>Essential Validity and Enforceability</u>

11. The Family Law Act governs the formation and enforceability of domestic contracts. To be enforceable, agreements must be made in writing, signed by the parties, and witnessed.

12. The court retains jurisdiction to override provisions of a domestic contract that it considers not in a child's best interest. It may also override any provisions for the support of a child if it determines the provisions to be unreasonable or not in compliance with Canada or Ontario's child support guidelines.

13. The court will override waivers of support or specific provisions for support if it would result in unconscionable circumstances in light of the parties' circumstances at the time of separation.

14. Provisions that make a right of a party contingent on chastity are not enforceable

15. Provisions of a contract could be set aside if the court is satisfied that the consideration for the provision was the removal of barrier to remarriage within the spouse's faith.

16. A court may set aside a domestic contract or a provision of a domestic contract if:

    a. A party failed to disclose their significant assets, debts and liabilities existing at the date the contract was made,
    b. A party did not understand the nature or consequences of the contract, or
    c. Otherwise in accordance with the common law of contract – ie fraud, duress, mistake, misrepresentation etc.

<u>Contracts Made Outside of Ontario</u>

17. Contracts made outside of Ontario are enforceable in Ontario if the contact is entered into in accordance with Ontario's internal law, that is the contract expressly waives rights to Ontario's family property equalization regime, complies with Ontario's high standard of financial disclosure and, in addition, meets common law contract standards.

18. The court will set aside provisions of contracts made outside of Ontario the same way it would a contract made in Ontario

19. A provision of a marriage contract respecting the right to custody of or access to children is not enforceable.

20. It is becoming increasingly common that parties to a marriage contract or separation agreement reside in more than one jurisdiction. Parties are entering international marriage and separation agreements with a view to enforceability on more than one jurisdiction. It is therefore very important to work with counsel in the requisite jurisdictions to make sure the agreements are, as best as possible, enforceable in each jurisdiction. Ontario's courts have recognized that a couple may have multiple jurisdictions of residence and have taken jurisdiction in cases in which the couple only resided in Ontario for recreational purposes, such as a summer cottage.

HAGUE, UCCJEA AND MIRROR ORDERS

- Patricia Apy, Red Bank, New Jersey
- Nancy Zalusky Berg, Minneapolis, Minnesota
- Melissa Kucinski, Washington, DC
- Katharine Maddox, Falls Church, Virginia
- David Schaffer, Naperville, Illinois

International Academy of Family Lawyers

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("1980 Convention")

Text of 1980 Convention:
https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

Explanatory Report ("Perez Vera Report"):
https://www.hcch.net/en/publications-and-studies/details4/?pid=2779

Other Resources from the HCCH:
https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction

INCADAT – the HCCH's case law database – www.incadat.com

Goals of the 1980 Convention:

1) Ensure prompt return of a child wrongfully removed or retained in any Contracting State to the Child's Habitual Residence (prompt is construed to mean within 6 weeks of initiating a return petition)
2) Secure Protection for a Parent's Rights of Access to the Child

What the 1980 Convention is <u>not</u>:

1) Does not determine custody (in fact, any custody suit initiated in the jurisdiction to where the child was removed/retained shall be stayed, pending resolution of a 1980 Convention return petition)
2) Does not determine jurisdiction to issue a custody order (measure of protection)
3) Does not conduct a best interest analysis in determining if a child should or should not be returned
4) Does not address the substance of other "Hague Conventions," such as the Hague Convention on Child Protection, the Hague Convention on Service of Process, the Hague Convention on International Adoption, the Hague Convention on Child Support, or the Hague Convention on Evidence
5) Does not address international travel or passport issues
6) Does not establish a court in the "Hague" (a city in the Netherlands) to resolve cases under the 1980 Convention (or any Hague Convention)

U.S. Implementing Legislation – International Child Abduction Remedies Act (ICARA, 22 USC 9001-9011)

Key Features:
1) concurrent jurisdiction between US state and federal courts

2) provides for burdens of proof (Sec. 9003)
3) provides for relaxed evidentiary/authentication rules (Sec. 9005)
4) fee shifting provisions for legal fees (Sec. 9007 (b))

U.S. Central Authority – U.S. Department of State, Bureau of Consular Affairs (www.travel.state.gov)

The U.S. Central Authority does not initiate Hague Abduction return petitions in the United States on behalf of a Left Behind Parent. It is incumbent upon the parent to seek out competent legal counsel and initiate an action in the appropriate court on his or her own behalf.

The U.S. Central Authority has no obligation to provide free legal counsel (having taken a reservation to Article 26 of the 1980 Convention) to Left Behind Parents, although it maintains a list of volunteer attorneys in many U.S. jurisdictions and attempts to facilitate contact between the Left Behind Parent and legal counsel.

Petitioner's Case

Key Elements of a Prima Facie 1980 Convention Return Petition:

1) Applies to a Child, under the age of 16
2) The case must be brought in a court of competent jurisdiction in the location of the child.
3) The Petitioner must have a "right of custody" under the law of the child's habitual residence
    a. A right of custody can exist under an order, agreement, or by operation of law
    b. *Abbott v. Abbott*, 560 US 1 (2010), has ruled that a parent's right to prevent international travel (e.g., a ne exeat right) is a right of custody
4) The Petitioner must have been actually exercising his or her right of custody at the time the removal or retention became wrongful
5) The Child was removed from that child's "habitual residence"
    a. Competing approaches to the definition of habitual residence
    b. Majority approach – determined by the parents' "last shared intent" (with a look towards the child's acclimatization); *See Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001), Gitter v. Gitter, 396 F.3d 124 (2nd Cir. 2005)*
    c. Minority approach – determined by looking at the child's objective circumstances and past experiences (a more "child centered" approach); *See Friedrich v. Friedrich, 983 F.2d 1396 (6th Cir. 1993)*
    d. Hybrid approach – a mix of the majority and minority approaches; *See Feder v. Evans-Feder, 63 F.3d 217 (3d Cir. 1995)*

e. Not equivalent to "home state," which is more clearly defined by the UCCJEA
f. Not equivalent to "domicile"

*It is important to determine the date on which the retention or removal of the child from its habitual residence became "wrongful" under the meaning of the 1980 Convention.

** Be sure to give your Rule 44.1 notice of your intent to rely on foreign law.

*** Ensure that not only are both countries parties to the 1980 Convention, but the Convention is in place between the two countries (i.e., if the foreign country acceded to the Convention, that the U.S. has accepted its accession prior to the wrongful removal/retention, so that a treaty relationship exists). You can find a status table on the link provided at the top of this outline.

Respondent's Case

Exceptions to returning a Child under the 1980 Convention:

1) Consent – Article 13(a) – did the Left Behind Parent have the intent to let the child travel for an indefinite or permanent time period?
2) Acquiescence – Article 13(a) – subsequent formal position taken that shows acquiescence to the removal or retention (i.e., formal statement like testimony; written renunciation of rights; consistent attitude over a significant period of time)
3) Mature Child's Objection – Article 13 (objection may be discounted if the child was coached or unduly influenced)
4) One Year Passed (since the wrongful retention or removal) and Child is Settled – Article 12; there is no "tolling" of this one year timeframe (*Lozano v. Alvarez, 133 S.Ct. 2851 (2013)*)
5) Human Rights Exception – Article 20 – meant to be restrictively applied on the "rare" occasion when returning a child would utterly shock the conscience of the court or offend all notions of due process
6) Grave Risk of Harm – Article 13(b) – risk to the child if returned (the language of Article 13(b) also includes that the child would also otherwise be placed in an intolerable situation if returned)
    a. The HCCH is in the process of producing a Guide to Good Practice on Article 13(b). The first draft from 2017, which will be substantially re-written, focused heavily on the topic of domestic violence as a grave risk for a child's return, and also perpetuated the notion that even if there is a grave risk, the child can still be returned if the harm was ameliorated in some way (i.e. some protective measures would be put in place upon return). This is no consensus in the Circuits on

whether this is a requirement, and is not outlined in the 1980 Convention.

Other Issues

Article 18 – "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."

Undertakings – A court, in deciding whether a child must be returned to its habitual residence, may make that return contingent upon certain "undertakings" by the Left Behind Parent. Conditions should be limited in scope, and there is concern over whether the habitual residence/foreign court will comply and enforce these undertakings.

Access Claims

No provisions for the judicial enforcement of access rights in the 1980 Convention. Some federal Courts (despite ICARA's concurrent jurisdiction provisions) have ruled that neither the Convention nor ICARA provides for federal courts to exercise jurisdiction over access claims. Practitioners should refer to the UCCJEA to see the relationship between custody/access claims and that interplay with the 1980 Convention to protect a parent's rights of access.

UCCJEA: Uniform Child Custody and Jurisdiction Enforcement Act
Fundamentals of Custody Jurisdiction

Background / General Provisions:

- All states have adopted the UCCJEA

- Primary principles:
  - Establish initial and continuing jurisdiction over custody matters based upon the child's home state
  - Protect the custody order of the child's home state from inappropriate modification by another state

- Goals of the UCCJEA:
  - Avoid competition between states to assert jurisdiction
  - Promote cooperation between states
  - Deter child abductions based upon forum-shopping for a more favorable jurisdiction
  - Avoid re-litigation of custody matters in a second state
  - Facilitate enforcement of custody and visitation orders between states

- The UCCJEA does not consider the best interests of the child/ren. The UCCJEA is a basis to determine jurisdiction, not a custody or visitation outcome based upon the child's best interests

- International application:
  - Courts of the United States treat foreign countries as if they were a state *provided that* the foreign country issuing the order acted in substantial conformity with the jurisdictional standards of the UCCJEA
  - If the foreign country violates fundamental principles of human rights, a U.S. court need not treat that country as a state

- Once a state properly asserts jurisdiction under the UCCJEA, that state has exclusive continuing jurisdiction over the custody matter *provided that:*
  - The state maintains a significant connection to the parties and child, or
  - All parties and the child have not moved away from the state

- Relevant definitions:
    - Abandonment = "left without provision for reasonable and necessary care or supervision."
    - Home state:
        - "The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding."

        - "In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period."

- Jurisdiction attaches at the commencement of proceedings
    - Jurisdiction is not lost by the child and one or both parents leaving the state prior to the resolution of the matter
    - However, if all parties have moved, the state *may* relinquish jurisdiction in favor of another state if the initial state determines that the other state is the more appropriate / convenient forum

Bases of Custody Jurisdiction:

- There are four primary bases for a state to assert continuing and exclusive jurisdiction over a child custody matter (priority is given to the home state):

    1. Home State - The state is the child's home state
        - The state is the home state of the child as of the date proceedings were commenced, OR
        - The state was the home state of the child within six months of the date proceedings were commenced AND the child is no longer in the state but a parent or person acting as parent continues to reside in the state
        - Note: Reason for child's removal is not relevant for this purpose
        - Note: Home state retains exclusive and continuing jurisdiction so long as one parent remains living in that state

2. Another state does not have jurisdiction based upon being the home state, or the court of the home state has declined jurisdiction, and
    - A child and at least one parent or person acting as a parent has a significant connection with the state other than mere physical presence, and
    - Substantial evidence is available about the child's care, protection, training and personal relationships
    - Note: Mere physical presence, in and of itself, is not sufficient to constitute a significant connection

3. All courts which could have asserted jurisdiction based upon the above have declined to do so, or

4. Presence of the child within the state when no other state has a basis to assert jurisdiction under the UCCJEA

- States may decline to exercise jurisdiction if:
    - The state is an inconvenient forum, and/or if
    - Jurisdiction is declined by reason of conduct of one of the parties

- Physical presence of, or personal jurisdiction over, a party or a child is *not* necessary or sufficient to make a child custody determination

Temporary Emergency Jurisdiction:

- Temporary emergency jurisdiction may be asserted when:
    - The child is present within the state, AND
        - Abandonment, *or*
        - Mistreatment of child, sibling or parent, *or*
        - Abuse of child, sibling or parent

- Temporary jurisdiction is meant to protect the child on a temporary basis until a court with appropriate jurisdiction issues a permanent order

- Temporary emergency jurisdiction shall only continue to assure the safety of the threatened person and to transfer the case back to the home state (if there is one) or other state with proper grounds for jurisdiction

- Orders entered on the basis of temporary emergency jurisdiction remain valid until:
    - An order from a proper state is rendered, or
    - If the order so states, it will become permanent upon the state becoming the home state of the child

- Threats to a sibling or a parent may trigger emergency jurisdiction

- Neglect does not give rise to temporary emergency jurisdiction

- Temporary emergency jurisdiction is not a preferred basis of jurisdiction

Duration of Exclusive and Continuing Jurisdiction:

- Temporary emergency jurisdiction is an exception to continuing and exclusive jurisdiction under the UCCJEA

- Jurisdiction continues until:
    1. Child & 1 parent absent:
        - Neither the child, nor the child and one parent (or person acting as a parent) has a significant connection with the initial state AND
        - Substantial evidence is no longer available in the state concerning the child's care, protection, training and personal relationships; OR
    2. Neither the child, nor the child's parents nor any person acting as a parent continues to reside in the initial state

Enforcement of Custody and Visitation Orders

- All states are required to enforce a custody and visitation order from another state provided:
    - The other state exercised jurisdiction in substantial conformity with the UCCJEA, OR
    - The other state's determination was made under factual circumstances meeting the jurisdictional standards set forth in the UCCJEA, AND
    - The other state's determination has not been properly modified

- Once another state's custody and visitation order is registered, the state of registration may enforce the terms of the order

- Expedited remedies:
    - A court may order the party with the child to submit to a hearing on the following judicial day for enforcement of the order
    - If there is a danger to the child or it appears a parent will remove the child from the jurisdiction, the court may issue a warrant to take the physical custody of the child as well as set an expedited hearing
    - Note: Public authorities such as prosecutors *can* be involved to secure compliance with orders and to issue warrants to take physical custody of the child pending an enforcement hearing, but this is not specifically required by the UCCJEA

- No substantive review of the order from the first state. Provided that the initial court properly exercised jurisdiction and complied with the due process requirements in the original order, the order must be enforced

- International enforcement:
    - A state may enforce an order for the return of a child made under the Hague Convention on the Civil Aspects of Child Abduction as if it were a child custody determination made within the United States

Modification of Custody and Visitation Orders

- A state may only modify a custody order if under the present circumstances it would have been able to exercise initial custody jurisdiction under the UCCJEA, AND
    1. The initial state determines it no longer has exclusive continuing jurisdiction or the initial state determines that the second state would be a more convenient forum, OR
    2. A court of either state determines that the child, the child's parents (or person acting as a parent) resides in the second state

- If the initial state no longer has jurisdiction, another state may modify the order

- To modify the initial order, the initial order must be registered in the new state.

- Once the order is properly registered, if the new state is able to assert jurisdiction based upon one of the four bases for jurisdiction, that state may modify the custody and visitation order.

Jurisdiction Declined by Reason of Conduct:

- Court *shall* decline jurisdiction if the party seeking jurisdiction has engaged in "unjustifiable conduct"
    - Unjustifiable conduct not specifically defined

- Options:
    - Dismiss the proceedings
    - Stay the proceedings until another court is able to assert jurisdiction

- Exceptions:
    - All parties agree to jurisdiction
    - Another court that could assert jurisdiction determines that this court is more convenient
    - No other state court is able to assert jurisdiction

UCCJEA: Uniform Child Custody and Jurisdiction Enforcement Act
DUE PROCESS REQUIREMENTS

Service Required:

- Requirement to be bound by a state custody determination:
  - Service requirements:
    - If within the state: Parties must be served in accordance with the state laws, OR
    - If outside the state: Parties must be provided notice as prescribed by law of the state where the action is filed or pursuant to the law of the state where service occurs, OR
    - Party submits to jurisdiction (no notice required), AND
  - Party must also be provided an opportunity to be heard

Notice Requirements:

- Notice & opportunity to be heard

- Must be provided to:
  - All persons entitled to notice pursuant to state laws
  - Parents whose parental rights have not been terminated
  - Any party having physical custody of the child

- If notice requirements are not complied with, a custody determination will not be enforceable

- State law governs the obligation to join a party and/or right to intervene in the proceedings

Required Information to Submit to Court: Initial pleading must contain the following information (subject to confidentiality procedures)

- Child's present address or whereabouts

- Each address where the child has resided during the preceding 5 years

- Names and present addresses of each person the child has resided with during the preceding 5 years

- Information related to the moving party, as follows:
    - Whether the party has participated as a party or witness in other proceedings involving the child; if so, must provide:
        - The name of the court
        - The case number(s)
        - The relevant dates of proceeding(s)
    - Whether the party knows of other proceedings which could affect the present proceedings (if so, must be disclosed)
    - Whether the party knows the names and addresses of any person *not* a party to the proceedings who has physical custody of the child and/or claims legal or physical custody; if so, must provide:
        - Name(s)
        - Addresse(s)

- Impact of failure to provide information:
    - Upon motion of either party or the court's own motion, the court may stay the proceedings until the information is provided

- Continuing duty to update information

- Information may be sealed for the child's health, safety or liberty

Limited Immunity from Other Proceedings:

- Appearance within the state solely for UCCJEA custody proceedings will not submit that party to the general jurisdiction of the state for other, non-related proceedings

- However, if the party would otherwise be subject to the jurisdiction of the state (pursuant to a basis other than physical presence related to the custody proceedings), appearing in a custody proceeding or enforcement proceeding will *not* provide immunity from service on other matters

Communication Between Courts of Different States: If jurisdiction is being asserted in two different states:

- Courts may communicate with one another
- Courts may permit the parties to participate in the inter-judicial communication
    - If courts do not permit parties to participate in substantive communications, parties must be provided an opportunity to present facts and legal arguments prior to the courts issuing their decision
- A record *must* be made of any inter-judicial communication
- Parties must be provided access to the record of inter-judicial communication

Effect of Custody Determination:

- If the state had proper jurisdiction AND all required parties were provided with an opportunity to be heard, the custody determination is binding, and another state will not have jurisdiction to commence custody proceedings (other than through proper registration for enforcement and modification proceedings)

Court's Powers Over Appearances:

- Persons within the state:
    - Court may order a party to appear with or without the child
    - Court may order a person who has physical custody or control over the child to appear with the child
- Persons outside the state:
    - Court can order notice (pursuant to notice requirements)
    - Court may include a statement ordering the person to appear with or without the child, and inform a party that failure to appear may result in an adverse decision

- Court may enter any orders necessary to ensure the safety of the child and/or of any persons ordered to appear

- Safety exception:
    - Court may permit testimony be taken in another state if safety is a major concern

Registration of Child Custody Determination in Another State:

- Custody determination may be registered in a different state *with or without* a simultaneous request for enforcement

- Procedure for Registrant - - Must be provided to the court of registration:
    - A letter or other documents requesting registration
    - Two copies (at least 1 certified) of the relevant order
    - A statement under penalty of perjury that to the best of the registrant's knowledge and belief the order to be registered has not been modified
    - Name and address of the person seeking registration and any parent or person acting as a party who has been awarded custody or visitation of the child (subject to confidentiality requirements to ensure a child's health, safety and liberty)

- Procedure for Court:
    - File order / documents as a foreign judgment
    - Serve notice upon persons listed
    - Provide persons listed an opportunity to contest registration

- Court's notice requirements:
    - Inform parties that determination is enforceable as of date of registration
    - A party opposing registration must contest the validity of the registered determination within 20 days of receipt of notice
    - Failure to contest registration will result in the confirmation of the custody determination

- Bases to oppose registration:
    - Issuing court did not have proper jurisdiction under the UCCJEA
    - Custody determination has been vacated, stayed or modified by a court having proper jurisdiction
    - Person contesting registration was entitled to notice of initial determination but was not provided proper notice

- If validity of order not timely contested, registration confirmed as a matter of law

- Confirmation of a registered order, whether by operation of law or following notice and a hearing, precludes further challenges to the order with respect to any proper objection that could have been made at the time of registration

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INTERNATIONAL FAMILY LAW
APRIL 20-21, 2018
WAINRIGHT ROOM

DOWN TOWN ASSOCIATION

HABITUAL RESIDENCE VS HOME STATE

AND

GETTING THE CHILD BACK – THE CONVENTION VS THE UCCJEA

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UCCJEA and The Convention

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"HABITUAL RESIDENCE"

"a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was **habitually resident immediately before** the removal or retention; and . . . *" Article 3 USCS Child Abduction (Hague)*

HABITUAL RESIDENCE

The phrase "habitual residence" appear no less than 10 times in the body of The Convention, interspersed among 6 Articles of The Convention.

FROM THE HAGUE

66 . . . "We shall not dwell at this point upon the notion of **habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile."**

HABITUAL RESIDENCE

Unfortunately, neither the Hague Abduction Convention nor ICARA offers a comprehensive definition of the phrase "habitual residence." Jenkins v. Jenkins 569 F.3d 549, 556 (6th Cir. 2009)

HABITUAL RESIDENCE

Moreover, the term has yet to be **interpreted** by the Supreme Court. Jenkins v. Jenkins 569 F.3d 549, 556 (6th Cir. 2009)

DISCUSSION OF SPLIT CIRCUITS' DEFINITIONS OF HABITUAL RESIDENCE

Cahue v. Martinez, U.S., 137 S. Ct. 1329 (2017)

One of a long line of denied petitions for "cert" presented to Supreme Court

Main Pieces of the "Habitual Residence" Puzzle

-*Parental intent*
- *which "parent's intent" counts? Both?
- *last place parents shared their intent to raise their child

-*Child's perspective*
- *what is "home" to me?
  - My crib?
  - My friends?
- *where am I?
- *where was I?
- *age dependent

number of times "habitual residence" appears in UCCJEA

number of times "habitual" appears in UCCJEA

number of times "residence" appears in UCCJEA

Statutory definition of "home state"

"Home State" means the State in which a child lived with a parent or a person acting as a parent for **at least six consecutive months immediately before the commencement of a child-custody proceeding**. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. **A period of temporary absence of any of the mentioned persons is part of the period**. UCCJEA Article 102(7)

UCCJEA SECTION 201

INITIAL CHILD-CUSTODY

JURISDICTION

UCCJEA SECTION 201. INITIAL CHILD-CUSTODY JURISDICTION

(a) Except as otherwise provided in Section 204, a court of this State has jurisdiction to make an initial child-custody determination only if:

BREAKING NEWS

A return order under the Convention is NOT an initial child custody determination.

ENFORCEMENT / REGISTRATION OF FOREIGN CUSTODY JUDGMENT UNDER UCCJEA

Article 3

Foreign country a "state" as far as UCCJEA is concerned.

UCCJEA vs Hague

UCCJEA is not a Convention.

The registration/enforcement powers of the UCCJEA are **not limited** to Convention signatories.

UCCJEA Section 302

Under this Article a court of this State may **enforce an order for the return of the child made under the Hague Convention** on the Civil Aspects of International Child Abduction as if it were a child-custody determination.

IS YOUR CUSTODY JUDGMENT PROPERLY PACKAGED?

-Notice, Due Process, and Home State

UCCJEA for benefit of the child.

UCCJEA not for benefit of parents.

-Parents cannot WAIVE home state jurisdictional requirement.

UCCJEA, page 26, Comments to Section 201

An agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.

UCCJEA Section 201(c)

(c) **Physical presence** of, or **personal jurisdiction** over, **a party or a child** is **not necessary or sufficient** to make a child-custody determination.

number of times "home state" appears in The Convention

number of times "home" appears in The Convention

Convention, UCCJEA, or Both?

Redmond v. Redmond, 724 F.3d 729 (7th Cir. 2013)

M.R. v D.R.
[2016] IEHC 459
http://www.bailii.org/ie/cases/IEHC/2016/H459.html

. . . While this important question of how to determine or otherwise define habitual residence under The Convention has been answered with varying approaches throughout the circuits, "the term has yet to be interpreted by the Supreme Court." *Jenkins v. Jenkins, 569 F.3d 549, 556 (6th Cir. 2009).* As a result, multiple approaches exist to determine a child's habitual residence, creating a lack of national uniformity throughout the Circuits regarding a fundamentally important matter. Accordingly, the Seventh Circuit decided an important question of federal law that has not been decided, but should be decided for the purposes of bringing uniformity in the United States, and internationally for the determination of habitual residence as it relates to The Convention.

II. CONFLICT AMONGST CIRCUITS

The Seventh Circuit held that the parental intent approach is to be applied to determine habitual residence under the Convention. This decision is in conflict with the Sixth Circuit which defines habitual residence using the child's perspective approach. Specifically, "Me determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions." *Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993).* *See* *Jenkins v. Jenkins, 569 F.3d 549, 556 (6th Cir. 2009),* *Robert v. Tesson, 507 F.3d 981, 998 (6th Cir. 2007).*

The Seventh Circuit is also in conflict with the Third Circuit, which defines habitual residence using a hybrid parental intent and child's perspective approach to determine habitual residence. Specifically, "[a] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis **[*14]** of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there." *Delvoye v. Lee, 329 F.3d 330, 332-33 (3d Cir. 2003),* Didon v. Castillo, 15-3350, 2016 WL 5349733, at *10 (3d Cir. Sept. 26, 2016), *Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995).*

Additionally, the Seventh Circuit decision conflicts with the Eighth Circuit which also applies a hybrid parental intent and child perspective analysis. Specifically, the factors relevant to the determination of habitual residence are the settled purpose of the move to the new country from the child's perspective, parental intent regarding the move, the change in geography, the passage of time, and the acclimatization of the child to the new country. *Barzilay v. Barzilay, 600 F.3d 912, 918 (8th Cir. 2010),* *Stern v. Stern, 639 F.3d 449, 451 (8th Cir. 2011),* *Sorenson v. Sorenson, 559 F.3d 871 (8th Cir. 2009).*

Furthermore, the Seventh Circuit further held that in determining habitual residence the intent and shared intent of an unmarried father who was not subject to any court orders concerning the child cannot be considered in determining habitual residence. *Martinez v. Cahue, 826 F.3d 983 (7th Cir. 2016).* Rather, only the intent of the unmarried mother, who was also not subject to any court orders concerning the child, is relevant, entitling such mother to "fix" habitual residence under The Convention. *Id.* Such a presumptive application of the parental intent analysis conflicts with the First, Third, Fifth, Eighth, and Ninth Circuit Courts on the same important matter. Specifically, the circuits find that the habitual-residence inquiry is essentially fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions. *Mendez v. May, 778 F.3d 337, 344 (1st Cir. 2015),* *cert. denied*, *136 S. Ct. 129, 193 L. Ed. 2d 40 (2015),* Didon v. Castillo, 15-3350, 2016 WL 5349733, at *10 (3d Cir. Sept. 26, 2016), Delgado v. Osuna, 15-41312, 2016 WL 5076017, at *4 (5th Cir. Sept. 19, 2016), *Barzilay v. Barzilay, 600 F.3d 912, 920 (8th Cir. 2010).*

The Seventh Circuit's approach also conflicts with the First Circuit's approach finding that one parent's wishes are not sufficient, by themselves, to affect a change in a child's habitual residence. *Darin v. Olivero-Huffman, 746 F.3d 1, 11-12 (1st Cir. 2014), Sanchez-Londono v. Gonzalez, 752 F.3d 533, 540 (1st Cir. 2014), Neergaard-Colon v. Neergaard, 752 F.3d 526, 531 (1st Cir. 2014), Mauvais v. Herisse, 772 F.3d 6 (1st Cir. 2014).*

The Seventh Circuit's decision also conflicts with the First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits which have always considered the shared parental intent of both parents, regardless of custody rights under state law, when determining habitual residence.

Accordingly, this writ should also be granted for the purpose of establishing uniformity and consistency of interpretation of The Convention treaty in order to achieve the uniformity of application across the Circuits and countries; uniformity being the premise upon which depends the realization of The Convention's goals. *See Papakosmas v. Papakosmas, 483 F.3d 617, 623 (9th Cir. 2007). . . .*

PARENTAL ALIENATION

- Justice Ellen Gesmer, New York, New York
- Daniela Horvitz Lennon, Santiago, Chile
- Katharine Maddox, Falls Church, Virginia
- Harold A. Mayerson, New York, New York
- Bernice Schaul, Ph.D., New York, New York
- Elliot Wiener, New York, New York

International Academy of Family Lawyers

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April 20, 2018

New York City

Parental Alienation

Justice Hon. Ellen Frances Gesmer – New York

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I. What is Parental Alienation?

Parental alienation is a topic that arises frequently in custody and visitation disputes. The phrase parental alienation has been used to describe a "child's strident rejection of a parent, generally accompanied by strong resistance or refusal to visit . . . ." *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, Joan B. Kelly and Janet R. Johnston.

In the 1980s, Dr. Richard Gardner devised the theory of "Parental Alienation Syndrome", which he described as:

> "The programming of the child by one parent, into a campaign of denigration directed against the other. And the second component is the child's own contributions that dovetail and complement the contributions of the programming parent. It's this combination of both factors that warrants the term parental alienation syndrome." *People v. Fortin*, 184 Misc. 2d 10 (County Court of New York, Nassau Co. 2000); *see also Zafran v. Zafran*, 191 Misc. 2d 60 (Sup. Ct. Nassau Co. 2002).

However, the concept of "Parental Alienation Syndrome" being a diagnosable/diagnostic "syndrome" has been widely criticized and is not commonly accepted.

Parental alienation is a very serious and real occurrence, and must be rapidly and appropriately addressed by mental health professionals (usually a team) and the Court in tandem, as will be discussed later. In my experience, parental alienation results from a "perfect storm" of conduct by the "aligned parent", conduct by the "rejected parent", and a particular child's temperament or personality. Litigants in custody/visitation proceedings, and their lawyers, frequently raise allegations of "parental alienation" against one another. I believe that the term "parental alienation" is over-used and misused in the litigation context, and is used too loosely as an "umbrella" term to cover many different situations, not all of which involve alienation. A child is either "alienated" from a parent or the child is not alienated – if the child is continuing to visit with a parent, that child is

not alienated. Nonetheless, efforts by a parent to interfere with the relationship between the child and the other parent are cause for concern, and New York courts take such allegations seriously. A custodial parent's interference with the relationship between a child and the non-custodial parent is considered so inconsistent with a child's best interests as to raise a strong probability that the parent who engages in such behavior is unfit to be the custodial parent.

II. What is Realistic Estrangement, And How Does It Differ From Parental Alienation?

Parental alienation must be distinguished from the concept of "realistic estrangement." With "realistic estrangement", the estrangement between the child and the parent results from a child's justifiable or reasonable basis for resisting the parent, for example, because of a parent's past or present negative, inappropriate or violent behaviors. By contrast, with parental alienation, the child's rejection of or resistance to a parent lacks any justifiable or valid basis.

III. How To Address Parental Alienation

If a parent is actively working to alienate a child from the other parent, the child's relationship with the other parent can be severed quickly – it can happen in a matter of days or weeks. Most mental health professionals in the United States would agree that time is of the essence in cases involving parental alienation, and rapid assessment, intervention and treatment is strongly recommended. Intervening in and treating families in which parental alienation is an issue is quite expensive, as a team of multiple mental health professionals should ideally be involved, and, to the extent there is litigation (which there often is), the parties are often paying counsel fees as well. To increase the efficacy of treatment, both therapeutic and legal avenues should be pursued in tandem.

A. Therapeutic Intervention And Judicial Oversight

In the United States, family therapy is recommended in cases involving parental alienation. Typically, all immediate family members should participate in the family therapy process (i.e., not just the child and the "rejected parent"). The family therapy must be tailored to the unique circumstances of each family.

In New York custody proceedings, there is also likely to be a forensic custody evaluator (a mental health professional) appointed by the Court.

Supervised and/or therapeutic visitation between the child and the "rejected" parent by a professional other than the family therapy provider is often necessary.

Judicial oversight and monitoring of the therapeutic intervention process (including any visitation schedule) is critical. The team of mental health professionals involved should be required to communicate with one another, and to provide regular reports to the Court at specified intervals. Timelines should be specified. There should be court-ordered penalties, including sanctions, for any failure by the "aligned" parent to comply with the therapeutic process or with the visitation schedule (an alienating parent will often provide excuses for why a child is unavailable for access with the rejected parent). Contact between the "aligned" parent and the child during the rejected parent's access should be minimized or prohibited. The court order governing the therapeutic process should also specify the circumstances under which the process may end – the "aligned" parent should not be able to unilaterally end the process.

B. Court-Ordered Financial Penalties

In New York, a court can impose monetary penalties against a custodial parent who is interfering with a child's visitation with the other parent.

For example, New York Domestic Relations Law § 241 ("Interference with or withholding of visitation rights; alimony or maintenance suspension"), provides:

> "When it appears to the satisfaction of the court that a custodial parent receiving alimony or maintenance pursuant to an order, judgment or decree of a court of competent jurisdiction has wrongfully interfered with or withheld visitation rights provided by such order, judgment or decree; the court, in its discretion, may suspend such payments or cancel any arrears that may have accrued during the time that visitation rights have been or are being interfered with or withheld. Nothing in this section shall constitute a defense in any court to an application to enforce payment of child support or grounds for the cancellation of arrears for child support."

New York courts have held that:

> "Interference with visitation rights can be the basis for the cancellation of arrears of maintenance and the prospective suspension of both maintenance and child support. However, such relief is warranted only where the custodial parent's actions rise to the level of 'deliberate frustration' or 'active interference' with the non-custodial parent's visitation rights." *Ledgin v. Ledgin*, 36 A.D.3d 669 (2d Dep't 2007).

In another New York case, *Bragar v. Bragar* (2002 N.Y. Misc. LEXIS 2025, Sup. Ct. N.Y. Co. 2002), the Court found that the Wife had alienated the parties' son from the Husband and was continuing to attempt to "deprive [the Husband] of a meaningful relationship with [the son]." Because of the Wife's "misconduct in causing the alienation of Adam from his father as well as her efforts to damage the husband professionally", a reduction of the Wife's equitable distribution was warranted (the Husband received 70% and the Wife received 30% of the marital estate).

A Court may also impose fines on a parent who fails to comply with a court order, including a visitation order.

C. Court-Ordered Change Of Custody

In cases involving severe parental alienation, where therapy has not been or is unlikely to be effective, a Court may award or change custody of the child from the "aligned" parent to the rejected parent. In these cases, it may also be necessary for the Court to completely restrict the child's access or contact with the "aligned" parent for a specified period of time.

D. Case Examples

There is no uniform approach in the United States to parental alienation; each state is different. Some examples of cases from different states are discussed below.

i. New York

a. ***Kramer v. Kramer*** (2015 N.Y. Misc. LEXIS 2801, Sup. Ct. Nassau Co. 2015). In this case, the father accused the mother of turning three of the parties' four children against him, and of actively working to turn the fourth (youngest) child against him as well. The mother accused the father of being a "deadbeat dad" trying to "starve" the family by "purposely reducing his income and pleading poverty." In *Kramer*, three of the children were minors, and they were ages 17, 15 and 11 (two boys and the youngest, a girl). At issue was which parent would have custody of these children.

The Court's decision details the chaos that plagued the Kramer family after the commencement of the divorce action. Among other things, the Father stated that the boys disrespected him, constantly communicated with the Mother during his parenting time, physically abused and assaulted him, vandalized his car, and on one occasion, one of the boys "jimmied" open the bathroom door while the Father was inside and proceeded to urinate on the bathroom mat in front of the Father. The court-appointed forensic evaluator stated that the Mother was taking no action to "dissuade the children from their aggressive behavior" towards the Father and "her failure to impose consequences for their misconduct enabled such misbehavior." The boys did not want to go to therapy, and the Mother refused to "force them to go." On another occasion, after the father punished the boys by taking away their hockey equipment, the mother drove the boys (and the parties' daughter) to the police station to assist in filing a police report against their father for "stealing" their equipment. The boys refused to visit

with their father after he moved out of the marital residence. The boys also physically assaulted their paternal grandparents, and refused to see the Father's family members, with whom they previously enjoyed good relationships.

In analyzing the factors to be considered in making a custody determination (including "the effect an award of custody to one parent might have on the child's relationship with the other parent"), the Court specifically found that (a) "if the Wife is awarded custody of the children the testimony has borne out that the boys will likely have no relationship with their father", which was "their express desire"; (b) "soon enough, this court believes that [the parties' daughter] will follow in their footsteps"; and (c) that the Wife "interfered with Husband's ability to maintain a loving relationship with his sons" (the boys had a good relationship with their Father prior to the divorce proceeding, and the Father "did nothing that would logically drive them to their blind hatred of him").

The children all expressed their wish to live with their mother. The forensic evaluator stated that "the likely outcome of granting [the boys'] wish to live with their mother is that they will cut off all contact with Husband" and that "any visitation schedule likely will not be followed." However, with respect to the boys, the Court still awarded the Wife legal and residential custody, on the theory that if the Husband were awarded custody, the boys' hatred and resentment of their father would only increase, perhaps culminating in violence. Accordingly, the Court found that a change in custody of the boys, under these circumstances, would result in harm to them. The Court also specifically rejected the "isolation" approach for the boys (i.e., ordering a period of 90-120 days from which they would be totally isolated from the mother), because of the psychological harm it could cause them and the Court's finding that "the potential for success is practically non-existent", given that the Mother would in all

likelihood not comply with the court order. The Court also declined to order the boys to attend therapy, given the evaluator's conclusion that "requiring the boys to attend therapy will have a detrimental impact on them."

However, the Court did award the Father custody of the parties' youngest daughter (notwithstanding her expressed preference to live with the mother), as her hostility toward her father was in its early stages and "the only hope for [the daughter] to enjoy a healthy relationship with both of her parents and all of her extended family is for Husband to have legal and residential custody of her." The Court mandated the Wife to participate in therapy for at least a year as a component of visitation with the parties' daughter, and was warned that "any future behavior aimed at disrupting Husband's relationship [with the daughter] may result in an order of limited, supervised visitation."

The *Kramer* case exemplifies the difficulties of obtaining effective relief from the Court in cases involving alienation, particularly when the alienation is severe and the children are older. In New York, children are often appointed with attorneys to represent them; those attorneys are obligated to advocate for their client's preferences and positions, even if the attorney disagrees with the child's position or does not think the child is acting in his or her own best interests. An attorney for the child ("AFC") is only able to substitute his or her judgment for the child in certain limited circumstances – when the AFC "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child." While a child's wishes and preferences are not determinative in a custody/visitation proceeding, they are an important factor that a court considers, particularly when a child is older and more mature. In *Kramer*, the daughter's attorney informed the Court of the daughter's preference to live with her

mother, but nonetheless recommended to the Court that the Husband have custody of the child and substituted his judgment "because of his concerns for [the daughter] and her future potential relationship with her Father . . . ." However, AFCs certainly do not always substitute judgment (nor is it always appropriate to do so), and, as demonstrated in *Kramer* with respect to the older boys, a Court must also consider the potential psychological harm to the children if custody is changed.

ii. California

a. **A.S. & C.A. A.S. v. C.A.** (Court of Appeal of California, Fourth Appellate District, Division 3, April 27, 2017): In this case, the parties, who were only married for one year, had a child. Following their separation, the child lived with the Mother and the Father had visitation. The Mother made domestic abuse allegations against the father, and a child custody evaluation was conducted. The child custody evaluator found that there was "insufficient evidence to substantiate mother's allegations of domestic violence, animal abuse, child abuse, or illicit drug use" against the Father. The evaluator also made several recommendations, including joint legal custody, visitation for the Father, for the parents to "participate in a coparenting class and coparenting therapy", and for each parent to participate in their own therapy. The Court ultimately awarded the parties joint legal custody, residential custody to the Mother, and visitation to the Father.

Subsequently, the Mother requested a "domestic violence restraining order" against the Father, and another child custody evaluation began. The Father requested an order "modifying child custody and visitation". The second child custody evaluator noted that the Mother made numerous intervening reports of child abuse against the Father, which were unfounded. The evaluator found that "there was no substantive data" that the Father abused the child, and noted

"several factors" supported Father's assertion that Mother "was alienating" the child. Ultimately, the evaluator concluded that the child "was in the process of being alienated and 'without intervention, . . . the child's paternal relationship will rupture.'" The evaluator made numerous recommendations, including that the parties will not make disparaging remarks to or about the other parent in the child's presence; the parents would not discuss the case with the child or question the child about the other parent; the parents should each complete parenting classes; the child should begin therapy; a co-parenting therapist should be appointed to help the parents resolve issues; both parents should continue or begin psychiatric treatment; if the mother makes unsubstantiated child abuse allegations, the father may seek a court order suspending her visitation; and if the mother did not comply with the evaluator's recommendations, the father should have sole legal custody and the mother's visits would be on alternating weekends.

At trial, the mother called her own expert to testify as to the evaluator's conclusions. The mother's expert agreed that there was parental alienation by the mother, but asserted that the court-appointed evaluator should have quantified whether the alienation was "in the low, moderate, or severe range" of alienation. The mother's expert testified that this case involved "low level parental alienation occurring by the mother" and that "low level parental alienation does not justify a change in custody" (the mother's expert agreed that the mother should go to treatment for parental alienation, and acknowledged that, without treatment, the alienation could "become moderate and then severe"). The mother's expert further opined that "one of the hallmarks of severe alienation is children refuse to see their parent"; in this case, the child was not refusing to see the father. The mother's expert criticized the evaluator's report for "failing to discuss in any way the negative effect on [the child] if he was removed from his primary custodial parent."

The lower court awarded sole physical and legal custody to the father until the mother completed all her requirements (i.e., the recommendations made by the evaluator), and ordered "that upon the passage of six months from the later date of mother's commencement of each of the requirements of the order, mother and father shall recommence sharing of joint legal custody." The lower court also limited the mother's visitation to alternate weekends.

The appellate court affirmed the lower court's decision, and found it significant that both the court-appointed evaluator and the Mother's hired expert stated that the Mother "had alienated" the child from the Father. Indeed, the "only significant difference" between the experts' opinions "revolved around the degree of alienation and what to do about it." While the appellate court acknowledged that the change in custody from mother to father "may have been somewhat drastic for" the child, it was not "entirely unpredictable" given the mother's repeated failure to undergo therapy despite recommendations, and a sufficient change of circumstances existed to warrant changing custody.

iii. <u>Vermont</u>

a. ***Sundstrom v. Sundstrom*** (Supreme Court of Vermont, 2004 VT 106, 2004): In *Sundstrom*, the parties divorced in 1998, at which time they agreed that the mother would have sole custody of the parties' two children, subject to the father's access schedule. Substantial post-judgment motion practice followed. Ultimately, the Father moved for a change of custody based on the Mother's interference with the Father's relationship with the children, which the lower court granted, concluding that the father had demonstrated a "material and substantial change in circumstances." In granting the Father's application, the lower court found that the Mother "continued to interfere with father's telephone contact with the children", including by "plac[ing] the children on the phone and tell[ing] father that he needed to get a job and pay

mother", "attempted to keep father from attending First Communion for one of the children several months prior by refusing to tell father when the ceremony was scheduled", and "filed a form with the children's school that listed her boyfriend as the children's stepfather, which meant that father was not permitted to obtain information about the children." The lower court also found that the "mother's attempts at parental alienation weighed against mother being the children's sole custodian", and "the harm caused by mother's manipulation and alienation of the children, in pursuit of her desire to punish father, outweighed any benefit that would exist from the children remaining in her home."

On appeal, the Supreme Court affirmed the lower court's conclusion "that there had been material and substantial change in circumstances", and held that "obstruction of visitation and attempts at parental alienation are not in a child's best interests, and they may form the basis for a change in custody." Moreover, the Supreme Court held that "the primary consideration is a child's best interests, and in making its determination, the court must consider all of the relevant evidence, including whether the harm caused by one parent's obstruction of visitation outweighs the harm that could be caused by a change in custody." In this case, the Supreme Court found the lower court's determination that a change in custody was in the child's best interests was supported by the record.

iv. <u>Florida</u>

a. ***Grigsby v. Grigsby*** (Court of Appeal of Florida, Second District, 2010): In *Grigsby*, the parties were married in 1991 and separated in 2003. In or around 2006, the Mother "began a campaign to alienate the Father from the children", and filed a petition for dissolution of marriage in December 2006. At trial, "the evidence established that after the injunction was dissolved the Mother refused to encourage the children to participate in scheduled time-sharing,

and she refused to allow the Father to see the children at other times", "[w]hen the Father attended the children's school functions and sports activities, the Mother threatened to obtain a new injunction against him", "she reported to the Department of Children & Family Services that the Father was sexually abusing the children" (a report determined to be unfounded), she "filed various [unfounded] police reports alleging criminal activity by the Father . . . ", and "refused to cooperate with the parenting coordinator appointed by the court" and "filed [unfounded] complaints with the state against the licenses of the psychologists and social workers appointed by the court."

The lower court found that "the Mother had actively interfered with the love and emotional ties that previously existed between the Father and the children", and "characterized the Mother's actions as the worst case of parental alienation that it had ever seen." Accordingly, the trial court gave the Father sole custody of the parties' children and "completely suspended the Mother's" access with the children. While the trial court "designated the suspension of the Mother's" access as temporary, the lower court's order "did not set forth what steps the Mother could take to reestablish time sharing with the children", and ordered that the Father could determine when the Mother's access would be reinstated.

On appeal, the Court found that the lower court properly awarded the Father sole custody and properly suspended the Mother's access with the children, as she "illegitimately used every tactic available to a parent who is legitimately concerned about the safety of her children in an effort to gain a tactical advantage in this custody case." Nonetheless, the appellate Court held that the lower court erred in failing to state "the specific steps the Mother must take to reestablish time sharing" and erred in giving the Father discretion as to "whether and when to reinitiate" the Mother's access. The lower court was required to, and should have, "clearly set forth the steps

the parent must take in order to reestablish time-sharing with the children". Accordingly, the appellate court remanded for the trial court to "set forth the specific steps that the Mother must take in order to reestablish time-sharing, and it must provide guidance concerning what proof of parental rehabilitation it is seeking from the Mother", and directed the trial court "to reserve jurisdiction to consider the Mother's progress and may not delegate to the Father and unidentified 'professionals' the determination of whether and when the Mother is sufficiently rehabilitated to have time-sharing with her children."

v. **Illinois**

a. ***In re Marriage of D.T.W.*** (Appellate Court of Illinois, First District, Second Division, 2011): The parties were married in 2002, and had two children. After a 38-day custody trial, the lower court issued a 102-page written order awarding sole custody of the children to the father, and giving the mother an access schedule.

On appeal, the Court detailed the numerous times that the Mother had interfered (or attempted to interfere) with the Father's court-ordered parenting time, and recited incidents of the Mother claiming the children were sick and/or taking them to the hospital prior to the start of the Father's parenting time, seeking an order of protection against the Father to cut off his visitation and contact with the children, picking up the children when the Father was scheduled to do so, seeking a criminal order of protection against the children's aunt (the Father's sister), filing a civil complaint for intentional infliction of emotional distress, on behalf of the children, against their aunt (the Father's sister), and filing a civil complaint for intentional infliction of emotional distress, on behalf of the children, against the Father's girlfriend. The appellate Court affirmed the award of sole custody to the Father (with a relocation of the children from Illinois to Florida), and agreed with the lower court's conclusion that the Father "was willing to encourage

a close and continuing relationship between the children and the [Mother] and that awarding sole custody of the children to [the Father] 'affords the best possibility of securing the maximum involvement and cooperation of both parents regarding the physical, mental, moral and emotional well-being of [the children]'". The appellate Court also noted that the Mother's "alienating behavior worsened during the two-year course of the custody proceeding" and that she was given the opportunity but failed to comply with the recommendations of the court-appointed forensic psychiatrist.

IV. Programs for Alienated Children/Parents

There are also programs in the United States for alienated children and parents.

1. One example is the "Family Bridges" program. That program describes itself as a "non-office-based intervention for alienated children"; it is designed to assist alienated children live with the "rejected parent" upon a Court changing custody. Dr. Richard Warshak's website states:

- "Led by a team of two professionals, Family Bridges offers a safe and secure environment that gives participants, in four consecutive days, what they need to restore a normal relationship. Beyond reconnecting children with their parents, the program teaches children how to think critically and how to maintain balanced, realistic and compassionate views of both parents."
- "The children and the rejected parent go through Family Bridges together as one family in a private workshop and not with a group of families. This allows the workshop leaders to schedule and tailor the program to meet the exact needs of each individual family. Usually Family Bridges takes place in a vacation setting, although in some cases the program has been conducted in the family home."

- For more information on the "Family Bridges" program, send an e-mail to doc@warshak.com.

2. Another example is the "Overcoming Barriers" program. Dr. Robin Deutsch is one of the founding members of this program. The program offers "High-Conflict Divorce Family Camp", which requires the participation of all family members, and takes place in a camp setting. For more information, contact overcomingbarriers@gmail.com.

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PARENTAL ALIENATION: An Overview

INTERNATIONAL FAMILY LAW CONFERENCE

Bernice H. Schaul, Ph.D.
April 20, 2018

THE CONTINUUM OF PARENT-CHILD RELATIONSHIPS AFTER SEPARATION AND DIVORCE: An Unofficial Guide

***Positive Relationships with Both Parents:**

The majority of children have good relationships with both parents after a separation and want to spend significant amounts of time with each one. Even in high conflict separations most children want to have contact with both parents.

***Affinity with one Parent:**

For a variety of reasons (temperament, age, gender, shared interests, etc) some children feel much closer to one parent than the other though they still wish to have consistent and substantial contact with the other parent. These affinities may change over time but the relationships in the family are at the healthy end of the continuum.

***Alignment with One Parent:**

These children had a consistent preference for one parent when the family was together and often want limited contact with the other after the parents separate. This can be due to a variety of factors, including a family dynamic prior to the separation in which one parent encourages the child to take sides when there is conflict between the parents. Or, in some situations, the child has a long history of separation issues and has been psychologically enmeshed with one parent. A lack of psychological boundaries between the preferred parent and the child is typical and is a major source of the problem.

Though they may express ambivalence toward the non-preferred parent these children do not completely reject that parent or seek to terminate all contact. However they are at risk for becoming alienated if issues in the family are not addressed.

***Realistic Estrangement from One Parent:**

When there is a history of family violence, abuse or neglect, children may refuse contact with a parent who has been responsible for these actions. These children may experience intense anger or phobic reactions to that parent and want no contact with him or her. Their fears and anger are based on actual experiences within the family (whether witnessed or not) and their wishes to avoid contact are an

expression of a healthy and adaptive response to a troubled parent. These children should not be considered 'alienated.'

Another type of estrangement can occur when the rejected parent has significant deficits and limitations, including emotionally abusive behavior. Assessment is necessary to determine if intervention is appropriate and could be helpful.

***Alienation from One Parent**

Children who, after the parents separate or at a later point in a high conflict case, refuse contact and stridently reject contact with a parent with whom they previously had a loving relationship. Estimates vary as to the percentages of families in which this occurs, though it is a relatively small number. Boys and girls appear to experience alienation approximately equally. Both mothers and fathers can be alienated from their children.

These are broad categories meant to provide a conceptual framework for understanding post-separation family relationships. However, families do not always fall neatly into one or the other category. 'Hybrid cases,' which are frequent, reveal that there are often a combination of factors that are at play in the family. Understanding these factors is critical in terms of determining what legal and psychological interventions are necessary.

THE ALIENATED CHILD:

Core feature: a child suddenly, over a relatively brief period of time, begins to reject and denigrate a previously loved parent and, in severe cases, refuses to have any contact with him or her. The rejection is unreasonable, irrational and flies in the face of the past history in the family. Some typical child behaviors when alienation is occurring include:

- **Persistently idealizes one parent and denigrates the other; freely expresses hatred or intense dislike for rejected parent while speaking adoringly of the preferred parent**
- **Shows no signs of ambivalence or guilt about their hostility and malicious treatment of the rejected parent**
- **False or trivial reasons are used to justify hatred; reports of events are distorted and exaggerated**
- **There is often a hollow, brittle or rehearsed quality about what the child says, can be quite chilling, stories told about the rejected parent lack depth and are repetitive and lacking in detail**
- **Resists or refuses contact with rejected parent even when therapeutic intervention is arranged**
- **If they do go on visits they often will spend long periods of time with the other parent on the phone, whispering, criticizing and reporting on events**
- **Children claim negative feelings and attitudes are their own, not those of the preferred parent, and that they are independent thinkers**
- **Hatred often extends to the extended family (grandparents, aunts and uncles, cousins) and even pets**

- **Child is hyper-vigilant about what favored parent needs; afraid to disappoint that parent, particularly if s/he is depressed or volatile**

****THE MOST TELLING SIGNS OF ALIENATION ARE SEEN IN THE DISTURBED BEHAVIORS OF CHILDREN. THESE BEHAVIORS ARE WHAT DISTINGUISH ALIENATION FROM MORE TYPICAL ANXIOUS OR HOSTILE RESPONSES TO HIGH CONFLICT IN THE DIVORCING FAMILY. IT IS NOT POSSIBLE TO CONCLUDE THAT ALIENATION IS OCCURRING IN THE FAMILY SOLELY ON THE BASIS OF PARENTAL BEHAVIOR.**

THE FAVORED (ALIENATING) PARENT: Some personality factors, beliefs and behaviors

These parents are often narcissistically vulnerable people who are personality disordered or demonstrate significant psychopathology. They may be wounded by the divorce and are not resilient enough to deal with the separation or the loss in a healthy or appropriate way. As a consequence they turn to their children for support and as weapons to retaliate against the other parent. Although they can be empathic and engaging as parents, they typically lack insight into their own behavior and the impact it is having on the children. They may be consciously or unconsciously vindictive or spiteful and they are intensely distrustful of the other parent. Other features may include:

- **Significant anger, problems with boundaries and differentiation from the child, severe separation anxieties**
- **They evoke sympathy and protectiveness from their children**
- **They have extremely negative views of other parent, black and white attitudes**
- **They claim that the child's reaction is "normal" and will resolve in time**
- **Believe that the child does not need a relationship with the other parent**

Some typical behaviors are:

- **Badmouthing the other parent openly, denigrating him or her, exaggerating flaws to the child and to members of the community,**
- **Interfering with or limiting the other parent's time with the child, phone contact, involvement in activities,**

- **Telling the child what s/he missed when they were visiting other parent,**

- **Refusing to communicate or exchange important information about the child, refuses to be in the same room as the other parent**

- **Emotional manipulation: creating loyalty conflicts, fostering dependency of the child, withdrawing love if the child shows signs of affection to the other parent,**

- **Uses the child as a spy or a messenger,**

- **Conveying to the child that the other parent is dangerous, unloving and insensitive or untrustworthy**

- **Unfounded abuse allegations**

THE REJECTED PARENT: Personality factors and behaviors

Prior parenting behaviors can vary from having been more than adequate to having been compromised as a result of ongoing marital conflict. This parent may however also demonstrate one or more of the following problems:

- **Passivity or withdrawal in the face of conflict**

- **Immature, self-centered in relation to child**

- **Harshness and rigidity in parenting style**

- **Angry, demanding, intimidating**

- **Lack of empathy/rejecting of the child**

SOME FACTORS THAT CONTRIBUTE TO OR EXACERBATE ALIENATION IN CHILDREN:

Alienation is a complex psychological phenomenon and results when there is a convergence of events and experiences that impact the child and the family. There is almost never one cause for alienation in a family. Some of the factors that contribute to the creation of this disturbed phenomenon are:

1. **Intense marital conflict in which the child is caught in the middle; long term disturbed family relationships**

2. **A separation that is humiliating for one parent**

3. **A persistent denigration of one parent by the other**

4. **Aggressive, chronic litigation**

5. **Personalities of the Preferred and the Rejected Parents**

6. **Child's age, cognitive capacities, temperament, developmental history:**

    - **Pre-adolescent and adolescents most susceptible (ages 8 to 15) to alienation; can be angrier and rigidly moralistic,**

    - **Less resilient children with chronic adjustment problems (anxious, fearful, passive children) find it more difficult to stave off the intense pressures of angry or needy parents and are more vulnerable to becoming alienated**

    - **Children under 7 or 8 are unlikely to have fixed alliances with one parent though this can change rapidly as they grow and if there is an older, alienated sibling or if the pressure on the child is intense**

- **Family history can be a factor, for example if there has been a consistent lack of support by one parent or if a child has been conditionally loved by a parent who is now actively courting the child.**

7. Aligned Professionals (lawyers, law guardians, clinicians) and family members who do not understand the dynamics involved in families in which alienation is present and who, as a result, reinforce the polarized thinking and maladaptive behaviors that are occurring

8. The Court's failure to take action quickly and issue orders that establish parameters for the family, specifically as it becomes clear that there is a breakdown in the parent-child contact and a risk that alienation is developing

FACTORS THAT HELP TO PREVENT OR MITIGATE AGAINST ALIENATION:

Rapid and authoritative response from the court as soon as problem is identified

Ongoing contact with rejected parent

Rejected parent is self-protective and not abandoning

Other valued people in child's life see the rejected parent as a good person

Older siblings not alienated

Child is insightful, clear thinking, has the cognitive ability to maintain a sense of balance in the face of the conflict

Legal system or trusted therapist takes a strong position supporting contact with rejected parent

INTERVENTIONS AND TREATMENT MODALITIES

There is a consensus among many professionals that when alienation exists case management by a legal and/or mental health professional is essential for monitoring and for some decision-making. It is also generally believed that a combination of education, coaching and/or psychotherapy with both parents is necessary, as is clinical work with the children. Intervention is typically not focused solely on reunification but on dealing with a broad range of distorted ideas and feelings associated with the rejected parent in particular, as well as avoidant behaviors.

It is difficult for one clinician to be effective when alienation exists and ideally a team of two or more professionals will work in various combinations with the family. Transparency and collaboration is essential. Individual therapists who have too little information about the reality of the family's problems can be counterproductive, if not destructive. That said, the work is difficult and extremely challenging and there are no guarantees that there will be a successful outcome.

There are some specific interventions or programs discussed in the clinical literature (Multi-Modal Family Intervention, Overcoming Barriers Family Camp, Family Bridges) that represent innovative methods for dealing with various degrees of alienation.

Bernice H. Schaul, Ph.D.
International Family Law Conference, April 20, 2018

POSSIBLE LONG TERM CONSEQUENCES FOR CHILDREN:
Development derailed, never benign, degree of damage varies.

1. **Literature consistently reports that alienated children are at risk for emotional distress and adjustment difficulties—at greater risk than children from litigating families who are not alienated. Clinical observations, case reviews, qualitative and empirical studies indicate that alienated children may exhibit:**

    a. **Poor reality testing**
    b. **Illogical cognitive operations**
    c. **Simplistic and rigid information processing**
    d. **Inaccurate or distorted interpersonal perceptions; skewed views of relationships, of men or of women**
    e. **Disturbed and compromised interpersonal functioning; tendency to be manipulative or feel omnipotent and entitled**
    f. **Self-hatred, low self-esteem, self-blame**
    g. **Pseudo-maturity**
    h. **Gender identity problems**
    i. **Poor differentiation of self (enmeshment)**
    j. **Aggression and conduct disorders, disregard for social norms, poor impulse control**
    k. **Emotional constriction, passivity or dependency**
    l. **Lack of observed remorse or guilt**

2. **Effects of alienation as reported by adults who were alienated as children (Amy Baker's work[1]): Many suffered low self-esteem, self-blame and guilt; 70% disclosed significant episodes of depression; one-third reported serious problems with drugs and alcohol during adolescence. Many reported becoming alienated from their own children. Most reported claiming they hated or feared the rejected parent but that they did not want that parent to walk away and secretly hoped someone would realize they did not mean what they said.**

Bernice H. Schaul, Ph.D.
International Family Law Conference, April 20, 2018

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[1] **Baker, A. J. L. (2007).** ***Adult Children of Parental Alienation Syndrome, Breaking the Ties that Bind.*** **New York: W.W. Norton & Company.**

RECOMMENDATIONS FOR PRACTICE AND POLICY

1. **Prevention: psycho-educational programs**

2. **Education for mental health professionals, lawyers and judges to assist in identification and intervention planning when alienation may be an issue. Without adequate understanding, lawyers and mental health professionals may become enmeshed and do a disservice to the family.**

3. **Early identification, screening, triage and expedited process: near unanimous agreement about this. Delays and ineffective intervention are likely to cause alienation to become more and more entrenched**

4. **Detailed and unambiguous parenting plans and treatment orders**

5. **Early and vigilant case management by one judge**

6. **Effective enforcement of all court orders**

7. **Improving professional collaboration**

8. **Judicial control after a trial**

9. **Better Access to Services**

Bernice H. Schaul, Ph.D.
International Family Law Conference, April 20, 2018

SOME SUGGESTED READINGS:

There is a tremendous amount written about alienation and it is possible to search out materials online, though clearly not all of this is reliable information. Below are a few peer reviewed resources in the clinical literature:

Baker, A. J. L. (2007). *Adult Children of Parental Alienation Syndrome, Breaking the Ties that Bind.* New York: W.W. Norton & Company.

Ellis, E.M. (2000). *Divorce Wars: Interventions with Families in Conflict.* Washington, DC: American Psychological Association.

***Fidler, B.J. and Bala, N. (2010). Children Resisting Postseparation Contact with a Parent: Concepts, Controversies and Conundrums. *Family Court Review, 48* (1), 10-47.**

Friedlander, S. and Walter, M.G. (2010). When a Child Rejects a Parent: Tailoring the Intervention to fit the problem, *Family Court Review,* 39 (3), 98-111.

***Kelly, J.B. & Johnston, J.R. (2001). The alienated child: A reformulation of parental alienation syndrome, *Family Court Review, 39* (3), 249-266.**

Lee, S.M. & Olesen, N. (2001). Assessing for alienation in child custody/access evaluations, *Family Court Review, 39* (3), 282-298.

Sullivan, M.J. & Kelly, J.B. (2001). Legal and Psychological Management of Cases with an alienated child, *Family Court Review, 39* (3), 299-315.

Warshak, R.A. (2001). *Divorce Poison: Protecting the Parent-Child Bond from a Vindictive Ex.* New York: HarperCollins Publishers Inc.

Warshak, R.A. (2010). Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children, *Family Court Review,* 48 (1), 10-47.

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Court Intervention in **Child Alienation** Cases

BY ELLIOT WIENER
AND BERNICE SCHAUL

ISTOCK

Prevention of the disintegration of families is such an important goal that judges, traditionally cautious, practical, and careful, can be enlisted to actively try to reverse the effects of a family's crisis.

When it appears that a child has been alienated from a parent, or soon will be, the necessity for judicial action is especially powerful. This article highlights the psychological issues involved in alienation, the remedies recommended by the mental health community, and the case law establishing the legal authority for court orders to address this critical problem in families.

Why It Matters

The severing of a relationship between a parent and a child compromises a child's healthy development and is an emotionally devastating experience for the family. There is a substantial body of psychological literature that demonstrates significant negative short-term and long-term consequences for children who become alienated from one parent in the context of a divorce. Research studies, clinical observation, and case reviews show that alienated children suffer from an array of emotional problems. At the very least they begin to have distorted views about personal relationships and poor reality testing, they can become manipulative and callous in ways that compromise their interactions with others, and they have separation and identity issues. Alienated children are at far greater risk for adjustment difficulties and emotional distress than children from litigating families who have not become alienated.[1] There is also evidence that the impact of alienation is long lasting. Low self-esteem, self-blame, and guilt are reported by adults who were alienated as children.[2]

Alienation: What It Is And What It Is Not

The term alienation, which has become a part of the lexicon of high conflict divorce, is frequently misunderstood and misused. At its core, alienation is about a child's disturbed behavior, not about a parent's behavior, and it involves a profound change in a child's reaction to a previously loved parent. This reaction typically occurs in the context of an acrimonious divorce in which the child has been exposed to a great deal of anger and conflict and suddenly begins to reject one parent and become intensely aligned with the other parent. The child's anger at the parent is not based on the reality of what has actually

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happened between the parent and the child, despite what they may claim. In the most severe cases of alienation, the relationships in the family become completely polarized. There is a good, loved parent and a bad, hated parent. The child has lost the freedom to love both parents.

Although often attributed to "brainwashing," alienation is a complex phenomenon that is caused by a convergence of factors. A history of intense marital conflict, a separation that is humiliating for one parent, persistent denigration of one parent by the other, the personalities of the parents, a child that is vulnerable in one way or another, and aligned professionals and aggressive litigation can all contribute to the creation of this problem. While the persistent denigration by one parent of the other is a necessary pre-condition for alienation, it is rarely the only factor that drives this process.

Some children rapidly become severely alienated from one parent and refuse contact completely, while others become aligned with one parent and want only limited contact with the other. Initially, these latter children may not completely reject the other parent, though the underlying dynamic of polarized family relationships is present. If the issues in these families are not addressed however, the children are at risk of becoming alienated. Therefore it is critical not only to identify the already alienated children but also those children who present with milder or more moderate signs of becoming alienated.

Alienation is *not* what has been identified as "realistic estrangement" or "justified rejection." There are times when children reject a parent for good reasons, such as when the parent has been violent, abusive, or neglectful or has demonstrated several parenting deficiencies. In these cases the child's rejection of the parent does not reflect unreasonable or unfounded anger toward a previously loved parent. Rather, the rejection is a healthy response to the parent's damaging behavior.

Hostility, denigration, and other expressions of anger by one parent toward the other during a high conflict divorce should also be distinguished from alienation. Parents in these cases frequently attack one another and say nasty and vindictive things. Accusations of alienation quickly follow. However, while this behavior is far from optimal, it is not alienation. Alienation is about the disturbed behavior of a child and the transformation of the parent-child relationship. Anger is about parental behavior and is observed in many high conflict cases. That is, when a child rejects and refuses contact with a parent, alienation is present. When a parent becomes hostile and attacking, it is bad behavior but not alienation. This is one of the most critical concepts to understand.

When it appears that a child has been alienated from a parent, or soon will be, the **necessity for judicial action is especially powerful.**

What the Court Can Do

There is a consensus in the mental health field about how to improve our approach to alienation cases. While in some cases the alienation may be so severe that they are resistant to intervention, in many others the court can have a significant positive impact on the family. Knowing full well that these cases are extremely complicated and range from severe to moderate to mild, there is agreement that they require:

Early identification is indisputably necessary in these families. Time is of the essence and delay in identifying alienated children, or those at risk, reduces the likelihood of successful intervention. A child's refusal to visit or the suspension of visits is a "red flag," particularly if the parent and child previously did things together before the separation and if there are no clear indicia of realistic estrangement. While a full forensic evaluation may be useful in some cases, early identification of the problem should not await such an evaluation. Instead, careful inquiry and prompt intervention is crucial in these families.

Strong and consistent judicial case management is essential. The court has credibility and authority and the respect of all parties and must play an important role in these cases. Unless the court provides direction, establishes expectations, monitors the family regularly, and ensures consequences for violations of court orders, the likelihood of successfully overcoming the alienation is low.

Clinical interventions must be crafted and ordered by the court and should be structured and responsive to the specific needs of each family and include both parents and the children. A family systems approach to treatment should be utilized with a team of clinicians, objectives of treatment/intervention should be established, and minimum periods of time for treatment should be delineated by the court. Clinicians who work with the family must be

knowledgeable about alienation. If they are not, intervention can be useless or even destructive.

Collaboration between the court and mental health professionals is necessary to identify critical issues and to structure interventions and orders that integrate the perspectives of the psychological and legal professions. Any intervention plan should be informed by clinical insights and implemented through the court's authority.

Contact with the rejected parent must not be suspended, even if it requires therapeutic involvement or the presence of another person (not supervision). The moment contact stops, the risk of entrenchment increases.

Mental health professionals agree that remedying a case of alienation is challenging at best but not impossible. The collaborative and multipronged approach outlined here offers the best opportunities for addressing the serious problems that these cases present.

Authority for Court Intervention

New York family law reflects an historic interplay between the legal and mental health communities and underscores the authority and responsibility of courts to compel parties to participate in, to facilitate their children's participation in, and to pay for mental health treatment. In *Wolfson v. Minerbo*, 108 A.D.2d 682 (1st Dept. 1985) the First Department "insist[ed]" that the parties "meaningful[ly]" comply with a Family Court order that "directed that the parties and the children submit to counseling and that the father pay the costs therefor" "so that a reasonable relationship can be reestablished between father and children." The court also directed "that petitioner pay for all future counseling sessions." The Second Department joined the First Department in *Resnick v. Zoldan*, 134 A.D.2d 246, 248 (2d Dept. 1987), directing "the parties and their daughter to undergo a program of psychiatric counseling under the court's direction and supervision in an effort to attempt a gradual assumption of visitation." Since then, the appellate and trial courts have repeatedly directed parties to participate in some form of psychotherapy.[3]

Collaboration between the court and mental health professionals is necessary to identify critical issues and to structure interventions and orders that integrate the perspectives of the psychological and legal professions.

Courts have also monitored the parties' attendance in treatment. In *Mark-Weiner v. Mark*, NYLJ 8/24/01, p. 18, c. 4 (New York Co., Gische, J.), the Supreme Court required the defendant to provide "proof that he is actively involved in such therapy" in the form of a bill marked paid or other receipt for services. In *Singer v. Peters*, 284 A.D.2d 152 (1st Dept. 2001), the court held that, with the parties' consent, the Supreme Court was entitled to review the therapist's notes and to obtain the testimony of the therapist to determine the parties' "participation and progress in the therapeutic process." *Singer*, 284 A.D.2d at 152.

Trial judges, with the approval of appellate courts, have been involved in selecting the "nature" of the therapy or the "manner in which [it] will be accomplished." *Scheuering v. Scheuering*, 27 A.D.3d 446, 811 N.Y.S.2d 100 (2d Dept. 2006). In *LR v. AZ*, N.Y.L.J. 7/31/09, p. 26, c. 1 (New York Co., Drager, J.), the court ordered the appointment of an "intervention therapist" to assist the parties in finding a "cognitive-behavioral" therapist to provide short-term treatment for the child. Where the therapy selected by a parent "was neither consistent nor effective," the Second Department ordered the parent to enroll the child "in intensive and consistent therapy with a child psychiatrist, with the goal of repairing the relationship between the father and the child so that visitation could resume in the future." *Stebelsky v. Schleger*, 135 A.D.3d 774 (2d Dept. 2016).

The Appellate Divisions have made that trial courts responsible to use their remedial authority to ameliorate the damage caused by alienation of children. In *Schnee v. Schnee*, (New York Co., Tolub, J. 1999, n.o.r.), the children were "extremely alienated from the mother" and did not want to "re-establish a relationship with their mother." Nonetheless, the trial court refused to order the parties and the children into previously agreed-upon therapy "where to do so will serve no useful purpose" because both the father and the children refused to attend therapy. "There is no magical ruling that this court can render which will make these children want to re-establish a relationship with their mother ... . The court is not unsympathetic to the plaintiff's plight, but can do little to award her the relief she really requests, her children's love and respect. Even a judge has no such power." The First Department disagreed. Noting that the experts unanimously recommended continued therapy at least for the children if not the entire family, the court held that the "record does not *presently*

support" the denial of family therapy, and remanded on that issue among others. 268 A.D.2d 392, 700 N.Y.S.2d 839 (1st Dept. 2000) (italics added). In *Rodman*, the Supreme Court ordered the mother to bring the "alienated" child to therapy and visitation and imposed fines for her failure to do so. The First Department affirmed. In *Wolfson*, the court found that neither party was participating in therapy in good faith. The Second Department "insist[ed] that there be a meaningful effort by both parties to participate in the counseling process so that a reasonable relationship can be reestablished between father and children." In *Zafran v. Zafran*, 306 A.D.2d 468 (2d Dept. 2003) (*Zafran I*), the trial court ordered temporary visitation to be implemented by a court-appointed case manager. The alienating father refused to cooperate with the court-ordered therapeutic supervised visitation and "undermined the court's efforts to facilitate unsupervised visitation." The father next resisted an update of the court-ordered forensic evaluation. *Zafran v. Zafran*, 28 A.D.3d 753, 754 (2d Dept. 2006) (*Zafran II*). The trial court, growing frustrated, denied the mother's motion to hold the father in contempt, but "terminated" all visitation. On appeal, the Second Department reversed, directing the lower court to reconsider the issue of contempt and suspending the visitation, reasoning that termination of the father-daughter relationship was not in the daughter's best interests. Since the daughter's interests also were at stake, the court found that contempt, not termination of visitation, was an appropriate vehicle for addressing the father's recalcitrance. 28 A.D.3d at 757. By contrast, in *Rodman*, the trial court decided not to hold the mother in contempt but, rather, to direct her to comply with its prior orders, and the appellate court affirmed that exercise of discretion.

The trial court decisions in *Schnee* and *Zafran* express the view that there are limits to what courts can do to repair fractured families. The appellate courts in each case and both courts in *Rodman* took a different tack, saying, in effect, that courts had to exhaust the remedies that the trial courts had at their disposal. Implicit in these appellate decisions is the hope that with the assistance, and if need be, the coercive power of the court, mental health professionals can help to repair severely damaged parent-child relationships. It is unclear what the appellate court in those cases would have done if the father in *Zafran* or the children in *Schnee* continued to refuse to participate in therapy in the face of enforcement of the court's contempt powers. Perhaps those appellate courts would reach the conclusion as, it seems, the trial courts did, that there is nothing more that the courts can do for these families. But the appellate courts are insisting that we have to try and mental health professionals, with the backing of the law, have provided us with a treatment plan that may help in some cases.

Recommendations for Triage

Attorneys with an alienation case should move early in the case for orders which insure that contact between the rejected parent and the child(ren) continues and that mental health services which specifically address alienation are immediately implemented. The motion is more likely to succeed if it is supported by an affidavit from a mental health professional, experienced in parental alienation, who identifies specifically the reasons for the initial assessment of alienation and a plan for addressing the problem. That affidavit should highlight the justification for prompt action.

Conclusion

The case law and the psychological literature underscore the urgent need for both judicial case management and rapid mental health intervention in alienation cases. If we are successful, in the long run the demands on the courts from alienation cases may be reduced. More importantly, however, this approach has the best chance of reducing the serious emotional damage that occurs in families when alienation continues unabated.

1. Fidler, BJ and Bala, N. (2010). Children Resisting Postseparation Contact with a Parent: Concepts, Controversies and Conundrums. Family Court Review, 48 (1), 10-47.

2. Baker, A.J. L. (2007). Adult Children of Parental Alienation Syndrome, Breaking the Ties that Bind. New York: W. W. Norton & Company.

3. The following is a partial list of cases. *Rodman v. Friedman*, 33 A.D.3d 400 (1st Dept. 2006) (parties ordered "to abide by the court's orders regarding ... therapy"); *Thompson v. Thompson*, 41 A.D.3d 487 (2d Dept. 2007) (the trial court "may direct a party to submit to counseling as a component of visitation"); *Anne S. v. Peter S.*, 92 A.D.3d 483 (1st Dept. 2012) (father to "continue intensive treatment"); *SMZ v. SDZ*, NYLJ 3/28/97, p. 31, c. 4 (New York Co., Silbermann, J.) (counseling is the "one remedy that may salvage" the situation); *JF v. LF*, 181 Misc.2d 722 (FC, West. Co. 1999), aff 'd. 270 AD2d 489 (2d Dept. 2000) (finding that the mother alienated the children from the father, the Court changed custody to the father and ordered that the children be in therapy "with an appropriate therapist with experience in parental alienation and that the parents cooperate in such therapy" and "that both parties participate in their own individual therapy, if recommended"); *LS v. LF*, 10 Misc.3d 714 (SC, Kings Co., 2005, Sunshine, J.) (court appointed a parenting coordinator to assist the parties and child to reestablish meaningful parenting time and directs parties to pay equally so that both have vested interest in the outcome and responsibility for their past conduct).

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1. Appointment of attorney for child

   a. *Anonymous v. Anonymous,* 102 AD3d 640 (2nd Dept. 2013): Children, ages 12 and 8, "should be represented independently" and on remand the trial court was directed to appoint an attorney for the children. The decision says that it turns on "the particular facts" the case, but the court cites no facts to support the conclusion that independent counsel for the children was necessary.

   b. *Quinones. v. Quinones*, NYLJ 5/26/16, p. 27, c. 1 (2nd Dept. 2016): Appoint of attorney for child "remains the strongly preferred practice, such appointment is discretionary, not mandatory" and where the child is young (here three years old) "and in the absence of any demonstrable prejudice to the child's interests,"the failure to appoint such an attorney was not abuse of discretion.

2. Separate Counsel for Different Children

   a. *Matter of Brian S.*, 141 AD3d 1145 (4th Dept. 2016): Where one child's position is "unharmonious" with the other child's position, separate counsel should be appointed. Here, two children took one position with respect to the neglect proceeding which differed from the position of the third child, requiring the appointment of separate counsel.

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3. Child's Preference

a. In *Matter of Charpentier v. Rossman*, 264 AD2d 393, 694 NYS2d 109 (2nd Dept. 1999), the father interfered with the relationship between the child and the mother since the proceedings were commenced, four years earlier, when the child was 13 years old. By the time the case reached the appellate court, the child was then 17 years old and had lived with the father since 1995 (apparently 4 years) and expressed a strong preference to remain with him. The Second Department affirmed an award of custody to the father.

b. *Matter of Delaney v. Galeano*, 50 AD3d 1035 (2nd Dept. 2008): The motion by the attorney for the child to hold the mother in contempt was denied by Family Court and the attorney for the child appealed. While the appeal was pending, the child wrote a letter to the Second Department in which he said that he did not want the appeal to proceed. The appellate court issued an order to show cause directing the parties to address the issue of the dismissal of the appeal. The attorney for the child "failed to demonstrate any basis upon which the child's preference may properly be disregarded" and the appeal was dismissed.

c. *William-Torand v. Torand*, 73 AD3d 605 (1st Dept. 2010): "While a child's views should be considered when determining issues of custody or visitation, they should not be determinative (*Obey v. Degling*, 37 NY2d 768, 770 [1975]; *Matter*

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of Taylor G., 59 AD3d 212 [2009]; *Matter of Hughes v Wiegman*, 150 AD2d 449, 450 [1989]). A court may not delegate its authority to determine visitation to either a parent or a child *(Matter of Leah S.*, 61 AD3d 1402 [2009]; *Matter of William BB. v. Susan DD.*, 31 AD3d 907 [2006]). A visitation provision that is conditioned on the desires of the children "tends . . . to defeat the right of visitation" (*Matter of Casolari v. Zambuto*, 1 AD3d 1031 [2003] [internal quotation marks and citations omitted]; *Pincus v Pincus*, 138 AD2d 687 [1988]). Here, because the access provisions of the court's order are conditioned on the children's wishes and leave the determination whether visitation will take place to the children, or their mother, they must be set aside. . . . In light of the children's ages and the mother's claim that they are reluctant to spend time with their father, on remand, the court should consider, after consultation with counsel, appointing an attorney for the children and holding a *Lincoln* hearing (*see Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117 [1990] [preferred practice in custody/visitation cases is to have an in camera interview with the child on the record in the presence of the attorney for the child])."

4. Substituted judgment

a. *Whitley v. Leonard*, 5 AD3d 825 (3rd Dept. 2004): Attorney for the child properly informed the court of the 12 year old's preference to live with the mother and then

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"conscientiously explained why she was advocating" otherwise. The Court held that the attorney for the child had a statutory duty to represent the child's wishes as well as his best interests. Here, the trial court found "a pattern of parental alienation" by the mother and "appropriately discounted the child's expressed preferences and directed a new custody arrangement that would repair and enhance the child's relationship with the father while continuing regular contact with the mother."

b. *Neuman v. Neuman*, NYLJ 6/13/05, p. 39, c. 1 (2nd Dept. 2005): The trial court's custody order, which was "in conformance with the recommendation of the Law Guardian," and which was contrary to the conclusion of the court-appointed mental health expert, was affirmed.

c. *Manfredo v. Manfredo*, 53 AD3d 498 (2nd Dept. 2008): The attorney for the child, "in addition to the other attorneys in this matter, properly submitted a written summation based upon the facts adduced at the hearing. Moreover, the attorney for the child did not breach her ethical obligations (*see* 22 NYCRR § 7.2[b]) and properly advocated the position of the child to the court."

d. *Matter of Thomas v. Thomas*, 35 AD3d 868 (2nd Dept. 2006): In affirming the trial court's decision to deny visitation to the father due to his abusive behavior, the Second Department cited the law guardian's "recommendation".

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e. *Rosenberg v. Rosenberg*, 44 AD3d 1022 (2nd Dept. 2007): Position of law guardian is a factor to consider and is entitled to some weight but is not determinative; accord, *Caravella v. Toale*, 78 AD3d 828 (2nd Dept. 2010).

f. *Matter of Krieger v. Krieger*, 65 AD3d 1350 (2nd Dept. 2009): On an application by the residential custodial parent to relocate to Ohio, the attorney for the child intended to "advocate[e] for a position that could be viewed as contrary to the child's wishes." The trial court required the attorney for the child to offer expert testimony on the issues of the child's capacity to articulate her desires and whether the child would be in imminent risk of harm if she moved with her father to Ohio. The appellate court reversed, holding that "The Rules of the Chief Judge do not impose such a requirement (see 22 NYCRR 7.2)."

g. *Matter of Swinson v. Dobson*, 101 AD3d 1686 (4th Dept. 2012): On the father's change of custody petition, Family Court awarded the father primary custody of the parties' child. The attorney for the child advocated for the child's stated goal, but the mother argued that the attorney for the child should have substituted judgment. Both the trial court and the appellate court rejected these arguments, saying that neither exception to the general rule "is implicated in this matter."

h. *In re Alfredo J.T. v. Jodi D.*, 120 AD3d 1138 (1st Dept. 2014): Attorney for the child properly informed the court of the 5 year old's preference to live with the

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mother and then advocated otherwise as child was incapable of "knowing, voluntary, and considered judgment".

i. *Matter of Lopez v. Lugo*, 115 AD3d 1237 (4th Dept. 2014): Substituted judgment affirmed where the record "amply demonstrated the 'substantial risk of imminent, serious harm" based on the mother's arrest for drug possession in the children's presence, the seizure of numerous weapons from her home, and the mother's husband's assault on one of the children who was attempting to intervene when the husband attacked the mother with an electric cord.

j. *Matter of Eastman v. Eastman*, 118 AD3d 1342 (4th Dept. 2014): Substituted judgment affirmed where the child was 7 years old, "functioned at a kindergarten level" and had Down Syndrome.

k. *Matter of Viscuso v. Viscuso*, 129 AD3d 1679 (4th Dept. 2015): The attorney for the child substituted judgment and advocated for a change in custody where "the mother's persistent and pervasive pattern of alienating the child from the father "is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]), and we conclude that the AFC acted in accordance with her ethical duties." Here, the Court found that "the mother interfered with the father's relationship with the child by, inter alia, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in

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the child a fear of the father, and encouraging the child to medicate herself before going to visit the father."

l. *Matter of Zakariah SS v. Tara TT*, 143 AD3d 1103 (3rd Dept. 2016): The psychologist who performed the custody evaluation concluded that "the child had been 'brainwashed, coached and rehearsed' by the mother." She supported her conclusion with a description of "a litany of ways in which the child acted in a manner consistent with a child of that age who had been coached to accuse an adult of abuse that had not actually occurred." Her conclusions, based on her observations of the child, were supported by her evaluation of the mother, her discussions with collateral sources, and her observations of the mother and child together and of the father. The mother argued that the attorney for the child "was required to advocate for the child's stated wishes to be in the custody of the mother. We find ample evidence in the record that the mother caused severe emotional distress to the child by her ongoing attempts to alienate the child from the father. If the child's professed wishes were acceded to, that distress was likely to continue and perhaps worsen. Moreover, the child's purported wishes were likely to lead to the continuation and amplification of severe and unwarranted damage to the child's relationship with the father. In such circumstances, we find no fault in the attorney for the child's decision to advocate for a position contrary to the child's wishes, of which Family Court was aware, given that such wishes

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were "likely to result in a substantial risk of imminent, serious harm to [her]" (22 NYCRR 7.2 [d] [3]; *see Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1681 [2015])."

m. *Matter of Isobella A.*, 136 AD3d 1317 (4th Dept. 2016): In an neglect proceeding based upon the mother's alienation of the children from the attorney for the child substituted judgment where the child was five and six years old at the time of the proceedings and the evidence showed that she lacked the requisite capacity. Here "The evidence established that the mother alienated the children from their fathers, with the result that Isobella was confused whether Charles was her real father. The mother also interfered with the fathers' visitation with the children and made false allegations against the fathers or their significant others. Isobella was diagnosed with adjustment disorder and had poor behavior in school as a result of the mother's conduct. The evidence also established that the mother forced Cameron to lie about Joseph and videotaped him stating those lies. The court properly determined that the mother's conduct impaired the children's emotional condition or placed them in imminent danger of such impairment (*see* Family Ct Act § 1012 [f] [i] [B]."

n. *Matter of Cunningham v. Talbot*, 152 AD3d 886 (3rd Dept. 2017): The father petitioned Family Court for an order terminating the mother's visitation with their

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children, then aged 12 and 9, on the basis of the mother's history of substance abuse, mental health problems, and her abandonment of the children. Family Court granted the mother's cross petition and ordered that she was entitled to unsupervised visitation with the children. The father's sole contention on appeal was that "the attorney for the children improperly advocated a position that was contrary to the children's expressed wishes to have no visitation with the mother." The appellate court held that the attorney for the children "may deviate from this obligation and advocate a position that is contrary to the child's express wishes where he or she "'is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child (22 NYCRR §7.2(d)(3))." Because there was "ample evidence that the father had thwarted the mother's efforts to contact the children, attempted to alienate the children from the mother and manipulated the children's loyalty in order to turn them against the mother. The record further establishes that, while the mother had no contact with the children for a significant period of time prior to the commencement of the instant proceedings, the mother made efforts to rehabilitate her relationship with the children during several court-ordered visits pending resolution of the proceedings. The father's concern for the children's emotional health were they to be again abandoned by their mother and his desire to protect

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them from the mother's violent husband were understandable; yet, if his and the children's professed wishes were followed, the mother-child relationship would be completely severed. The attorney for the children at trial properly informed Supreme Court that the children had expressed a desire not to visit the mother (*see* 22 NYCRR 7.2 [d] [3]; *Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1077 [2012]) and, as the record evidence supports a finding that the children's wishes were both a product of the father's influence and 'likely to result in a substantial risk of imminent, serious harm to [them],' the attorney for the children was justified in advocating for a position contrary to those wishes (22 NYCRR 7.2 [d] [3]; *see Matter of Zakariah SS. v Tara TT.*, 143 AD3d 1103, 1107 [2016]; *Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680-1681 [2015])."

5. Trial Tactics Undermining Child's Position

a. *Matter of Brian S.*, 141 AD3d 1145 (4th Dept. 2016): In a neglect proceeding, the trial attorney for one of the children (a teenager at the time of the hearing failed to advocate for his position (he wanted to live with his mother, a respondent in the neglect proceeding) by opposing the mother's motion to dismiss at the close of petitioner's case and by conducting a cross examination "designed to elicit unfavorable testimony regarding the mother, thus undercutting [the child's] position." The trial attorney for the child failed to establish that either exception

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in the controlling rule was met. The Fourth Department held that following evidence did not constitute a substantial risk of imminent and serious harm to the children if they continued to live with their mother and was therefore insufficient to permit substituted judgment: the children frequently skipped school; the mother occasionally used drugs in the house and was therefore unable to care for the children; the mother once struck one child on the arm with a belt, leaving a small mark.

6. Interviewing Client

a. *Matter of Mark T. v. Joyanna U.,* 64 AD3d 1092 (3rd Dept. 2009): Appellate counsel for the child took a position contrary to the position taken by trial counsel, but appellate counsel had "neither met nor spoken with the child. He explained that, while he did not know the child's position on this appeal, he was able to determine his client's position at the time of the trial from his review of the record and decided that supporting an affirmance would be in the 11½-year-old child's best interests." This attorney was relieved.

7. Attorney for the Child Should not be a Witness

a. *Naomi C. v. Russell A.*, 48 AD3d 203 (1st Dept. 2008): On a motion to dismiss a petition to change custody, the trial court asked the attorney for the children to discuss the position of the 10 year-old child regarding how well the existing

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custody arrangement was working, knowing that at least one parent did not like that order. The First Department said that the trial court "should not consider the hearsay opinion of a child in determining a motion to dismiss a pleading and "most importantly" it should not make the attorney for the child an unsworn witness since the attorney for the child is subject to the same ethical rules applicable to all attorneys. 22 NYCRR §7.2(b).

8. Position of attorney for the child entitled to "some weight"

a. *Matter of Grassi v. Grassi*, 28 AD3d 482 (2nd Dept. 2006): "A parent seeking a change of custody is not automatically entitled to a hearing, but must make some evidentiary showing sufficient to warrant a hearing. . . . Family Court possessed sufficient information to render an informed determination on custody and visitation, without a hearing, consistent with the best interests of the child. . . . The Court presided over the parties' extensive court appearances, spanning approximately two years, and was intimately familiar with their situation . . . . The court . . . relied upon the reports of the Law Guardian. . . ."

b. *In re Osbourne S.*, 55 AD3d 465(1st Dept. 2008): The trial court's custody "decision was in accord with the Law Guardian's recommendation that the child be placed in the custody of the father (*see Matter of Krebsbach v Gallagher*, 181 AD2d 363, 368 [1992], *lv denied* 81 NY2d 701 [1992])."

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c. *Swinson v. Brewington*, 84 AD3d 1251(2nd Dept. 2011): Attorneys for the child, as advocates, may make their positions known to the court orally or in writing, they may not present reports containing facts that are not part of the record or make *ex parte* submissions to the court.

d. See also *Matter of Lynch v. Velella*, 85 AD3d 1032 (2nd Dept. 2011) The position of attorney for child is "entitled to some weight".

e. *Matter of Guiracocha v. Amaro*, 122 AD3d 632 (2nd Dept. 2014): "In addition, although not determinative, the position of the attorney for the child, as articulated after the hearing, that the child is more bonded to the mother and that she should have residential custody of him, was entitled to some weight (see *Matter of Fallo v Tallon*, 118 AD3d 991 [2014]). Here, the Family Court, in its custody determination, made no mention of the position of the attorney for the child, and that position appears not to have been taken into account at all (cf. *Matter of Johnson v Johnson*, 309 AD2d 750, 750 [2003])."

f. *Hirtz v. Hirtz*, 108 AD3d 712 (2nd Dept. 2013): The "position" of the attorney for the child is entitled to "some weight" as it is not "contradicted by the record".

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9. Attack on Attorney for the Child - Malpractice Claim

a. *Mars v. Mars*, 19 AD3d 195 (1st Dept. 2005): In the context of a fee dispute, a parent may assert a malpractice claim as an affirmative defense against an attorney for the child's fee application for "advocacy" where the children were old enough to articulate their wishes and the parent was ordered to pay the fees.

b. But see *Lewittes v. Lobis*, 164 Fed. Appx. 97 2005 US App Lexis 29232, 2005 WL 3557256 (CA2 2005), where CA2 held that the law guardian "whether as 'law guardian' or guardian ad litem, [the attorney for the child is] entitled to quasi-judicial immunity. See *Bluntt v. O'Connor,* 291 AD2d 106, 108, 737 NYS2d 471, 472-73 (4th Dept. 2002); *Bradt v. White*, 190 Misc.2d 526, 740 NYS2d 777 (Sup. Ct. Green Co. 2002)."

c. *Venecia V. v August V.,* 113 AD3d 122 (1st Dept. 2013): In ratifying the conduct of the attorney for the children, who advocated for their stated goals pursuant to the controlling court rule (22 NYCRR §7.2), the First Department emphasized that to substitute her judgment for the children's stated goals, the attorney for the child must be "'convinced' that the child lacks the capacity for knowing, voluntary, and considered judgment.'" Here, the father argued that the children lacked the requisite capacity because they were "manipulated by their mother" which he supports on the basis of the forensic expert's observations and conclusions that

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she "controlled and manipulated the children, and purposely alienated the children from him." His argument was undermined by three points. First, "While the forensic expert indicated his view that the mother had engaged in behavior that alienated the children from their father, he also found that the father estranged himself from the children by his own actions." Second, the trial court conducted a *Lincoln* interview of the children (an *in camera* interview) "and determined that the children were not rehearsed or coached, and that they desired to move to New Jersey." Third, the appellate court held that "[e]vidence of overreaching or bad behavior by one parent that may influence a child caught in the middle of a custody dispute does not automatically require the child's attorney to be "convinced" that the child's stated position is involuntary."

10. Attack on Attorney for the Child – Motion to Relieve the Attorney for the Child

a. *Perry-Bottinger v. Bottinger*, 68 AD3d 670 (1st Dept. 2009): The attorney for the children advocated for their best interests, not for their stated goal on the basis of his interactions with the parties during the litigation, the conclusions in the forensic report, and proof of the mother's conduct. The trial court denied the mother's motion to disqualify him and the First Department affirmed, holding that his advocacy of the children's best interests "was a proper exercise of his authority and does not form a basis for his disqualification."

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b. *Matter of Swinson v. Dobson*, 101 AD3d 1686 (4th Dept. 2012): A party contending that the attorney for the child has failed to fulfill his or her obligation must make a motion to remove the attorney, failing which the issue is not preserved for appeal. Accord, *Matter of Mason v. Mason,* 103 AD3d 1207 (4th Dept. 2013)). See also *Matter of Viscuso v. Viscuso*, 129 AD3d 1679 (4th Dept. 2015) where the motion made such a motion. But see *Matter of Zakariah SS v. Tara TT*, 143 AD3d 1103 (3rd Dept. 2016) and *Matter of Cunningham v. Talbot*, 152 AD3d 886 (3rd Dept. 2017) where no such motion is discussed in either case.

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The Chief Judge Clarifies the Role of Attorneys for Children

By Elliot Wiener

The amendment of the Rules of the Chief Judge, effective October 17, 2007, added Rule 7.2, which describes the role of the "attorney for the child." These rules are intended to clarify the ambiguous office of the "law guardian" under New York law.

To appreciate this new rule, it is worthwhile to compare it with prior descriptions of the role of the law guardian that have been promulgated over the years by various officials and bar groups: "Law Guardian Definition and Standards" promulgated by Justice Jacqueline Silbermann, the Deputy Chief Administrative Judge for Matrimonial Matters and the Administrative Judge of the Supreme Court Civil Branch, New York County;[1] the working definition of "law guardians" adopted by the Statewide Law Guardian Advisory Committee as cited by the Miller Commission;[2] and five versions of "Law Guardian Representation Standards" adopted by the New York State Bar Association between 1992 and 2007.[3]

Nomenclature

Rule 7.2 defines the role of the "attorney for the child," which, it says, "means law guardians." The Rule thus invents a new office that substitutes for and which is the equivalent of, but is not identical with, the statutory role of "law guardian," although, given the existing statutes,[4] the phrase cannot be entirely avoided. This change echoes the language of the working definition of the role of the law guardian that the Statewide Law Guardian Advisory Committee has adopted. Both the Miller Commission and the Administrative Board have recommended the amendment of the statutes "to replace the term 'law guardian' with 'attorney for the child.'"[5] The Rule also reflects the general conclusion that the ambiguous, if not inherently self-contradictory, obligation to act simultaneously as a child's lawyer and guardian no longer meets the still-evolving job description of an attorney representing a child in family law litigation. "Guardians" protect the child's best interests. Lawyers advocate for goals defined by clients. Too often these roles are incompatible. Rule 7.2 implicitly suggests that clarifying the job title will help to clarify the duties of these attorneys.

Ethics

The Rule's discussion of ethics does double duty both by making a substantive point that attorneys for children have legally based ethical obligations to their clients and by emphasizing that they function in the role of attorneys, not guardians.

Underscoring the tip in the balance toward the attorney role, the Rule expressly says that attorneys for children are subject to all the same ethical rules that apply to other lawyers, drawing particular attention to the ethical obligation of the attorney for the child with respect to *ex parte* communications, confidential client communications, attorney work product, and becoming a witness in the litigation.[6]

Beyond this, the Chief Judge's Rule emphasizes the lawyer's role through the explicit requirement that attorneys for children "zealously advocate" the child's position. The Statewide Law Guardian Advisory Committee sets the standard of advocacy at "diligently advocate,"[7] while Justice Silbermann's Rules require the law guardian to "advocate" for the child's position. The 2005 NYSBA Standards require the law guardian to "advocate a position on behalf of the child." This, the Standards say, imposes on the Law Guardian the same duty to advocate as is required of "other attorneys in the case."[8] It is likely that in practice these are differences in semantics rather than substance. All of these expressions share the common requirement that the attorney advocate a position, although they vary in the level of intensity that the advocacy must take. There is an alternative conception of the role of the child's attorney, which has roots in the 2005 NYSBA Standards and in Justice Silbermann's Standards, that does not require the child's attorney to advocate a "position" on behalf of a client in all cases. I will discuss this model further below.

Setting Goals of the Litigation

The Chief Judge's Rules recognize the special problem inherent in representing children and account for this problem by creating two separate rules for setting the litigation goals: (1) following the child's wishes or (2) advocating a position selected by the attorney "that is contrary to the child's wishes." The Rule establishes a two-step test for deciding which method to employ. At both steps, the obligation falls on the attorney to make a substantive judgment. First, the attorney must assess whether the child is "capable of knowing, voluntary and considered judgment." If the answer is yes, the attorney must make the second assessment, whether following the child's wishes is likely to result in a "substantial risk of imminent, serious harm to the child."[9]

If the child "passes" both tests, the attorney must "be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in

the child's best interests." If the child "fails" either test, the attorney "would be justified in advocating a position that is contrary to the child's wishes." The only restriction on this license is the duty of the attorney to "inform the court of the child's articulated wishes if the child wants the attorney to do so." This obligation implicitly obliges the attorney to explain to the child the attorney's assessment of the child's expressed wishes and, presumably, the reason the attorney has decided to go a different route. The Chief Judge's Rules dispense with the formal requirement under Justice Silbermann's Standards that the attorney report to the court his or her conclusion the child is impaired.

There is significant overlap between the Chief Judge's Rules and Justice Silbermann's Standards. Under the latter, whether the attorney was required to advocate "the child's stated position" depended upon whether the attorney concluded that the child was "impaired." However, under Justice Silbermann's Standards, the first portion of the definition of "impairment" focuses on "a child's inability to make knowledgeable, voluntary and considered judgment. . . ." So far, the categories in the Chief Judge's Rules and in Justice Silbermann's Standards are identical. But they do differ. Justice Silbermann's Standards include in the definition of "impairment" a child's inability "to work effectively with his/her attorney." This functional assessment is missing from the the Chief Judge's Rules. On the other hand, the Chief Judge's Rules allow the attorney to substitute his or her judgment for the client's if the attorney believes that following the child's wishes is likely to result in a "substantial risk of imminent, serious harm to the child." Risk assessment is not explicitly part of the attorney's job under Justice Silbermann's Standards, although it surely could inform an assessment of the child's "considered judgment."

The 2005 NYSBA Law Guardian Representation Standards[10] say that the attorney "should develop a position . . . in conjunction with the child. . . ." The standards employ a two-step test. First, the attorney must assess whether the child is "too young." If so, the attorney "must . . . determine the child's interests independently," which presumably means the attorney is free to formulate his or her own position on behalf of the child. The standards do not tell us what "too young" means. Second, if the child is not "too young . . . to articulate his or her desires and to assist counsel, the plan should be developed with the child's cooperation and agreement." These standards leave no room for qualitative assessments of the type contemplated in either the Chief Judge's Rules or in Justice Silbermann's Standards. If the child is not "too young" to articulate his or her desires, the attorney must employ a plan with which the child agrees, even if the articulation of the desires suggests that the child is not making a knowing, voluntary, and considered judgment and even if the articulated desire would put the child at "substantial risk of imminent, serious harm."

The New York State Bar Association's Standards for Attorneys Representing Children in child welfare cases of June 2007[11] include a provision that would improve Rule 7.2. Those standards require the attorney to "be prepared to introduce evidence to support the attorney's position."[12] The Commentary to the standard says that the attorney should substitute his or her judgment "only . . . if the attorney has objective factual evidence to support" his or her conclusion regarding the child's judgment. It is not unheard of for parents to criticize attorneys for children for failing to advocate for a child's stated wishes.[13] Thus, even if this is not required by rule, the attorney for the child would be well served if he or she could point to objective facts to support his or her position.

Options Available to the Attorney

The Chief Judge's Rules give the attorney two options. If the child "passes" the tests, the attorney "should be directed by the wishes of the child."[14] If the child "fails" the tests, the attorney "would be justified in advocating a position that is contrary to the child's wishes." Either way, however, the attorney must "advocate the child's position." The Miller Commission also concluded that the child's attorney "is expected . . . to take a position in the litigation . . . and to use every appropriate means to advance that position."[15] Similarly, the 2005 NYSBA Custody Standards also require the attorney to "advocate a position on behalf of the client."[16] As an alternative to this "advocacy" model, Justice Silbermann's Standards articulate an "informational" model for the attorney to follow. Under those standards, if the child is "impaired," the attorney must "assist the Court in making an informed decision in the best interests of the child by ensuring that relevant evidence is obtained and presented to the Court, including evidence that otherwise might not be presented to the Court. . . ." This model relieves the attorney of the obligation to determine what he or she thinks is in the child's best interests, thereby insuring that that responsibility remains with the court. By allowing the attorney to take whatever position he or she wishes once the child has failed the Rule 7.2 tests, the Rule makes the selection of the law guardian critical to the outcome of the litigation, since his or her position often carries extra weight in custody litigation.[17] This problem is compounded by the failure of the rules to require the law guardian to have objective factual evidence to support the attorney's conclusion that the child has failed the Rules' tests. It should be a goal of these rules to reduce, if not eliminate, the significance of the idiosyncratic opinions of attorneys for children. By excluding the "informational" model that Justice Silbermann's Standards include, the Chief Judge's rules increase the risk that the outcomes in custody cases will be unduly influenced by the particular views of the attorney for the children. This is an unfortunate result that is avoidable by a simple amendment to Rule 7.2 that incorporates the "informational" model.

Conclusion

Rule 7.2 improves the rules governing lawyers for children in family law cases by dispensing with the inherently ambiguous "law guardian" label and by providing clear rules governing when an attorney must advocate a child client's stated position. The Rule could be improved by authorizing these attorneys to take on an informational role when the attorney believes the child is unable to make knowledgeable, voluntary, and considered judgments rather than requiring the attorney to advocate for his or her own subjective view of the child's best interests. The Chief Judge's Rules could also be improved by requiring the attorney for the child to be prepared to introduce objective factual evidence to support the attorney's conclusion that the child's lack of judgment warrants ignoring his or her stated wishes.

Endnotes

1. "Law Guardian Definition and Standards" promulgated by Justice Jacqueline Silbermann, Statewide Administrative Judge for Matrimonial Matters.
2. *Matrimonial Commission Report* at pp. 43-44.
3. See "Law Guardian Representation Standards Volume II: Custody Cases," which was published by the New York State Bar Association in September 1992; January 1994; November 1999; and June 7, 2005, and "Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings," published by the New York State Bar Association in June 2007.
4. FCA § 249, entitled "Appointment of Law Guardian," requires or permits the appointment of a "law guardian" in specified Family Court proceedings.
5. See the Miller Commission Report at p. 44. The Administrative Board of the Judicial Conference approved the recommendation on October 4, 2007.
6. Rule 7.2(b). See *Naomi C. v. Russell A.*, 48 A.D.3d 203 (A.D.1 2008), which cites this provision and criticizes the trial court for making the law guardian, as an unsworn witness, disclose client confidences.
7. See *Law Guardian Program Administrative Handbook* published by the Second Department at p. 2, "Policy Considerations" (June 2007).
8. NYSBA 2005 Standard B-2, Commentary.
9. Rule 7.2 is almost identical to the working definition of the role of the law guardian adopted by the Statewide Law Guardian Advisory Committee, except that the latter refers to a "risk of physical or emotional harm," whereas Rule 7.2 refers to "harm." It is unlikely that the greater economy of expression of Rule 7.2 was intended to restrict the meaning of "harm." The Chief Judge's Rules use the word "serious," suggesting that a child's wishes may not be lightly ignored.
10. Hereinafter "NYSBA June 2005 Custody Standards."
11. Hereinafter "NYSBA June 2007 Child Welfare Standards."
12. "Standards for Attorneys Representing Children in New York Child Protective, Foster Care, and Termination of Parental Rights Proceedings," published by the New York State Bar Association in June 2007, § A-4.
13. *See, e.g., Mars v. Mars*, 19 A.D.3d 195, 797 N.Y.S.2d 49 (A.D.1 2005) (parent was ordered to pay the law guardian's fees; the children were old enough to articulate their wishes, therefore the parent has standing to raise malpractice as an affirmative defense to the law guardian's fee application regarding his advocacy as opposed to guardianship). *But see Bluntt v. O'Connor*, 291 A.D.2d 106, 737 N.Y.S.2d 471 (A.D.4 2002); *Bradt v. White*, 190 Misc. 2d 526, 740 N.Y.S.2d 777 (SC, Greene Co. 2002); *Lewittes v. Lobis*, 2005 US App. Lexis 29232 (CA2 2005), all finding that the law guardian has quasi-judicial immunity against damages claims. For a case raising the issue without asserting a damages claim, see *Whitley v. Leonard*, 5 A.D.3d 825, 772 N.Y.S.2d 620 (A.D.3 2004) (on appeal from custody order, mother contends that law guardian breached obligation by failing to advocate child's stated wishes).
14. The use of the word "should" is curious. It is common to the point of being almost universal to express a mandatory obligation by using the word "shall." Justice Silbermann Standards employ the word "shall" in describing the attorney's duty in the same situation. The word "should" may suggest a lingering ambivalence on the part of the authors of these rules.
15. *Matrimonial Commission Report* at p. 43-44.
16. The prior NYSBA Custody Standards did not include this requirement.
17. *See, e.g, Young v. Young*, 212 A.D.2d 114, 628 N.Y.S.2d 957 (A.D.2 1995) (law guardian's "recommendations and findings" are entitled to "some weight"); *Rosenberg v. Rosenberg*, 44 A.D.3d 1022, 845 N.Y.S.2d 371 (A.D.2 2007) ("Recommendations of court-appointed evaluators and the position of the Law Guardian are factors to be considered and are entitled to some weight"). The cases do not similarly elevate the "position" or "findings and recommendations" of other attorneys.

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Understanding and Litigating Parent-Child Alienation Cases

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I. Introduction

When an allegedly alienated parent (the "rejected parent") tells her attorney that the other parent (the "favored parent") is alienating their child from him,[1] as attorneys we must determine the appropriate course of action to take.

According to two different clinical experts in alienation matters, Edward Farber, Ph.D., and Charles David Missar, Ph.D., when alienation is suspected it is critically important to address the alleged alienation as soon as possible.[2] Dr. Farber explains that with longer delays, the child's position becomes more rigid and rejection becomes entrenched. Dr. Missar explains that as time passes, alienated children become more entrenched in their positions, and the rejected parent becomes even further entrenched in the children's minds with respect to all the reasons the children did not want to have contact with the rejected parent to begin with. Further, the more entrenched the children's position is, the less likely they are to be open to the objective, non-biased reality of the situation. Both experts agreed that after a year of ongoing alienation, it would be extraordinarily hard to regroup and address the alienation with a meaningful chance at successful reunification.

II. Identification of Alienation

Before alienation can be addressed, it must first be identified. As attorneys, what should we look for? Here again, both experts are in agreement: Extreme behaviors; complaints that are out of proportion to the alleged wrongdoing; terms such as "never" and "always;" inflexibility in the way the child views the rejected parent; words which mimic the words used by the favored parent when describing the rejected parent (including calling the rejected parent by the name the favored parent uses – e.g., "Tom" instead of "dad" or referring to dad as the "birth father"); comments from the child that indicate everything about the rejected parent is negative and everything about the favored parent is positive; complaints which are often trivial and wherein the child's reaction is often overblown and disproportionate to the alleged misdeeds; ambiguous complaints lacking examples; and denials by the alienated child of any history of positive

[1] Rejected parents tend to be fathers, though certainly there are alienation cases where the children have rejected their mother. For ease of this article, I have assigned the masculine to the rejected parent and the feminine to the favored parent.

[2] Comments attributed to both Dr. Missar and Dr. Farber are included without use of quotation marks for ease of reading. Some comments are direct quotes, others are paraphrased. Both experts were provided with an opportunity to correct any information attributed to him prior to publication of this article.

interaction with the rejected parent despite evidence to the contrary. In short, when children exhibit such extreme views of the rejected parent, this should serve as a warning sign that the child may be, or may be becoming, alienated from that parent.

Other important early warning signs include the "spread" of the extreme behavior. Dr. Farber has found that the alienation spreads from the rejected parent to the rejected parent's extended family. Further, both experts agree that a child's acute awareness of legal proceedings is a hallmark sign that alienation may be occurring.

Dr. Missar explains that the term "alienation" does not refer to a specific mental disorder within the DSM-V, but it is a generally accepted phenomenon researched within the field of forensic psychology. Alienation is more than estrangement from a parent, or simply the absence of contact with a parent. It is a circumstance in which a child has an extremely negative reaction to a parent that takes cognitive, emotional and behavioral forms. Alienation is not simply loving one parent more than another. Alienated children have a strong and often irrational aversion toward a parent with whom they formerly enjoyed a close relationship. The aversion may take the form of fear, hatred and/or avoidance.

Dr. Missar further explains that there are two types of alienation – overt alienation and subtle alienation.

Dr. Missar cites examples of overt alienation as follows:

- Telling the children negative things about the rejected parent;
- Telling the children that the divorce was the rejected parent's fault;
- Telling the children that the rejected parent is a bad person;
- Telling the children that the rejected parent does not love them;
- Convincing the children that the rejected parent took an action which in fact was not an accurate representation (it may be a lie, a negative exaggeration and/or "spin" of past action); and
- Convincing the children that the rejected parent was responsible for something which, under a review of the facts, was not the rejected parent's fault nor responsibility.

In contrast, he lists examples of subtle alienation as follows:

- The favored parent accepting the child's refusal to spend time with the rejected parent;
- Failure by the favored parent to implement consequences for children refusing contact with the rejected parent;
- The favored parent's attendance at events the favored parent knows the rejected parent will also be attending, thereby setting up a direct conflict for the child as to which parent to associate with; and
- Scheduling activities for the child which conflict with the rejected parent's custodial time.

Dr. Missar explains that by subtly coopting time away from the rejected parent or inserting oneself into activities that the rejected parent would also attend, the favored parent can further alienate the child by making the child choose between parents in those moments.

As attorneys, we must recognize that if our client is the allegedly alienating parent, he or she will likely not admit to or even recognize that they are doing anything wrong. Dr. Missar points out that most favored parents will not expressly tell a child to reject his/her parent, nor will the favored parent admit to any alienating behavior. The favored parent will usually insist to the children and to anyone involved that it is the rejected parent's actions which have solely contributed to the child's alienation and rejecting behavior. It is rare that a favored parent will overtly brainwash children to reject the alienated parent. However, subtle but ongoing alienation can often times be more effective than overt alienation in impacting a child's relationship with and rejection of the alienated parent.

Dr. Missar stresses that alienated children, who may act terribly towards the rejected parent, often do not behave inappropriately with other third parties and may appear to be thriving in all other areas of their life including socially and academically.

III. The Players in Alienation Cases

According to Dr. Farber, alienation cases have three players: (1) An attached parent who sees her job as protecting the child from the other parent, (2) a vulnerable child often with other emotional issues and (3) the rejected and often angry parent.

The attached parent will often focus on the child's perceived fear relating to the rejected parent, and often state that she *wants* the child to have a good relationship with, and contact with, the rejected parent. Dr. Missar has seen many instances where the statements of support for the relationship are not matched by actions, and there may be evidence that the favored parent is actually rewarding the child for alienation or at the very least, not imposing any repercussions for a child when said child refuses a visit with the rejected parent. Dr. Farber has found that the favored parent is often not the parent to initiate the divorce and the favored parent frequently appears to be excessively attached to the child.

Dr. Farber finds that often there is a depressive quality or anxiety, which makes the child vulnerable. The divorce and ongoing parental conflict increases the level of anxiety and the angry parent becomes the subject of anxiety and fear. When the child contemplates visiting with the rejected parent, physiological signs of fear develop. The child's heart races, their palms get sweaty and the child's mind races. The child then avoids the parent and this fear progressively worsens every time the child thinks about the rejected parent. This can lead to a complete refusal of contact.

According to Dr. Farber, the rejected parent usually believes that the child and the favored parent are fabricating allegations about them. Dr. Missar points out that although the rejected parent may be partially at fault for the alienation, this situation is easier to treat through reunification therapy as opposed to working through a child's irrational alienation from the rejected parent.

IV. Why should we care if there is alienation?

Dr. Farber's review of the research on alienation concludes that approximately 50% of children who rejected contact with a parent during childhood end up having no contact in adulthood with the parent they were formally attached to. Further, when young adults who had no contact with a parent were asked what they wished had happened when the rejection commenced, about half of the respondents stated that they wished someone in authority had forced them to have contact with the rejected parent.

As family law attorneys, with our focus on families, I believe it is our duty to understand these issues, to work with experts where appropriate, and to address these issues. We must understand these family dynamics in order to advise our clients in the direction that preserves family relationships, regardless of marital status.

In addition to the loss of a parent that may result from alienation, Dr. Missar identifies five potential long-term consequences to the child resulting from unresolved alienation and rejection of a parent:

1. Long term problems with trust;
2. Irrational views of people who may have wronged them;
3. Increased problems with mental health disorders;
4. Increased problems with substance abuse; and
5. Problems keeping marriages and jobs intact.

V. As litigators and advocates, how should we address alienation and rejection of a parent?

Given that we are not therapists but rather legal advocates, what can we do to help rebuild the parent-child relationship if it appears alienation may be occurring? First, we must understand what the term "reunification" means. Dr. Missar defines reunification as the therapeutic process by which the rejected parent and child address and then work through those factors that have led to the animosity and rejection (i.e., alienation) toward the goal of re-establishing their relationship.

My first recommendation would be to see if all parties can agree to address the rejection, even if both parents do not agree that alienation is occurring. Usually both parents will, at a minimum, agree that a child is rejecting or starting to reject a parent, even if they disagree as to the reason for the rejection. Identifying and hiring a therapist who understands alienation and who can immediately work with the family is paramount.

When the favored parent refuses to address the rejection, the attorney for the rejected parent might consider the following options:

- Filing a motion for reunification therapy;
- Filing a motion for a custody evaluation if the court has authority to order such evaluation;

- Filing a motion for a psychological evaluation of the favored parent (if the case-specific facts support such an evaluation); and
- Asking the court to increase the rejected parent's time with the child and/or for a complete transfer of custody.

From a therapeutic standpoint, Dr. Farber recommends the following four steps:

- Identify the source of the anxiety;
- Develop a step-by-step fear hierarchy;
- Teach relaxation skills, use rewards, moderate negative consequences; and
- Implement gradual reintroduction of the feared object (rejected parent).

Dr. Farber also cites three types of clinical and legal interventions:

- Gradual exposure of the child to the rejected parent- systematic desensitization;
- More intensive educational programs; and
- Reversal of custody, whether temporary or permanent.

Both experts agree that a reunification therapist should work with all three parties - the child, the rejected parent, and the favored parent - to address the issues which may have contributed to past or ongoing alienation. This is critical for successful reunification therapy. They also emphasize that the sooner the process is commenced, the better the chance for success because the less entrenched the alienation is to begin with, the better the chance of successful reunification.

Dr. Missar points out that when the favored parent does not fully participate in reunification nor encourage reunification, this can be another indication that alienation has occurred or is occurring. in this situation, as attorneys, we can ask the court to enter an order specifically setting forth the actions the favored parent is to take. For example, we can ask the court to enter an order:

- Appointing a reunification therapist;
- Requiring the favored parent to timely transport the children to therapy appointments;
- Requiring the favored parent to timely transport the children to all scheduled visitations with the rejected parent;
- Prohibiting the favored parent from infringing on the other parent's scheduled time and activities;
- Requiring all parties to participate in reunification therapy as recommended by the reunification therapist; and
- Requiring both parents to sign consent forms permitting the reunification therapist to speak with the children's past and present treating professionals (if any).

Depending on the level of animosity in the case and the number of professionals involved,[3] it may be appropriate to request the court to enter an order appointing a therapeutic coordinator to

[3] Which may include a reunification therapist, individual therapists for the child and/or parents, a parent coordinator, etc.

manage the reunification process. This person would facilitate communication and coordination with all parties and would convey pertinent information to the relevant therapists as appropriate. This therapeutic coordinator could also report to the court about the progress of reunification and make recommendations as to how to proceed with reunification. Obviously, the court is free to give as much weight to the coordinator's recommendations as it deems appropriate.

Dr. Farber outlines eight specific roles that the court can play in alienation cases:

1. Early involvement;
2. Judicial imprint on case;
3. Strong order of reunification;
4. Orders for treatment;
5. Education-impact on child and parent of avoidance;
6. Periodic reviews to help keep family on track (regularly scheduled reviews; yearly reviews are not effective because if a parent is not cooperating, the passage of a year will likely be too long to undo the damage);
7. Orders for more intensive treatment programs; and
8. Use of contempt orders, temporary suspensions of contact, and reversals of custody as a last resort.

Dr. Farber points out that while courts cannot order insight into the role the alienating parent plays, the court can order behavior change and provide judicial review to ensure compliance. He notes that the message must be sent to the child that there is absolute authority that reunification will happen, and the parents and child should be provided with an outline of the steps necessary to make reunification happen.

He further recommends that the child must be given permission by the favored parent to have a relationship with the rejected parent, even if reluctantly given/conveyed. During reunification sessions, Dr. Farber ensures that the favored parent voices authority to the child to have a relationship with the rejected parent. Thereafter, even if the favored parent tells the child something different outside of the therapeutic session, Dr. Farber will repeatedly remind the child that permission for a relationship was provided at one point, which can be very helpful to the reunification process.

As a practical matter, it can be incredibly difficult if not impossible to "prove" alienation is occurring. There are many ways in which alienation can be addressed, and in each instance, the attorney should focus on the unique facts of his/her case.

I have personally addressed the issue in two very different ways, with very different outcomes (though every case is case- and judge-specific, and what works in one case may not work in another). In one instance, we relied primarily on experts while in the other we provided recorded evidence demonstrating the parent's attempts at alienation.

If there is already a therapist involved who has recognized the rejection and alienation, it may make the most sense to have that therapist testify in court as to his/her observations and findings. If there are no therapists involved in the case who can testify that alienation may be

occurring, then it may make sense to hire an expert in clinical psychology who has significant experience with alienation cases. In such instances, having the expert define what constitutes alienation may be effective once coupled with evidence of the child and favored parent's respective behaviors. If the expert has not met any of the parties, the expert can opine on various hypotheticals which relate to the specific case facts (i.e., opining whether various hypotheticals are emblematic of alienation). Depending on the facts of the case, examples of such hypotheticals might include:

- What, if any, significance is there when a favored parent attends the child's activities during the rejected parent's scheduled time?
- What, if any, message would it send to the child if the favored parent took the child out for fun activities when the child refused contact with the rejected parent?
- What, if any, significance is there when a child refers to the rejected parent by his first name?
- What, if any, significance is there if the favored parent excludes the rejected parent from the child's developmental milestones?
- What, if any, significance is there if the favored parent refused to permit the rejected parent to transport the child to activities or doctor appointments, even when such activities and appointments occurred during the rejected parent's scheduled time?
- What, if any, significance is there if the favored parent calls the child every morning the child is in the rejected parent's care to ask the child if he/she is okay?
- What, if any, significance is there if the favored parent refers to the rejected parent in the third person when speaking with the child?
- What, if any, significance is there if the favored parent regularly picks up the child from the rejected parent's home prior to the end of scheduled visitation at the child's request?
- What, if any, significance is there if the child refers to the current spouse of the favored parent (i.e., the step-parent) as "Mom" or "Dad"?
- What, if any, significance is there if the favored parent keeps the child home from school to avoid the child going with the rejected parent for visitation which commences immediately following school dismissal?
- What, if any, message do you believe is conveyed to a child by the favored parent's acceptance of the child's decision as to when the child will, and will not, spend time with the rejected parent (regardless of the terms of a custody and visitation order)?
- What, if any, significance is there when the favored parent fails to institute any repercussions when the child refuses contact with the rejected parent?
- What if any, impact would there be on the child if the favored parent has the child come to court to testify against the rejected parent (outside of abuse and neglect situations)?

Outside of therapeutic and/or expert testimony, documenting the attempts at alienation can have a significant impact on the outcome of your case. In one of my alienation cases, my client told me early on that the other parent was trying to alienate the children from my client. I was involved early enough that the parties had not yet separated thus providing an opportunity to obtain evidence of the parent's attempts at alienation. The allegedly alienating parent appeared very credible and sympathetic and, for various reasons, I had concerns that my client might not come

off as credible. Accordingly, I advised my client to record what the other parent was saying.[4] The evidence my client brought back to me was profound.

In addition to my client's own verbal testimony as to the ways the other parent disparaged my client to the children, we also had recordings demonstrating the attempts at alienation which we played for the court. One recording was of an accidental voicemail that the other party left on my client's cell phone. In this voicemail, the parent could be heard saying to the children "you guys [will] have to make a decision where you want to stay, it's going to be full on war...keep telling everybody you want to stay with [me]." Other recordings provided evidence that the other parent told the children[5] that my client "was a liar" who did not "stand by [his/her] words" and that the children would know "one day, what [my client] did ... and you will hate [my client] and [my client's f'ing] mother for it."[6]

I do not usually recommend to my clients that they record the other parent even if legal (and I generally strongly advise against it) because it does not foster co-parenting and often tears down trust. However, where there is significant and rational reason to believe that alienation has occurred or may be occurring, this can serve as powerful evidence in a he-said/she-said situation.

VI. Conclusion

When we represent a rejected parent and we suspect alienation may be occurring, we need to act fast. The longer we wait to act, the more entrenched the alienation will become, and the less chance that successful reunification may occur. To the extent possible, we need to provide motivation for the favored parent, the rejected parent and the alienated child to participate in reunification efforts. Judges and attorneys must be unified in the message that, absent an extreme situation such as child abuse or an unfit parent, children deserve and need two parents in their lives.

It is important to ensure the education of attorneys, judges and the relevant players. The experts I interviewed agree that when a child loses his/her relationship with one parent, the child will suffer in the short and long term. As advocates, we can point our clients to relevant literature, we can educate judges through the use of expert testimony, and we can assist in crafting strong orders with appropriate review. If we are unable to obtain a custody trial in the short term, we should try to obtain an interim order for reunification therapy so that, at a minimum, contact is maintained before the child becomes irreparably entrenched in his/her position. While this may be a tall order, perhaps we can also try to have a greater appreciation for each party's views as we work towards providing children the best upbringing possible.

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[4] The circumstances under which my client's recordings were made were legal in my jurisdiction. Jurisdictions vary with respect to when recording a party is or is not legal.

[5] The children could be heard in the background of this recording, so there was little question as to whether the children heard the parent say these things.

[6] The way in which the allegedly alienating parent attempted to turn the children against my client's mother is in line with the "spread" referenced by Dr. Farber early in this article.

VII. Information on clinical psychologists interviewed for this article

Dr. Farber's contact information is as follows:

Edward D. Farber, Ph.D.
Reston Psychological Center, P.C.
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Reston, Virginia 20190
(703) 437-3236

Dr. Edward Farber provides diagnostic and therapeutic psychological services to children, adolescents and adults from primarily a cognitive behavioral perspective. A licensed clinical psychologist in Virginia and Maryland, Dr. Farber is involved in clinical practice, teaching and research. Dr. Farber's practice has included forensic evaluations to include parent/child attachment and bonding and custody evaluations involving children, adolescents and adults.

Dr. Farber is on faculty at the George Washington University School of Medicine. Formerly the Chair of Psychology at the Ohio State University Pediatrics Department and Columbus Children's Hospital, Dr. Farber draws upon academic expertise in his clinical practice to provide a broad range of clinical services. His doctorate is from Ohio State with further training at New York University Medical Center, Bellevue Hospital and Children's Hospital.

Dr. Farber is the author of the co-parenting guide "Raising the Kid you Love with the ex You Hate." He also wrote an article on alienation for the Virginia Family Law Quarterly Newsletter (Spring 2016 edition) titled: "Putting it Together: Reunification Therapy Bit by Bit." Dr. Farber has also lectured throughout Virginia on the topic of alienation and reunification and he frequently testifies in Virginia courts as an expert on custody matters including alienation and reunification.

Dr. Missar's information is as follows:

Charles David Missar, Ph.D.
3300 M Street, N.W., Suite 201
Washington, DC 20007
Telephone: 202-965-4330

Dr. Missar has extensive experience in the area of high conflict custody matters, including without limitation substantial background and expertise in the areas of parent alienation and reunification.

Dr. Missar has a Ph.D. In clinical psychology and has been licensed since 1990. He has provided individual, couples, group and family therapy in a private practice setting since 1993. The majority of Dr. Missar's psychotherapy has been with adults and

adolescents but he has also worked with many children. Dr. Missar's practice has included forensic evaluations to include parent/child attachment and bonding and custody evaluations involving children, adolescents and adults. With regard to the latter, Dr. Missar has conducted over 1,000 evaluations where parental alienation was a specific issue. In addition, he has provided reunification therapy over 100 times and has also written and/or testified about the benefits of reunification therapy in parental alienation cases hundreds of times. Dr. Missar has served as both an invited presenter as well as invited faculty many times with respect to assessment of custody and parent/child relationships and attachment.

Dr. Missar has provided expert testimony in courts throughout the District of Columbia, Maryland and Virginia as well as in the U.S. District Court.

HIGH NET WORTH MATTERS – OUTCOMES, PROCEDURE & STRATEGY

- Sarah Boulby, Toronto, Ontario, Canada
- Rachael Kelsey, Edinburgh, Scotland
- Else-Marie Merckoll, Oslo, Norway
- Pamela Sloan, New York, New York
- Thomas Sasser, West Palm Beach, Florida

International Academy of Family Lawyers

INTERNATIONAL FAMILY LAW CONFERENCE

NEW YORK, 2018

Sarah Boulby

High Net Worth Matters – Outcomes, Procedures & Strategy

Ontario

Overview

Ontario family law has some of the most generous provisions for non-titled spouses in the world. Absent a marriage contract, the value of all wealth generated during a marriage is shared, subject to limited restrictions. Unmarried spouses may assert restitutionary claims to business or personal assets on the basis of a joint family venture. Spousal and child support awards are substantial and based on division of after tax income. Married spouses have greater property entitlements than unmarried spouses but both have the same rights to spousal and child support.

Ontario is a common law jurisdiction. As a province of Canada, family property law is governed by provincial legislation. Spousal and child support is governed both by the federal Divorce Act and provincial statutes, which are substantively parallel. There are different jurisdictional tests for each element of family law. For a divorce, a claimant must have resided in Ontario for one year before commencing the claim. Spousal and child support may be claimed as a corollary to a divorce application. If the spouses are unmarried or married, they may seek spousal support under provincial

legislation if ordinarily resident in Ontario at the time of the application. Ontario courts have recognized that a couple may have more than one ordinary residence. A spouse may obtain the benefit of Ontario family law rights even if the couple's only residence in the province was a secondary residential property such as a family cottage. The right to seek spousal support under provincial legislation is lost once the parties divorce. For family property rights married spouses may apply if Ontario was their last common habitual residence as a couple or if they did not have a last common habitual residence.

Family Property Law

a. **Married Spouses**

Ontario deems all marriages to be economic partnerships. A married spouse has the right to share in the wealth generated during a marriage from the date of marriage to either the date of separation or the date of death. This is calculated using a formula. Each spouse must calculate his/her net family property. Net family property is the value of all assets net of liabilities owned at the valuation date less the value of all assets net of liabilities owned at the date of marriage. A spouse's net family property can never have a negative value. If the spouse's wealth declined during the marriage the net family property is deemed to be nil. The valuation date is the date of separation or, if the claim is made at death, the day before the date of death. A matrimonial home is treated differently than other assets. There is no deduction for the value of a matrimonial home as of the date of marriage if that home is still owned and ordinarily occupied as a matrimonial home at the valuation date. There are certain exceptions as to what is included in net family property. Notably, assets that were inherited or gifted to a spouse from

a third party during the marriage, were not co-mingled and still exist or are traceable into another asset at the valuation date are excluded from net family property. Once the parties' respective net family properties are determined, the difference is calculated. The spouse with the greater net family property must pay an equalization payment to the other spouse which is one half the difference between their respective net family properties. The equalization payment is a simple debt with interest potentially payable from the valuation date. There is a very high threshold to depart from the equalization entitlement. A court must find that it would be unconscionable to equalize – this is a test rarely met other than in short term relationships of less than five years.

Ontario's equalization scheme was designed for a traditional long term marriage of a couple who started with nothing and built a life together. The scheme does not work as well for couples who marry later in life and who already have assets or have children from prior relationships. The scheme also does not work as well for those with complex family holdings. The most common problems are:

a. The matrimonial home—if a spouse brings a matrimonial home into the marriage and occupies that house as a family home at the end of the marriage then he or she cannot claim a deduction for the value. That means that, in effect, one half the value of the home brought into the marriage is lost to the other spouse. Spouses may have any number of matrimonial homes. Not only the primary residence but recreational properties may be matrimonial homes. This applies to properties owned by a spouse or a corporation owned

by the spouse. It does not apply to properties held by a trust and occupied by one of the spouses as a beneficiary of the trust.

b. Date of marriage valuations – To calculate the value of all the assets and liabilities held by each spouse at each date can be an expensive exercise requiring expert evidence. For date of marriage assets and liabilities it may be an impossible exercise if the marriage occurred long ago as documents may be irretrievably lost. Aside from these logistical problems, there is no provision in the equalization calculation to protect the growth in value of an asset brought into the marriage. A spouse may bring a business into a relationship which has nominal value at the date of marriage but has grown exponentially in value during the relationship. In that case, although the spouse owned the asset before marriage most of the value of that asset must be shared with the spouse.

c. Inherited/Gifted assets – These assets are treated inconsistently depending on the date of the gift or inheritance. To take an extreme example, if a spouse received a gift from his grandfather the day before the wedding of $1 million in shares and held those shares to the date of separation at which point they were worth $2 million then he would have to equalize the increase in value and pay $500,000 to his spouse. If the grandfather had given the shares the day after the wedding then the spouse receiving the shares could exclude them from equalization and pay nothing.

b. What is Property – The definition of property for family law purposes is broad in scope. It includes legal and beneficial interests, vested and contingent assets and liabilities. These

include beneficial interests in testamentary or *inter vivos* trusts and property over which a spouse has a power of appointment.

b. Unmarried Spouses

Unmarried spouses are not entitled to equalization of net family properties. They must rely on restitutionary principles. An economic partnership is not presumed for unmarried partners but where spouses have engaged in mutual effort, have a history of economic interdependence and integration, had an intention to share property, whether express or inferred, and gave priority to the family in decision-making during the relationship, a court will find a joint family venture granting a beneficial interest in some portion to the titled spouses's assets.

Spousal Support Law

In Ontario both married and unmarried spouses have rights to spousal support. Married spouses acquire this right with marriage while unmarried spouses must have cohabited in a conjugal relationship for three years or have a child together and be in a relationship of some permanence. The duration and quantum of spousal support is largely determined in accordance with Spousal Support Advisory Guidelines. These provide a formula to share after tax disposable income taking into account the length of the relationship and any child support obligations. At incomes over approximately $800,000/year, the courts exercise a greater degree of discretion in setting the quantum of spousal support. The duration of spousal support is typically in a range from one half to the full length of short and medium term relationships. In long term relationships, or those with older spouses, spousal support is of indefinite

duration subject to review if there is a significant change. Retirement is typically a trigger for a change or termination of spousal support.

Child Support Law

In Ontario child support is governed by mandatory Child Support Guidelines. If children reside primarily in one parent's home, the other parent pays support calculated as a percentage of income. If children reside in both homes equally or on a schedule whereby they are in neither parent's home for more than 60% of the time, then the parents either pay a set off support based on their respective incomes or allocate the children's expenses between them on a discretionary basis. In addition to the basic monthly child support, parents must share special and extraordinary expenses such as private school, child care, and post secondary education in proportion to their respective incomes. The responsibility to pay child support extends beyond the age of 18 while an adult child remains a dependent, potentially through graduate degrees including medical and law school in higher income families.

As child and spousal support are both income based, the calculation of income is often the most important issue. Income for support purposes is calculated on a different basis than for tax purposes. Income is imputed to reconcile the after tax available income to that of an employee. Income from all sources is taken into account including salary, corporate dividends, investment income whether interest or capital gains, pre-tax corporate income for a company of which the spouse is a shareholder, director or officer, and trust income. Income may be imputed to a spouse in a number of ways including:

intentional underemployment, residence in a country with lower tax rates than in Canada, where the spouse's property is not reasonably utilized to generate income, or where a spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Disclosure Obligations

Spouses have onerous financial disclosure obligations in Ontario. As financial disclosure is mandatory, the court may draw an adverse inference from a party who fails to disclose documents or submit to questioning. Where parties settle issues arising from their separation by agreement, that contract may be set aside if a party made inadequate or misleading financial disclosure.

Canada is not a signatory to the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters. As such, letters of request are necessary to obtain disclosure from Canada. To compel evidence, the letters of request (letters rogatory) must be secured from the domestic court first, and then the foreign party must apply to a Canadian court to enforce them. Enforcement of the letters of requests is determined by the provincial courts and is discretionary.

In Ontario, federal and provincial legislation sets four statutory pre-conditions on an application to give effect to a disclosure request from the foreign jurisdiction.

(a) it must appear that a foreign court desires to obtain the evidence or that the obtaining of the evidence has been authorized by commission, order or other process of the foreign court;

(b) the witness whose evidence is sought must be within the jurisdiction of the Canadian court which is asked to make the order;

(c) the evidence sought must be in relation to a civil, commercial or criminal matter pending before the foreign court or in relation to an action, suit or proceeding pending before the foreign court; and

(d) the foreign court must be a court of competent jurisdiction.

If these preconditions are met, the Canadian court may still go behind the letter of request and examine what specifically the foreign court is seeking and give effect only to those requests that satisfy the requirements of the law of the Canadian jurisdiction.

There are six factors that will guide the determination by the Ontario Court as to whether it will exercise of its discretion to enforce the letters of request. These factors are:

1) The evidence sought is relevant (not just potentially relevant and the request must identify the facts that establish the relevance of the evidence in the action);

2) The evidence is necessary for trial and will be given at trial, if admissible;

3) The evidence is not otherwise obtainable;

4) The order sought is not contrary to Canadian public policy;

5) The documents are identified with reasonable specificity; and

6) The order sought is not unduly burdensome, considering the scope of the request against what the witness would be obligated to do, and produce, if the action were to be litigated in Canada.

Dispute Resolution

In Ontario family law disputes that involve divorce or property issues must be heard in the Superior Court. Spouses may choose to submit their issues to mediation, arbitration or a combined mediation/arbitration process by agreement. Family law arbitrations have specific legislated requirements including they must apply Ontario law, both parties must receive independent legal advice on the process, be screened for domestic violence and the parties must retain at least minimal appeal rights to a court. Private dispute resolution has many benefits including the ability to select a decision-maker with specialized family law knowledge and the advantages of a private process.

International Academy of Family Lawyers
International Family Law
The Down Town Association, New York

High Net Worth Matters–Outcomes, Procedure and Strategy

Advokat Else-Marie Merckoll
Oslo, Norway
LANGSETH
Advokatfirma DA

Marriage Act/Overview

Norwegian Marriage Act of 4th july 1981

During marriage:

- Joint responsibility of spouses to support the family and each other.
- Both spouses are, during marriage, free to dispose of what he or she owns before or generates during marriage
- A spouse may not contract debts which affect the other spouse

LANGSETH
Advokatfirma DA

Marriage Act/Overview

Divorce- without a marriage contract:

- All wealth generated during marriage is shared, with some restrictions
- Each spouse may keep what he or she owned before marriage or later have received as heritage or gift
- The spouses are no longer obliged to support each other
- Normally, license for separation and divorce are granted by the County Governor and not by the Court
- Division of assets is usually dealt with privately rather than before the court

LANGSETH
Advokatfirma DA

Spousal support

- According to our Marriage Act, it is unusual for a spouse to be granted maintenance after a divorce in Norway
- In certain cases, the spouse who has limited possibility to support him or herself may be granted spousal maintenance for a period limited to 3 years
- In cases where the parties have been married for a very long, and/or the spouse is old or sick and is unable to support him or herself, it may be possible to get support for a longer period
- Levels of spousal maintenance are in such cases relatively low

LANGSETH Advokatfirma DA

Child support

- Regulated in *Act relating to Advance Payments of Child Maintenance* and *Act related to Children and Parents*
- Calculated according to normal cost for supporting a child
- The payment is based on both parents income
- The less visitation, the higher maintenance payment
- The duration of a child maintenance order is up to the age of 18 years or the child is still in high school. Neither the child nor the spouse can make a claim for maintenance after this
- Levels of child support are relatively low in Norway

LANGSETH Advokatfirma DA

Marriage Agreements

- High Net Worth spouses frequently make Marriage Agreement
- Both pre- and postnuptial agreement are legally binding in Norway
- Must be made in writing, signed with 2 witnesses
- If the Marriage Agreement is to confer protection against creditors, it must be registered in The register of Marriage Settlements
- The Marriage Agreement is binding between the spouses when the agreement is signed.

LANGSETH Advokatfirma DA

Marriage Agreements cont.

- Separate property
- Gifts between spouses have to be made through Marriage Agreements
- The Marriage Agreement may include an agreement about transferring gifts from one spouse to the other for each year of the marriage
- It is possible to agree separate property in case of divorce, but joint property in case of death
- It is not possible to make a legally binding in regards to spousal maintenance or an agreements that provides a lump sum in compensation in case of a divorce
- According to Norwegian law, it is not possible to establish trusts

LANGSETH
Advokatfirma DA

Heritage

- We do not pay inheritance tax in Norway
- The heir will take over the deceased tax position.
- Testator may decide in a last will that the legacy shall be separate property for the heir
- The same rules apply for gifts, with certain restrictions

LANGSETH
Advokatfirma DA

CIVIL AND COMMON LAW DIFFERENCES

- Charlotte Butruille-Cardew, Paris, France
- William Longrigg, London, England
- Charles Fox Miller, Hollywood, Florida
- Mia Reich Sjogren, Gothenberg, Sweden

International Academy of Family Lawyers

The French Civil Law Approach

IAFL – New York 21 April 2018

Charlotte Butruille-Cardew,
Partner CBBC
PARIS - FRANCE

Civil Law and French Civil Code the French system

- 1804 Code Napoléon : French civil Code, French civil proceedings Code…
- Family judge (J.a.f.), Court of appeal, French Supreme Court (Cour de cassation) and E.C.J. (European Court of Justice).
- A right to appeal but limited before the French Supreme Court,
- Length and format of family proceedings : open to all Justice – dead Justice ?
- Duty to the client/not to the Court as an *Avocat.*
- No contempt of Court – attractive jurisdiction/disclosure,
- No similar concept to trust – Suspicion ?

Choice of law rules

- The law applicable to divorce

  EC Regulation n°1259/2010 of 20 December 2010 – Rome III
- The law applicable to maintenance obligations

  The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations
- The law applicable to matrimonial property regimes

  Hague Convention dated 14 March 1978 and EC Regulation n° 2016/1103 on Matrimonial property regimes

Lack of disclosure

- Absence of *In personam jurisdiction* and no contempt of Court – no jail imprisonment,
- Possibility to consult banks (FICOBA) - France only.
- No subpoena. Cannot join third party : e.g.: trustees.
- *Déclaration sur l'honneur* :
  - Contentious divorce : C.civ 1ère 11/09/13 N° 12-17730 – possible revision.
  - New divorce – nullity ?
- No obligation to answer questions from the Court or form the opposing party.
- Discretionary power from the Court to order the producing of documents – sometimes with penalty but fairly rare,
- Little jurisdiction abroad on assets or entities:
  - letter of Rogatory, little use of *Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,*
  - No division or/and rare allocation of foreign assets (Notary/Judges/sharing tax).

Matrimonial Property Regime (MPR)

- The matrimonial regime of a married couple is set by rules that organize asset administration and entitlement within the marriage, both during the marriage and upon its dissolution. It is often referred to in Common Law countries - where the notion does not exist – as matrimonial property rights.
- European Regulation on Matrimonial Regime (2016/1103) – 23,01,2019 defines it as a "set of rules relating to the economic relations of the spouses between them vis-à-vis third parties".
- The MPR determines the powers of the spouses, either individually, or jointly, to administer their assets and defines the rights of third parties (generally creditors) in relation to the couple's estate. When the marriage terminates, the matrimonial regime of the couple is wound up and each spouse, according to the regime chosen, is allocated a portion of the assets acquired during the marriage.

Primary / secondary regime

- The MPR of a couple is determined either by a contract entered into by the spouses or by virtue of the Law, in the absence of a contract.
- Most common MPR in France : regime of community of assets, separation of property, universal community and participation.
- Those MPR are often referred to in comparative law studies as a **secondary regime**.
- A **primary regime** applies to any married couple residing in France regardless of the matrimonial regime chosen by the spouses: it is a set of mandatory rules which apply automatically to all married couples and organises their *minima* duties and rights in respect of the management of assets and the administration of their estate for the purpose of protecting their family life [art 214 to 226 of the French Civil Code (FCC)].
- **The primary regime** applies automatically to married couples residing in France, regardless of their respective nationality [*Civ. 1re, 20 october 1987, Cressot*].

Concealment of community assets

- ***« Recel de communauté »*** or **Concealment of community assets** [art 1477 of the FCC]
- **The spouse who has attempted to deprive the other spouse of his/her share of the community assets, will be - as a sanction- deprived of his/her own share in the concealed asset to the benefit of the innocent spouse.**
- If the fraud is discovered, the perpetrator of the concealment will receive a smaller portion of the community assets in comparison to what he/she would normally have been entitled to, in application of the community of property regime, whilst the innocent spouse will receive a greater portion.

  → The *« recel de communauté »* is a concrete application of the law of retaliation (*G. Cornu, les Régimes Matrimoniaux: PUF, Thémis, 9e éd. 1997, n°98).*

Protection of the Family home

- French Law strictly prohibits the sale or any legal act that could be related to the matrimonial home.

  « The spouses may not, separately, dispose of the rights whereby the housing of the family is ensured, or of the pieces of furniture with which it is garnished. The one of the two who did not give his or her consent to the transaction may claim the annulment of it: the action for annulment is open to him or her within the year after the day when he or she had knowledge of the transaction, without possibility of its ever being instituted more than one year after the matrimonial regime was dissolved.» [Art 215, 3rd paragraph of the FCC].

  * The place has to be **qualified as the Family home** ;

  * The **furniture** and its **content** too ;

  * A ***de facto* separation of the spouses does not impeed** on the notion of Family home, neither does the free enjoyment of the home ordered by a Judge as an interim measure ;

  * Even if the house is titled in the sole name of the one of the spouses (personal property), the owner will not be able to sell it or rent without the prior consent of the other spouse or a Court Order.

The « Civil Estate Company » (SCI)

- Many spouses create an SCI (“*société civile immobilière*”), literally a real estate company, dedicated to own and manage a real property.

  This civil legal structure is very attractive from a tax and practical point of view.
- The company is an independent legal entity and the partners' divorce is not a cause of action to wind up the company, Indeed, the partners (spouses) will continue its activity despite an ongoing divorce.

Post-divorce issues – sharing tax (« *droit de partage* »)

- Orders relating to the winding up of matrimonial regimes are automatically transmitted to the **Tax administration that raises a tax of 2.5% applicable on the net total amount of the community assets** or on the joint assets in case of a separation of property regime.
- **It is supposed to be a worldwide assets tax,**

Structuring of corporate/civil legal entities

- **CARON case on fictitious companies** – if spouses were tempted by the creation of a company abroad that may own a real property in order to fraud the French tax system, rights of the other spouse or the reserved rights of their heirs (reserved portion) French courts sanction fraudulent company, ignoring the legal entity created.
- This principle lies with the Caron case [*Civ. 1ère, 20 mars 1985, n°82-15033*].

  A man created a company in the US, which owned a real property located in France, in order to avoid the imperative stipulations of the FCC. The "company veil" was voided, and his heirs –that he wanted to disinherit- were deemed heirs with consequent inheritance rights.

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Common Law and Civil Law
WILLIAM LONGRIGG

SATURDAY 21 APRIL 2018

England and Wales: Common Law Jurisdiction

- Civil Law vs Common Law
- Discretion vs Certainty
- Henry II and the Emperor Justinian
- English speaking world and the rest of the world with some fused systems.
- Property regimes
- Trusts

Property Regimes

- In what context are the courts operating?
- Matrimonial Property Regimes created on marriage (immediate or deferred).
- Civil law countries consider that England and Wales has "separation of property" regime. Is that accurate?
- *White –v- White* 2001 1ALL ER1, HL.
- Separation of property and maintenance
- Maintenance not normally covered by pre-nups in civil law jurisdictions

Procedure in England And Duty of Lawyers to the court

- How does it work in England?
- Procedure on divorce.
- Duty to the court.
- Duty of full and frank disclosure – Form E.
- Very thorough system to include questionnaires.
- First Appointment, Financial Dispute Resolution Hearing (FDR) final hearing.
- Final hearings can last for days or weeks.

Documents before the court

- Case is argued many times on paper.
- Each hearing requires a skeleton argument in addition to the pleadings.
- Now limited to 350 pages per hearing
- Common law jurisdiction make more of a deal of it.

Which system is the fairest?

- The formulaic system with limited discretion?
- A system which struggles to acknowledge interests in trusts or property held nominally by third parties?
- A system with lack of forensic thoroughness whether there is no duty to the court on the part of the lawyers or the parties?
- A system which is cumbersome, lengthy and very expensive for the parties?
- Perhaps a combination?

Some thoughts on maintenance

- England and Wales out of step with the rest of the world (including Scotland).
- Germany: generous maintenance is granted in the south and little maintenance is granted in the north.
- Sweden, Finland etc. no maintenance
- Brussels II – rush to court
- Maintenance Regulation (EU regulation no: 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and decisions and co-operation in matters relating to maintenance obligations). Rush to court on maintenance
- EU provisions too complex and inconsistent. Many rely on civil law concepts and sit uneasily with common law jurisdictions.
- Brexit!!

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Common Law and Civil Law
WILLIAM LONGRIGG

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Civil and Common Law Differences
MIA REICH SJÖGREN

SATURDAY 21 APRIL 2018

WHAT IS THE DIFFERENCE BETWEEN COMMON AND CIVIL LAW?

- What is Common Law?
- Common Law a peculiarly English development.
- 1066 monarchs began to unite the country and its laws using the King´s Court.
- Rules developed organically.
- Not written down.

Civil Law

- European rulers drew on Roman Law.
- Emperor Justinian 6th century.
- Rediscovered in 11th century.
- Enlightenment in the 18th century in continental countries produced comprehensive legal codes.

Common Law

- Main source of law.
- Use of statutes but judicial cases regarded as most important.
- Judges have an active role in developing rules.
- Courts abide by precedents set by higher courts.

Civil Law

- Codes and statutes are designed to cover all eventualities.
- Judges have more limited role of applying the law to the case in hand.
- Past judgements are just guides.
- Judges tend to be investigators rather than arbiters between parties that present arguments.

CIVIL LAW MORE WIDESPREAD

- Approximately 150 countries have a civil-law system.
- 80 countries have a common-law system.
- Common-law systems in former English colonies. Australia, India, Canada and the United states.

REFLECTIONS

- Civil law more stable and more fair?
- Common law more flexible?
- Many systems are now a mixture of the two
- Best of both legal worlds?

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Civil and Common Law Differences
MIA REICH SJÖGREN

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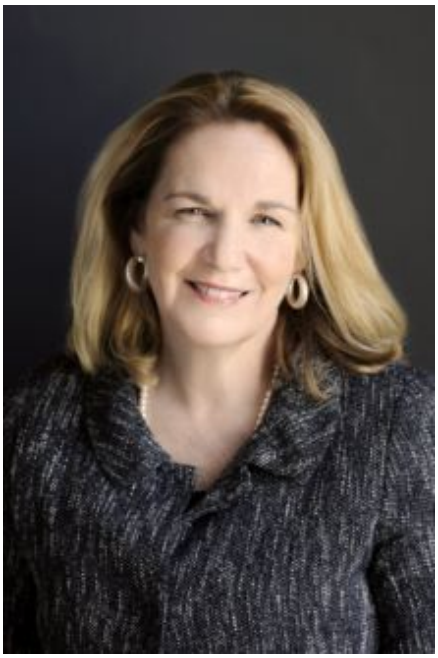

PATRICIA E. APY ESQ.

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PATRICIA APY HAS PRACTICED FAMILY LAW FOR 30 YEARS, SINCE 1996 SHE HAS BEEN A PARTNER IN THE LAW FIRM OF PARAS, APY, & REISS, A PROFESSIONAL CORPORATION SPECIALIZING IN THE PRACTICE OF FAMILY LAW.

MS. APY HAS LITIGATED, BEEN QUALIFIED AS AN EXPERT WITNESS AND CONSULTED ON INTERNATIONAL FAMILY DISPUTES THROUGHOUT THE WORLD. SHE SPEAKS THROUGHOUT THE UNITED STATES AND CANADA ON FAMILY DISPUTE RESOLUTION IN "NON- HAGUE " COUNTRIES AND RISK FACTORS FOR CHILD ABDUCTION.

EDUCATION: CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW, CLEVELAND, OHIO
Juris Doctorate Degree, 1986.;

UNIVERSITY OF MISSOURI, COLUMBIA MISSOURI
Masters in Social Work Degree, Clinical Concentration in Family and Children. 1983
.
ORAL ROBERTS UNIVERSITY, TULSA, OKLAHOMA
Bachelor of Social Work Degree, Concentration in Community Organization. 1978
.

Harvard University Law SCHOOL, CAMBRIDGE MASSACHUSETTS 1999.
Islamic Legal Studies Program, Continuing Legal Education

SHE HAS BEEN A FELLOW OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS (PREVIOUSLY KNOWN AS THE INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS) SINCE 1998.

SHE SERVED AS A LEGAL ADVISOR TO THE UNITED STATES DELEGATION TO THE HAGUE IN NOVEMBER 1995 AND RETURNED AS A DELEGATE IN OCTOBER 1996 TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW FOR NEGOTIATION OF THE PROTECTION OF MINORS TREATY. SHE SERVED AS THE REPRESENTATIVE OF THE INTERNATIONAL ACADEMY OF FAMILY LAWYERS AT THE HAGUE FOR THE REVIEW OF THE TREATY ON INTERCOUNTRY ADOPTION, WITH PARTICULAR ATTENTION TO CHILD TRAFFICKING. SHE HAS SERVED AS A CONSULTANT TO THE UNITED STATES DEPARTMENTS OF STATE, AND DEFENSE ON ISSUES INVOLVING FAMILIES AND CHILDREN AND THE APPLICATION OF TREATY LAW. SHE HAS SEVEN TIMES TESTIFIED BEFORE CONGRESS FOUR TIMES BEFORE SUBCOMMITTEES OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS AND ONCE BEFORE BOTH THE HOUSE COMMITTEE ON VETERAN'S AFFAIRS, AND THE SENATE SUBCOMMITTEE ON VETERAN'S AFFAIRS, ON BEHALF OF THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION. HER MOST RECENT TESTIMONY OCCURRED ON APRIL 11,2018 BEFORE THE HOUSE SUBCOMMITTEE ON GLOBAL HEALTH, AFRICA, GLOBAL HUMAN RIGHTS AND INTERNATIONAL ORGANIZATIONS.

SHE IS AMONG THE PRINCIPAL AUTHORS OF THE SEAN AND DAVID GOLDMAN INTERNATIONAL PARENTAL KIDNAPPING PREVENTION AND RETURN ACT, (22 USC 9111 ET SEQ) FOR THAT, AND HER BODY OF WORK IN PROTECTING THE LEGAL RIGHTS OF MILITARY MEMBERS, SHE RECEIVED THE AMERICAN BAR ASSOCIATION GRASSROOTS ADVOCACY AWARD, GIVEN IN THE SUPREME COURT OF THE UNITED STATES ON APRIL 15, 2015. SHE IS ALSO THE AUTHOR OF AMENDMENTS TO THE CUSTODY STATUTE OF THE STATE OF NEW JERSEY TO PROTECT MILITARY MEMBERS AND THEIR FAMILIES. FOR THAT WORK SHE WAS RECOGNIZED BY THE NEW JERSEY STATE BAR ASSOCIATION WITH THE 2010 DISTINGUISHED LEGISLATIVE SERVICE AWARD AND THE SECOND ANNUAL MILITARY SUPPORT AWARD IN OCTOBER OF 2011.

MS. APY HAS PARTICIPATED IN NUMEROUS REPORTED DECISIONS. OF NOTE, SHE SERVED AS COUNSEL FOR DAVID GOLDMAN, A NEW JERSEY FATHER WHOSE SON WAS THE FIRST AMERICAN CHILD RETURNED PURSUANT TO THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION FROM BRAZIL.

SHE IS A FREQUENT LECTURER, WRITER AND EXPERT WITNESS ON INTERNATIONAL FAMILY LAW.

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Nancy Zalusky Berg's career in family law began 1985. Since then she has been a zealous advocate for her clients in all areas of family law from complicated high asset dissolutions to tirelessly advocating for victims of domestic violence and child protection cases. Most significantly, Nancy offers unparalleled expertise in international family law including child abduction and recovery, and enforcement of foreign orders. Nancy is exceptional in identifying and solving complex international property and child related issues, with significant understanding of cultural dynamics as well as local laws.

Nancy's expertise is recognized locally and internationally. She is the current President of the International Academy of Family Lawyers (www.iafl.com), past President of the IAFL – USA Chapter, a member of the American Academy of Matrimonial Lawyers, (www.aaml.org), past member of the Minnesota Lawyers Professional Responsibility Board. She has spoken all over the world on international family law issues and child abduction. Nancy has lectured in Canada, Japan, Nigeria, Argentina and London. She has been in the "Best Lawyers in America" and identified as one of Minnesota's "Super Lawyers" of Law & Politics, Minnesota Monthly and Mpls-St. Paul magazines since 1993. She has been one of the top 100 lawyers in Minnesota for many years and listed as one of the top 40 lawyers in the Family Law practice area by Law & Politics. Ms. Berg has received a peer review rating of AV Preeminent by American Registry since 1995. She is a qualified neutral under Rule 114 of the Minnesota General Rule of Practice. Ms. Berg has also served on a variety of community non-profit boards. Ms. Berg is the "go to" person for referrals for mental health professionals and lawyers in other jurisdictions. It is said she literally knows everyone!

When Nancy is not reading or advocating, she has enjoyed riding dressage, knitting, working with glass creating stain glass windows and jewelry. Her favorite pastime however, is travelling the world to immerse herself in different cultures and understand the different legal systems.

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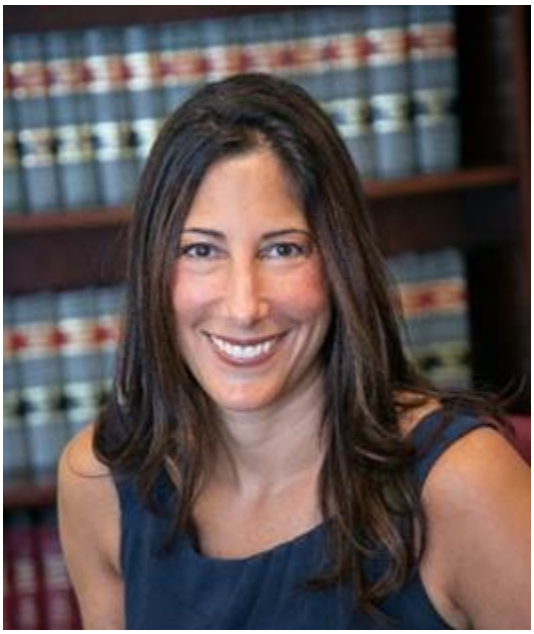

Attorney Blomberg joined Schoonmaker, George, Colin & Blomberg P.C. (formerly Schoonmaker & George, P.C.), as an associate in 1999. She became a partner in January, 2006 and a named partner in October, 2011. She received her B.A. from University of Pennsylvania in 1994 and received her J.D. from Fordham University School of Law in 1997. Prior to joining the firm, she practiced in the matrimonial department of Tenzer, Greenblatt LLP (currently Blank Rome, LLP) in New York City, practicing family law in both New York and Connecticut.

Attorney Blomberg is a Fellow of the American Academy of Matrimonial Lawyers, having been inducted in October 2009, and a Fellow of the International Academy of Matrimonial Lawyers, having been inducted in February of 2011. Attorney Blomberg is President-Elect of the Connecticut Chapter of the American Academy of Matrimonial Lawyers.

She is admitted to practice in the States of New York and Connecticut, as well as in the United States Supreme Court.

Attorney Blomberg is a member of the American Bar Association, the Connecticut Bar Association and the Fairfield County Bar Association.

She was the Young Lawyer's Family Law Section Chair in 1999-2000, Connecticut Bar Association, Past Co-chair of Family Law Section, Young Lawyers Executive Committee, Co-Chair of Family Law Section in 2000-2001, Fairfield County Bar Association, Past Co-Chair of Family Law Section and sat on the Board of Directors for the Fairfield County Bar Association from 2002-2004.

Attorney Blomberg continues to serve the Connecticut Superior Court as a Special Master in family cases including at the Regional Family Trial docket in Middletown where contested child custody cases are heard. Attorney Blomberg

has acted as a court-appointed attorney and Guardian Ad Litem for children in contested custody cases and has completed all mandatory requirements for the Guardian Ad Litem/Attorney for the Minor Child comprehensive Basic Training. She is also recognized as an AAML trained mediator.

Attorney Blomberg is a past President of the Connecticut Chapter of the Fordham University School of Law Alumni Association. Since 2004, she has sat on the Steering Committee and been actively involved with Casa Verde, Home of Hope, in Medellin, Colombia.

BAR ADMISSIONS

- Connecticut, 1997
- New York, 1997
- United States Supreme Court, 2006

EDUCATION

- University of Pennsylvania, B.A. 1994
- Fordham University School of Law, J.D. 1997

HONORS AND AWARDS

Super Lawyer (New England) 2013 to date:

- Top 50: Women New England Super Lawyers (2017, multiple)
- Top 25: Women Connecticut Super Lawyers (2017, multiple)
- Top 100: New England Super Lawyers (2017, multiple)
- Top 50: Connecticut Super Lawyers (2017, multiple)

Rising Star (New England):

- Rising Star (New England) in 2008 through 2012

Best Lawyers:

- Selected by peers as one of the "Best Lawyers in America" in 2016, 2017 and 2018.

AVVO:

- Received highest rating of 10 ("Superb") from AVVO

Attorney Blomberg was also honored as a "VIV Magnificent Woman" from the online magazine, VIV Mag.

PROFESSIONAL ASSOCIATIONS AND MEMBERSHIPS

- American Academy of Matrimonial Lawyers, Connecticut Chapter:
  - *President-Elect, 2017 – present*
  - *Vice President, 2016 – 2017*
  - *Secretary, 2015 – 2016*
  - *Treasurer, 2014 – 2015*
  - *Board of Managers, 2010 to date*
  - *Fellow of the American Academy of Matrimonial Lawyers, 2009 – present*
- Member of the 2013, 2014 AICPA/AAML Joint Seminar Committee
- Fellow of the International Academy of Family Lawyers, 2011 to present
- Special Masters Program in the Judicial District of Stamford, Co-Chair, 2008 to present
- Connecticut Chapter of Fordham University School of Law Alumni Association, President, 2007
- American Bar Association, Member
  - Young Lawyers Family Law Section, Chair, 1999-2000
- Connecticut Bar Association, Past Co-chair of Family Law Section.
  - Young Lawyers Executive Committee, Co-Chair of Family Law Section, 2000-2001
- Fairfield County Bar Association, Past Co-Chair of Family Law Section
  - Board of Directors, 2002-2004

PRESENTATIONS AND PUBLICATIONS

- AAML Connecticut Chapter – Advanced Financial Issues Seminar: Co-Presenter with *Frederic J. Siegel, Esq.* "Handling Complex Equitable Distribution Cases" April 15, 2016.
- AAML – Advance Technology Seminar: "Technology Primer Seminar" April, 2014
- AICPA/AAML National Conference on Divorce: "Financial Disclosure: The Devil Is In The Details", April, 2014
- AICPA: "Social Media: To Tweet Or Not To Tweet", February 20, 2014
- Coordinator for the Committee Presentation "Pleasures and Pitfalls of Collecting and Presenting Electronic Evidence" presented at the 2013 AAML Mid-Year Meeting, March 19, 2013.
- Presented a NBI Advanced Family Law Seminar, March 14, 2013.
- What Every Non-Matrimonial Lawyer Should Know About Premarital Agreements, Trusts, Gifts & Inheritances, Withers Bergman, LLP, September, 2010
- Top Ten Family Law Cases, Connecticut Bar Association, January 27, 2011
- An Introduction to Family Law, Connecticut Bar Association, seminar held February 16, 2011
- Unconscionability: the Heart of the Premarital Agreement Act, American Journal of Family Law, Summer, 2001. Read Article
- Putting Your Cards on the Table, Connecticut Law Tribune, August , 2008
- Premarital Agreements: What Every Young (or Not So Young) Trust and Estate's Lawyer Needs to Know, Connecticut Bar Association, seminar held on March 15, 2005.
- Connecticut Family Law Citations: A Reference Guide to Connecticut Family Law Decisions by Cynthia C. George and Thomas D. Colin, Co-Editor Jill H. Blomberg (2000-2005).

- Property Distributions—The Cases We Have Known, Do Know, or Should Know, Connecticut Bar Association, seminar held on March 12, 2002
- What Every Young Lawyer Needs to Know About Premarital Agreements, The Connecticut Lawyer, November, 2000

CERTIFICATIONS

Completed all mandatory requirements for the Guardian Ad Litem/Attorney for the Minor Child comprehensive Basic Training and AAML trained mediator.

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SARAH M BOULBY

Website: www.boulbyweinberg.com

Email: sboulby@boulbyweinberg.com

Sarah has practiced family law since 1993. She advises clients located in Ontario and internationally on complex support, property and parenting issues. She negotiates agreements and represents clients in court at the trial and appellate level as well as in mediations and arbitrations.

Sarah is listed in Best Lawyers International. She is a Fellow of the International Academy of Family Lawyers, a worldwide organization of family lawyers recognized by their peers as leading lawyers in their countries. Sarah is the President-Elect of the Canadian Chapter of the Academy.

Sarah is a member of the Law Alumni Association Council of the University of Toronto Faculty of Law. She also serves as a Director of the Toronto Lawyers Association.

Sarah speaks and writes frequently on family law issues. She is the author of educational material used by the Law Society of Ontario in its Licensing Process.

Sarah graduated from Queen's University with an Honours Bachelor of Arts in 1986 and a Master of Arts in 1989. She graduated with an LL.B. from the University of Toronto in 1991. Sarah served as Law Clerk to Mr. Justice Peter Cory at the Supreme Court of Canada in 1991-1992. She was called to the Ontario Bar in 1993. She was counsel to the Ontario Law Reform Commission and since 1993 has practiced as a family lawyer.

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CHARLOTTE BUTRUILLE-CARDEW

Website: www.cbbc-avocats.com

Email: cbc@cbbc-avocats.com

Charlotte is partner and co-founder of the firm CBBC.

Before starting CBBC, Charlotte worked in London and Paris Business Law, then family law and heritage. She has particularly focused her work towards international affairs with complex financial issues in family law. She has developed a particular expertise in prenuptial agreements, international civil partnerships and the Board or the litigation involving wealth structuring.

Charlotte emphasizes teamwork as well as listening and talking in order to understand the specific needs of each client and to work in the best interests of everyone.

Accredited Practitioner and Trainer in collaborative law, alternative dispute resolution technique based on integrative negotiation, introduced in France in 2007, Charlotte has also developed a real expertise in such international negotiations, and thus can provide her clients with a tailored alternative, fast and discreet.

She works in both French and English.

She is a member of many international organizations, working closely with universities and also teaching.

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JUSTICE ELLEN FRANCES GESMER

Justice Ellen Frances Gesmer
Supreme Court of the State of New York
County of New York
60 Centre Street, Part 24
New York, New York 10007

PROFESSIONAL EXPERIENCE

Associate Justice, Appellate Division of the Supreme Court of New York, First Department
February 2016 to present

Justice, Supreme Court of the State of New York, Matrimonial Part
New York County, March 2009 to February 2016
Bronx County, October 2006 to March 2009

Judge, Criminal Court, City of New York
January to October 2006

Judge, Civil Court of the City of New York
Brooklyn Civil Court, 2004
Manhattan Civil Court 2005

Partner, Gulielmetti & Gesmer, P.C., New York, New York
1987 to 2003

Associate Attorney, Teitelbaum & Hiller, P.C., New York, New York
1985 to 1987

Clinical Assistant Professor-Child Advocacy Law Clinic, University of Michigan Law School, Ann Arbor, Michigan
1983 to 1984

Staff Attorney, Supervising Attorney, Acting Director of Litigation
Bedford-Stuyvesant Community Legal Services Corporation, Brooklyn, New York
1977 to 1983

Law Clerk, United States District Court (D. Mass.), Boston, Massachusetts - Honorable Joseph L. Tauro
1976 to 1977

EDUCATION

Yale Law School, J.D. 1976
Radcliffe College, B.A., *summa cum laude* 1972

PROFESSIONAL ACTIVITIES

Matrimonial Practice Advisory and Rules Committee.

- Member (2009 to present)

National Association of Women Judges

- International Committee (2004 to present)

Association of the Bar of the City of New York

- Committee on Matrimonial Law (2007 to 2011)
- Committee on African Affairs (2004 to 2007)
- Committee on Professional Discipline (2001 to 2004)
- Committee on Professional Responsibility (1998 to 2001)
- Committee on Rights of Crime Victims (1990 to 1993)

Women's Bar Association

- State Wide Committee on Domestic Violence (2002 to 2005)
- Matrimonial and Family Law Committee (1997 to present)
- Judiciary Committee (1998 to 1999)

Sanctuary for Families, Legal Advisory Committee (1999 to 2003)

- Chair, Matrimonial Subcommittee (2002 to 2003)

COMMUNITY ACTIVITIES

Dancing in the Streets

- Secretary, Vice President, Member of the Board of Directors (2004 to present)

Judges and Lawyers Breast Cancer Alert

- Board of Directors (2009 to present)

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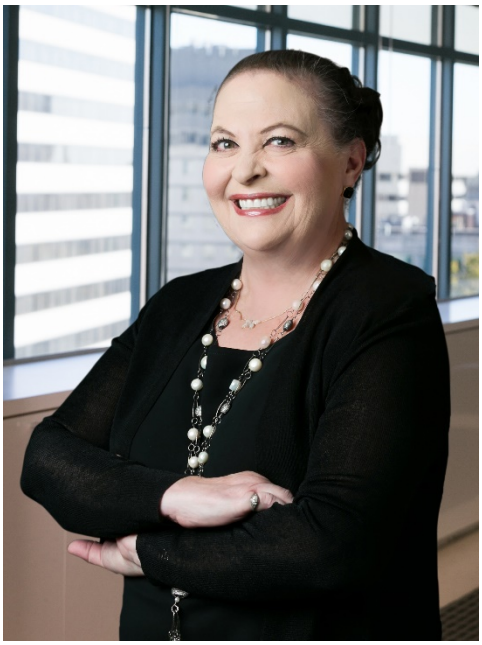
CHERYL HEPFER

Website: www.offitkurman.com

Email: chepfer@offitkurman.com



Cheryl Lynn Hepfer has been practicing family law in Maryland for over 45 years. She has been listed in Best Lawyers in America and as a top Lawyers in the Washingtonian, Bethesda Magazine and Super Lawyers. She is Past President of the American Academy of Matrimonial Lawyers and Past President of the International Academy of Family Lawyers. She is the only Diplomate from Maryland in the American College of Family Trial Lawyers.

Ms. Hepfer is a frequent lecturer on matters of family law, including issues of the valuation and division of marital assets, custody, access and general divorce related topics. She has also been quoted by several national and regional media outlines, such as CNN, ABC's Nightline, the New York Times and National Public Radio.

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DANIELA HORVITZ LENNON

Website: www.horvitz.cl

Email: dhorvitz@horvitz.cl

Daniela Horvitz has specialized in different subjects: Diploma in "ISL S-DAY" from Harvard University, 2001; Diploma in "Criminal Procedure Reform" of the University of Chile, 2003; Graduated in "Introduction to the Law of the United States" of the Pontifical Catholic University of Chile, year 2004; Graduated in "Oral Litigation" from California Western School of Law, year 2011; among others.

She is a member of Chile bar association, since the year 1999; Of the family commission of the Chilean Bar Association, since 2009; Founder and first President of the Family Lawyers Association of Chile (AAF), 2009, and currently President again 2018; Member UIA (International Union of Lawyers), since 2011; Member ABA (American Bar Association) international section, since 2012 and Vice Chair of the Family Commission on 2015; Member of International Academy of Matrimonial Lawyers, since 2012; Member of honor of IBDFAM (Brazilian Institute of Family Duty), since 2012; And member of the Societé General de Droit Comparé since 2013.

She has participated in various exhibitions and publications at national and international level: Exhibitor with "Family businesses and insolvencies", insolvency commission UIA Zaragoza-Spain year 2012; "Compensation for damages in family relations", family commission UIA and FACA Buenos Aires-Argentina year 2012; "The Economic Compensation", Congress of the Argentine Nation year 2012; "Children facing the change of domicile and regulations of patrimonial regulation in the old age", Annual Congress UIA Dresden-Germany year 2012; "Surrogate paternity in Mercosur", annual IBDFAM Gramado-Brazil year 2012; "The Hague Convention in Chile", symposium organized by IAML Buenos Aires-Argentina in 2013; "Collaborative Law in Chile", XXI Day of AEAFA Family Law Madrid-Spain year 2014, "Partnership and Communities", Annual Congress UIA, Budapest, 2016, among others.

Author of the Chilean chapter of the book "Family Law", published by Thompson Reuters, and edited by James Stewart, on 2015, 2016 and 2017.

Also she practices as an Arbitrator in civil and commercial cases in Chile.

She has been honored to be pro bono as a curator ad litem in cases of children in violation, at the request of the Family Courts.

On 2017 she awarded the recognition as "Best Family Lawyer of the year" in Chile.

Areas of Practice:
Appeals, Arbitration, Child Care/Public Law, Child Custody/Residence/Visitation/Contact, Child Support, Cohabitation, Collaborative Law, Divorce, Domestic Abuse/Violence/Protection Orders, Emergency Procedures/Injunctions, Enforcement: Child Custody, Enforcement: Child Support, Enforcement: Property Division, Enforcement: Spousal Support, Finance: Capital Provision, Finance: Insolvency, Finance: Pensions/Superannuation/Retirement and Employment Benefits, Finance: Property Issues, Finance: Trusts, Hague Convention/Child Abduction, Mediation, Modification/Variation: Child Custody, Modification/Variation: Child Support, Modification/Variation: Property Division, Modification/Variation: Spousal Support, Parentage/Paternity, Pre-nuptial/Post-nuptial Agreements, Relocation/Removal from Jurisdiction, Same Sex Partnerships, Spousal Support/Maintenance/Alimony

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RACHAEL KELSEY

Website: www.sko-family.co.uk

Email: rachael.kelsey@sko-family.co.uk

Rachael is a solicitor and the "K" of SKO Family Law Specialists, the largest niche family practice in Scotland, which is now in its tenth year.

Rachael works in Edinburgh and London, practising Scots Law. She advises on the full range of family law matters, with a particular interest and expertise on jurisdictional issues in family law cases, with over 90% of her practice now having some kind of jurisdictional element to it. She is one of only three 'leading individuals' in Scotland for family law in the current edition of the Legal 500. She has been in 'Band 1' of matrimonial lawyers in Scotland in Chambers and Partners for many years, where her firm is top ranked, as it is in the Legal 500. Rachael is accredited by the Law Society of Scotland as a Specialist in Family Law and as a Family Mediator.

In 2016 Rachael was appointed for a period of 3 years to the Family Law Committee of the Scottish Civil Justice Council. She is Secretary of the IAFL having previously been Counsel to the Academy. She was a founding member of the group set up to institute a bespoke Family Arbitration scheme in Scotland- FLAGS- and now trains arbitrators nationally and internationally.

Rachael was a member of the Scottish Government Civil Sub-Group working on the implementation of vulnerable witness legislation and also on the Lord Advocate's working group on child witnesses; was previously Chair of the Family Law Association (2005-2006); Chair, and a trustee, of Family Mediation Lothian (2008-2017) and Treasurer of CALM (the organisation of solicitor mediators in Scotland) (2007-2016).

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MELISSA KUCINSKI

Website: www.mkfamilylawfirm.com

Email: melissa@mkfamilylawfirm.com

Melissa Kucinski is an attorney and mediator in D.C. and Maryland. She served as a consultant to the Hague Conference on Private International Law in 2013, and has written a dozen articles published in more than one language on international children's issues and mediation of complex cross-border custody and abduction cases. Melissa has presented at nearly 30 national and international conferences on international children's issues and mediation. Melissa was part of a U.S. Delegation sent to Tokyo, Japan in 2014 to train Japanese mediators to handle international parental child abduction cases under the 1980 Hague Convention on Parental Child Abduction. Melissa has been a long-standing member of the U.S. Secretary of State's Advisory Committee on Private International Law. She served as a private sector advisor to the U.S. Delegation to The Hague's Sixth Special Commission meeting in 2011 to review the practical operation of two international children's treaties, and she attended the Seventh Special Commission meeting in 2017 with International Social Service (ISS). She currently chairs ISS's efforts to create a global network of international family mediation resources. Melissa has served in a variety of capacities within the American Bar Association, including past chair of an International Family Mediation Task Force, where she spearheaded the effort to design and host a weeklong advanced international family mediation training. Melissa has taught the International Family Law course at the George Washington University School of Law since 2010. She is a fellow of the International Academy of Family Lawyers. Her new book, A Practical Handbook for the Child's Attorney: Effectively Representing Children in Custody Cases, will be published later this year.

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WILLIAM LONGRIGG

Website: www.charlesrussellspeechlys.com

Email: william.longrigg@crsblaw.com

William specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children cases.

William is the former head of the family sector at Charles Russell Speechlys and specialises in divorce, financial relief (to include pre-nuptial and post-nuptial agreements) and private law children matters. He also lectures on a range of family law issues including trusts and matrimonial breakdown and is a joint author with Sarah Higgins of *Family Breakdown and Trusts* for Butterworths. He has wide experience of cases with an international element and is Immediate Past President of the International Academy of Family Lawyers. William was named 2014 International Family Lawyer of the Year at the prestigious Jordans Family Law Awards and Family Lawyer of the Year 2016 at the *Spears Wealth* awards.

William is ranked as a "leading individual" by Chambers & Partners and listed in the Honours List of Leading Lawyers in the Family & Matrimonial category of the Citywealth Leaders List 2013. He was ranked in the top 10 London Family Law solicitors by Spears Wealth Magazine in 2015 and 2017.

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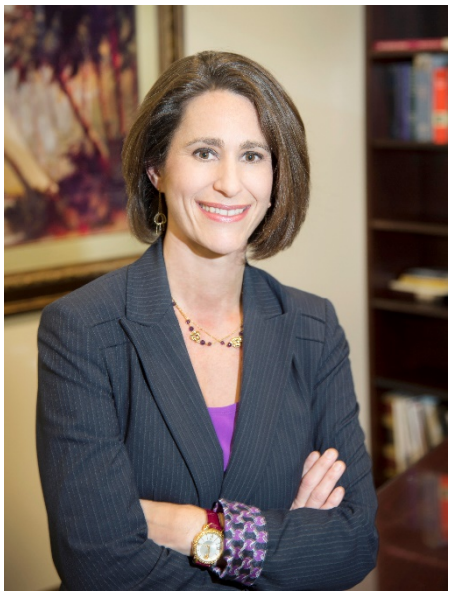

KATHARINE MADDOX

Website: www.maddoxandgerock.com

Email: kmaddox@maddoxandgerock.com

Katharine has experience in all areas of family law, both domestic and international, including preparation of settlement agreements and litigation concerning the following issues:

- Spousal support
- Child support
- Division of marital property including division of complex business interests and assets
- Child custody and visitation/access
- Relocation of children as it relates to custody and visitation
- Jurisdictional disputes
- Protective orders

Memberships:

Katharine is a Fellow of the International Academy of Family Lawyers (IAFL). The IAFL is "a worldwide association of practicing lawyers who are recognized by their peers as the most experienced and skilled family law specialists in their respective countries." (http://www.iafl.com/). In addition, Katharine is a Fellow of the American Academy of Matrimonial Lawyers (AAML). Fellows of the AAML are "recognized by the bench and bar as a leading practitioner in the area of matrimonial law." (http://www.aaml.org/).

Recognitions:

Katharine has been selected as a "Super Lawyer" every year since 2013, and prior to that she was selected as a "Rising Star" in the Super Lawyers publication. In addition, Katharine has four-times been selected as a "Top Lawyer" in the area of family law by Northern Virginia Magazine.

She has also been recognized as one of the top lawyers in the field of family law by Virginia Business Magazine and she has received the top rating possible, "Superb, 10 out of 10" from the AVVO ratings website.

Katharine has been featured in the following publications:

- Northern Virginia Magazine article titled *Making the Case for Custody*: http://www.northernvirginiamag.com/education/education-features/2011/12/28/family-and-all-it-entails-frozen-embryos-and-furry-friends/
- USA Today Father's Day edition article titled *More dads demand equal custody rights*:http://www.usatoday.com/story/news/nation/2014/06/14/fathers-day-divorce-custody-partner-husbands-wives/10225085/
- National Law Journal article titled *Divorce Lawyers Without Boarders*:http://www.ideallegalgroup.com/wp-content/uploads/2013/02/130123-National-Law-Journal.pdf

Lectures and Publications:

Katharine has lectured on family law issues to the IAFL as well as to the Virginia Trial Lawyers Association and the Fairfax Bar Association.

Katharine was first published in 2004 when she authored an article for the Journal of the Virginia Trial Lawyers Association titled *Relocation in Custody Cases: A History and the Present State of the Law.*

Katharine and her law partner Julie Gerock have co-authored the Virginia chapter of the European Lawyer Reference Series, *Family Law: Jurisdictional Comparisons.*

Most recently in 2018, Katharine published an article for the American Academy of Matrimonial Lawyers titled *Understanding and Litigation Parent-Child Alienation Cases*.

Katharine's background:

Katharine received her Bachelor of Arts in psychology from the University of Virginia and her Juris Doctorate (with Honors) from The George Washington University, where she served as the Chairperson of the Law School Academic Integrity Committee.

Katharine's interest in international family law issues was bolstered by the fact that she previously lived in Rome, Italy for 16 months.

Katharine enjoys travel, reading, cooking and spending time with her friends and family including her extended family in Argentina. Katharine occasionally brings her friendly rescue dog, Bodhi, into work with her.

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HAROLD A. MAYERSON

Website: www.mak-law.com

Email: hmayerson@mak-law.com

Harold A. Mayerson

Harold A. Mayerson is a co-founder of the firm. He is a Fellow of the American Academy of Matrimonial Lawyers (AAML) and has been listed in the Super Lawyers, Best Lawyers and Ten Leaders publications in recognition of his work in the Matrimonial Bar.

Harold brings to the practice of matrimonial law a long history of public service and a deep sense that the work he does is principally to help his clients get through one of the most difficult and complicated periods of their lives. He understands and accepts the responsibility that serving clients' needs requires that he brings to the table an understanding not only of divorce law but an enormous reservoir of knowledge in the fields of psychology, economics, divorce, and custody disputes. He understands that divorce and custody disputes too often bring out the worst in very good people. In his work, he collaborates closely with financial planners, accountants and mental health professionals.

Harold brings to the practice of matrimonial law a long history of public service and a deep sense that the work he does is principally to help his clients get through one of the most difficult and complicated periods of their lives. He understands and accepts the responsibility that serving clients' needs requires that he brings to the table an understanding not only of divorce law but an enormous reservoir of knowledge in the fields of psychology, economics, divorce, and custody disputes. He understands that divorce and custody disputes too often bring out the worst in very good people. In his work, he collaborates closely with financial planners, accountants and mental health professionals.

Harold's public service includes two years in the United States Peace Corps in the Dominican Republic where he learned Spanish and worked with small farmers setting up cooperatives. He remains fluent in Spanish and actively studies French at the Alliance Francaise. While at Brooklyn Law School, Harold founded a chapter of the Law Students Civil Rights Research Counsel (LSCRR) and served as National Treasurer of that organization and as a civil liberties intern with Martin Berger, Esq. in New York City.

Harold worked for two years as an Assistant Corporation Counsel for the City of New York presenting child abuse cases in the Family Court of the State of New York. He also served as a legislative assistant to Congressman Herman Badillo in Washington, D.C. and in the South Bronx and subsequently worked as staff attorney for the Criminal Defense Division of the Legal Aid Society in the Bronx and Manhattan for more than five years and while there, tried many jury trials.

Harold has held numerous leadership positions with Bar Associations and committees involved in matrimonial and family law. He served as President of the New York City Chapter of the National Lawyers' Guild for two years, and served as co-chair of the Custody Committee of the Family Law Section of the New York State Bar, also serving on its Executive Committee for over twenty years. He has been a Fellow of the AAML for over twenty years and has served as a vice president of the organization's New York State chapter and presently serves on that chapter's Board of Governors. He is also a Fellow of the International Academy of Matrimonial Lawyers (IAML).

He has served three terms on the Matrimonial Committee of the City Bar, plus one term as its chair. While in that position, he moved aggressively to present to the New York State Legislature the need for no-fault divorce legislation, an effort which has been successful. He has also served on the executive committee of the New York County Lawyers Association.

Harold was one of the founders of the New York City P.E.A.C.E., a program to educate parents going through divorce as to the effects of divorce on children, and has frequently lectured to parents on the importance of resolving custody disputes. He has served for over twenty years as a member of The Interdisciplinary Committee on Mental Health and Family Law and has served two terms as co-chair of that committee and presently serves on its executive committee. The Forum's members are comprised of judges, psychiatrists, psychologists, social workers, and lawyers who regularly meet and discuss issues relating to families and the effects on them while going through a divorce. He is Vice Chair of the AAML Impact on Divorce of Special Needs Children Committee.

Harold frequently lectures on divorce and custody law and lives in SoHo with his wife, Rebecca, who is a Library-Media Specialist at P.S. 16 in Corona, Queens. For relaxation, they travel every year to the northwest coast of Oregon to contemplate the Pacific Ocean and eat oysters, and to France where they split their time between Paris and the many rural areas of that country where they hike and explore the foods of France. Additionally, they spend time in their home in Bridgewater, Connecticut where they grow garlic which is sold locally, under the name "Bridgewater Garlic", proceeds from its sales are contributed to the local land trust. Harold is a member of the Bridgewater (Conn.) Democratic Town Committee and the Bridgewater Land Trust. He is also a Justice of the Peace in the State of Connecticut.

HAROLD A. MAYERSON, ESQ.

MAYERSON ABRAMOWITZ & KAHN, LLP

275 Madison Avenue, Suite 1300
New York, New York 10017
(212) 685-7474
Fax: (212) 685-1176
hmayerson@mak-law.com

BACKGROUND: Born in Hamilton, Ontario, Canada, December 27, 1941.

Admitted to Bar, 1967, New York.

EDUCATION:

- Hunter College of the City University of New York (B.A., 1962).
- Brooklyn Law School (LL.B., 1967).
- U.S. Peace Corps Volunteer, Dominican Republic, 1962-1964.
- Law Assistant, Appellate Division, Second Department, New York State Supreme Court, 1967-1968.
- Assistant Corporation Counsel, New York City, 1969-1970.
- Legislative Assistant and Counsel to Congressman Herman Badillo, 1971-1972.
- Staff Attorney, Criminal Defense Division, Legal Aid Society, City of New York, 1972-1977.
- Fellow, American Academy of Matrimonial Lawyers, 1993--; Member of New York State Chapter Board of Managers; Chair, 2002 to 2005, Matrimonial Law Committee: The Association of the Bar of the City of New York; Member and Co-Chair of the Executive Committee, Interdisciplinary Forum on Mental Health and Family Law.
- New York State Bar Association: Member, Family Law Section; Co-Chair, Custody Subcommittee 1990--; Member of Executive Committee 1990--; Member, New York County Lawyers' Association (Member, Board of Directors 1999-2002); Former Co-Chair P.E.A.C.E. Program/New York City.
- Frequent lecturer on matrimonial law, custody, no-fault divorce, parental access and parental alienation issues

PRACTICE: Family Law; Divorce Law; Domestic Relations Law

SKILLS: Fluent in Spanish

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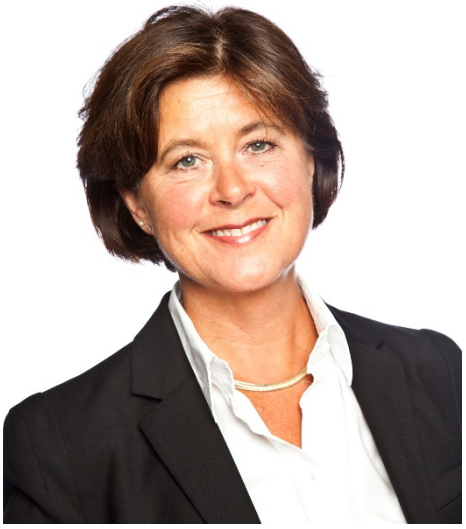
ELSE-MARIE MERCKOLL

Website: www.langsethadvokat.no

Email: merckoll@ladv.no



Else-Marie advises on the full range of family law matters. She is particularly experienced in relation to the financial settlement of personal estates, divorce proceedings and the dissolution of cohabitation arrangements. She assists in the drawing up of e.g. prenuptial agreements, marriage agreements, wills, cohabitation agreements, and acts as a lawyer for the administration of estates, both out of court and private. Else-Marie also works regularly as an executor. She is also experienced with child cases and international Child Abduction under the Hague Convention.

A large part of her practise have an international jurisdictional element to it.
Else-Marie is leading partner in Family Law Team in Langseth Advokatfirma DA.
She is fellow of the International Academy of Family Lawyers (IAFL) and Chairman of the Board of The Norwegian Bar Association, Oslo County.
She has written various articles and among them the Norwegian Chapter of the book FAMILY LAW, A Global Guide From Practical Law

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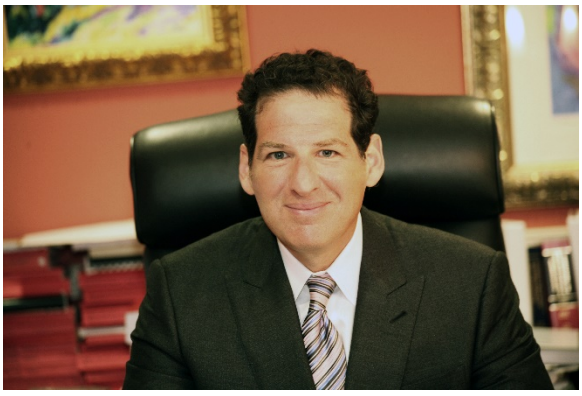
CHARLES FOX MILLER

Website: www.bsfllp.com

Email: cfmiller@bsfllp.com



Charles Fox Miller is an administrative partner at the law firm of Boies, Schiller & Flexner LLP. He is a graduate of the University of Michigan (BA) and Northwestern University School of Law.

Mr. Miller has developed a nationwide practice, with a focus on Florida and New York.

Mr. Miller is a member of The New York Bar and The Florida Bar. He is Board Certified in Marital and Family Law by The Florida Bar, and is a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. He is the immediate Past President of the American Academy of Matrimonial Lawyers (Florida Chapter).

Miller has served as a faculty member of the Houston Family Law Trial Institute (2006-2018). Mr. Miller has been named as one of Florida's Top Lawyers in Family Law and is listed in, *Super Lawyers*, *Florida's Best Lawyers*, *Florida's Legal Elite*, and *Best Lawyers in America* (2008-2018).

In 2016, he was recognized in The National Law Journal as a Trailblazer in the issue of Divorce, Trusts & Estates.

Mr. Miller has published articles and lectured extensively on family law issues.

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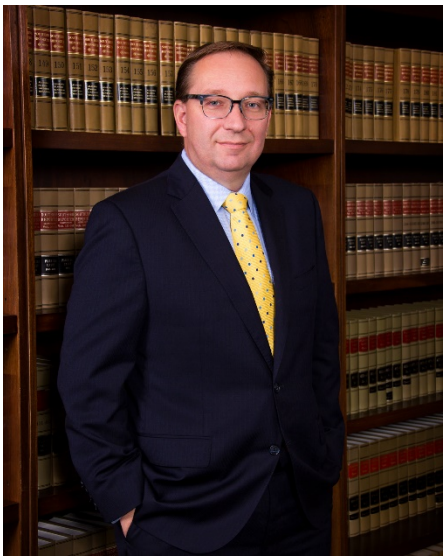

THOMAS SASSER

Website: www.sasserlaw.com

Email: tomsasser@sasserlaw.com

Thomas J. Sasser is the managing partner of the law firm of Sasser, Cestero & Sasser, P.A., which is located in West Palm Beach, Florida. He is Board Certified in Marital and Family Law. Mr. Sasser is a Fellow of the American Academy of Matrimonial Lawyers ("AAML") and the International Academy of Family Lawyers ("IAFL"). He is a Diplomate of the American College of Family Law Trial Lawyers. He received his J.D. in 1995 from The University of Florida and his B.A. in 1992 from The College of William and Mary in Williamsburg, Virginia. He is a past Chair of the Family Law Section of The Florida Bar. In addition, he is a four-time past chair of the Florida Bar Marital and Family Law Board Certification Review Course. He is a past President of the Florida Chapter of the AAML and serves as the national Secretary of the AAML. He also is the Treasurer of the IAFL and has served on the Board of the United States Chapter of the IAFL. He served as the chair of the Palm Beach County Bar Association Family Law Practice Committee from 2003 - 2008. Mr. Sasser is the author of several articles for the Family Law Section Commentator and The Florida Bar Journal. He often lectures for the Palm Beach County Bar Association, The Florida Bar Family Law Section, the AAML and the IAFL.

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DAVID SCHAFFER

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David enjoys practicing “esoteric” family law, both locally and internationally. With his in-depth knowledge of the UCCJEA, he convinced an Illinois trial court to overrule a Russian Supreme Court decision on custody jurisdiction. He has represented clients in two seminal cases re: habitual residence, including Redmond v Redmond. David is a member of the IAFL Hague Committee. He writes monthly "Front Lines of Family Law" column for Chicago Daily Law Bulletin. He appears on the U.S. Department of State's referral list for Hague cases. For his work with the State Department he received an Award of Merit from the National Center for Missing and Exploited Children. He is also a Fellow-American Academy of Matrimonial Lawyers, having served six years as an instructor for the AAML’s Institute for Training Family Law Associates. He was recently appointed to the Academy's newly created International Issues Committee. A former chair of the Illinois State Bar Associations’ Family Law Section Council, David was also appointed by the Illinois Legislature to serve its Family Law Sub-Committee, which completely rewrote Illinois’ family law statutes. David enjoys: an AV rating from Martindale Hubbell for more than 20 years; being voted “SuperLawyer” last 10 years; selected a Leading Lawyer. A frequent author and lecturer, David has been quoted in four Dear Abby columns and has appeared as a legal analyst on FoxNews.

2018 International Family Law Conference
New York, New York
April 20 – 21, 2018

BERNICE H. SCHAUL, Ph.D.

BERNICE H. SCHAUL, Ph.D.
Clinical Psychologist
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New York, New York 10011
(212) 228-9614
(718) 858-2530

Education:

B.A., Douglass College, Rutgers University
Phi Beta Kappa, Psi Chi, High Honors in Psychology

Ph.D., M.A., University of Connecticut, Department of Clinical Psychology

Certificate in Psychoanalysis, National Psychological Association for Psychoanalysis

Professional Experience:

Presbyterian-St. Luke's Hospital, Chicago, Illinois (Rush Medical Center)
Clinical Internship, 1968-69: Intensive training and supervision in Psycho-diagnostics and individual, child, group and couple therapy

Jewish Child Care Association, New York, New York, 1970-71
Research Psychologist working on projects involving the assessment of various dimensions of foster parenting.

Family Court Mental Health Services, New York, New York: 1971-77
Chief Psychologist, Senior Psychologist and Staff Psychologist

Private Practice, New York, New York: 1971 to the present
Forensic Consultation: Clinical assessments of clients and families in custody cases, reports to the Court; consultation with divorcing and divorced parents regarding child-related issues
Psychotherapy: Adults, adolescents and couples

Long Island University, Doctoral Program in Clinical Psychology: 1983 to 2014
Adjunct Clinical Supervisor: Supervisor of second year graduate students

P.E.A.C.E./NYC: Interdisciplinary parent education program organized by the New York County Lawyers Association, New York Society for the Prevention of Cruelty to Children, the Office of Court Administration and Judge Jacqueline W. Silbermann
Supreme Court, 1998 to 2004: Chair, Mental Health
Family Court, 1999 to 2001: Chair, Mental Health

Presentations:

"Using the Mental Health Expert in Custody and Visitation Cases," a three session training seminar for matrimonial and family law attorneys, September 1991

"Overnight Visitation for Young Children," presentations at the Interdisciplinary Forum, Brown Bag Lunch for New York County Family Court Judges and New York Society for the Prevention of Cruelty to Children (1996)

"Overnight Visitation Issues and Recommendations," panelist at a program sponsored by the American Academy of Matrimonial Lawyers, NY Chapter, and the Interdisciplinary Forum, April 1996

"Divorce, Custody Evaluations and the Courts," Colloquium for the Long Island University Doctoral Program in Clinical Psychology, November 1996

"Forensic Mini-Course: The Courts and Custody Evaluations," New York Freudian Society, November 1997

"Interviewing Children," presentation at the New York Society for the Prevention of Cruelty to Children, February 1998

"Deconstructing and Reconstructing: Revisiting Visitation," Panelist at a program sponsored by the American Academy of Matrimonial Lawyers, NY Chapter, and the Interdisciplinary Forum, June 1998

"Pathological Identification and Parental Alienation," presentations to the Matrimonial Committee of the Women's Bar Association, February 1999, and the Interdisciplinary Forum, March 2000

"Preparation of a Forensic Report in a Custody Matter," lecture for a CLE program at Pace Law School, April 1999

"Use of Forensic Experts in Matrimonial Cases," presenter/panel member at a meeting of the Matrimonial Section of the New York County Lawyers Association, April 1999

"Custody Evaluations," presentations for Cardoza Law School class and New York Hospital-Cornell/Westchester Division Child Psychiatry Fellows, April, May 1999, May 2000

"Parental Alienation—What it is and What It is Not," Westchester County Bar Association, CLE Program, November 2000

"Focusing on the Child: Law Guardian and Forensic Issues in Domestic Violence/Custody Cases," Judicial Seminar, Panelist, April 2002

"Custody Evaluations," presentations for New York Law School classes March 2003, February 2004, February 2005, February 2011

"The Use of Mental Health Professionals in Contested Child Custody Cases," CLE Seminar offered by the Appellate Division and New York City Family Court, Presenter/ Panelist, January 2004

"Expanding the Boundaries of Professional Practice," Presenter/Panelist, New York State Psychological Association Annual Convention, May 2004

"Forensics," Judicial Seminar for Family Court Judges, Presenter, June 2004

"Child Custody Forensic Evaluation: Science, Art or Neither?" Speaker at CLE Seminar, Association of the Bar of the City of New York, November 2004

"The Evolving Role of Forensics in Custody Litigation," Speaker at CLE Seminar, New York County Lawyers Association, January 2006

"Custody Evaluations," Presentation for CLE Training Session, Appellate Division, First Department, Assigned Counsel Plan, February 2006

"Effective Legal and Therapeutic Responses to Alienated Children in Divorce and Custody Setting," Speaker/Panelist, CLE Seminar offered by the Interdisciplinary Forum and New York County Lawyers Association, April 2007

"Parental Alienation: What is it? What isn't it? What can we do," Lecturer, Judicial Seminars, New York State Judicial Institute, Summer 2007

"Parenting Coordination: The Definitions, the Structure, the Challenges," Presentation to the Interdisciplinary Forum, April 2009

"The Content of Forensic Reports," Lecturer, Appellate Division, First and Second Departments, A Two Part Fundamental Training Series, May 2009

"About Our Kids," guest on Dr. Radio, Sirius XM Satellite NYU radio, May 2009

"Hot Tips from the Experts," Panelist, City Bar Center for CLE, November 2009

"20/20," ABC program on International Abduction Case, Expert Commentator, December 2009

"Parenting Plans: the psychological issues," OCA Webinar for Parent Educators in New York State, January 2010

"Parental Alienation: What is it? How do we recognize it? What can we do about it?"

Speaker, Forum given by the Matrimonial Committee of the City Bar and the Matrimonial Section of New York County Lawyers' Association, March 2010

"Psychological Perspectives on Child Abduction," Speaker, FBI sponsored program "International Parental Kidnapping: An Investigative, Legal and Psychological Understanding," November 2010

"The Role of the Court Appointed Forensic in Custody Disputes," Speaker, Panelist NYS Judicial Institute, March 2011

"Child Alienation: Remedies and Responses for the courts, counsel and evaluators," Keynote Speaker, program sponsored by City Bar Matrimonial Committee, the New York Women's Bar Association Matrimonial Committee, the New York County Lawyer's Matrimonial Section and the Interdisciplinary Forum on Mental Health and the Law, April 2011.

"Judicial and Clinical Perspectives on Current Issues in Forensic Evaluations," Presenter, program sponsored by the Appellate Division, Second Department and Mental Health Professionals Certification Committee, May 2012

"Parental Alienation: What is it? What isn't it? What can the court do about it?" Workshop for Court Attorney Referees, New York State Judicial Institute, September 2013

"Expert Testimony at the Cutting Edge," Panelist, American Academy of Matrimonial Lawyers CLE Seminar, May 2014

"The Spectrum of Parental Alienation and Estrangement: Challenges for Mental Health Professionals, Attorneys and the Court,"
Guest Speaker, program sponsored AFCC-NY and the New York City Bar Association, June 2014

"Parental Alienation from the Legal and Clinical Perspectives"
Speaker, Annual Fall Seminar for Attorneys for Children, Nassau County October 2014

"The Spectrum of Parental Alienation and Estrangement: Challenges for Mental Health Professionals, Attorneys and the Court"
Guest Speaker, Westchester County Bar Association CLE, May 2016

Publications:

"Considering Custody Evaluations: The Thrills and the Chills," chapter in A Handbook of Divorce and Custody: Forensic, Developmental and Clinical Perspectives, The Analytic Press, Inc., Hillsdale, New Jersey (2005).

Jurow, G. and Schaul, B., "Custody Evaluations: Recommendations about Recommendations," NYLJ, 10-24-05, page 4, col. 4.

Weiner, E. and Schaul, B., "Court Intervention in Child Alienation Cases," NYLJ, 7-25-16, Section on Matrimonial Law

Specialized Training:

"Parenting Coordination: Helping High Conflict Parents Resolve Disputes," a two-day workshop with Dr. Joan Kelly, sponsored by The Association of Family and Conciliation Courts and the University of Baltimore School of Law Center for Families, Children and the Courts, March 2004

Basic Mediation Training, Ackerman Institute for the Family (40 hour course) April through June 2006

Advanced Issues in Parenting Coordination: Functional Co-Parenting for High Conflict Families, a two-day workshop with Dr. Matthew Sullivan, sponsored by the Association of Family and Conciliation Courts, February 2008

Memberships and Committees:

Interdisciplinary Forum on Mental Health and Family Law
Executive Board: 1994-present
Co-Chair: 1997-1999; 2011-2013
National Register of Health Service Providers in Psychology
American Psychological Association
National Psychological Association for Psychoanalysis
New York State Psychological Association
Statewide Law Guardian Advisory Committee, Ancillary Services Subcommittee
Preparation of Materials for Judicial Conference, 1998
P.E.A.C.E. Statewide Advisory Board, 1999
Mental Health Professional Screening Committee, Appellate Division, Second Department, 2005-present

July 2016

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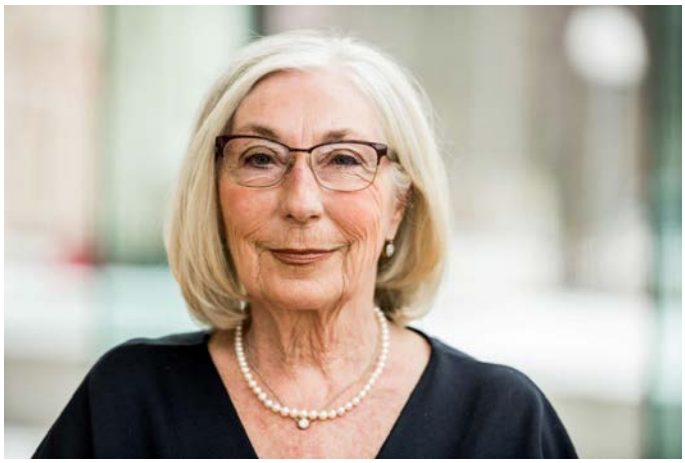
MIA REICH SJÖGREN

Email: mia@reichsjogren.com



Member of the Swedish Bar Association since 1984

Partner , Sverker Sjögren Advokatbyrå AB, 1984- 2004

Partner , Advokaterna Sverker och Mia Reich Sjögren AB, 2004-

The Law Firm cooperates with Advokatfirman Ljung AB, Gothenburg since 2006
Adress Advokatfirman Ljung AB, Södra Hamngatan 23, 400 13 Gothenburg , Sweden.

Branch office in Båstad, Adress Ängelholmsvägen 1, 269 21 Båstad, Sweden.

Member of the IBA, family Law division

Member of the IAML since 1994,

Admissions Committee, IAML

Counsel IAML

President of the European Chapter of the IAML 2008-2010

Vice-President IAML 2010-2016

President Elect 2016-2018

Lectured and written on Swedish International Family Law

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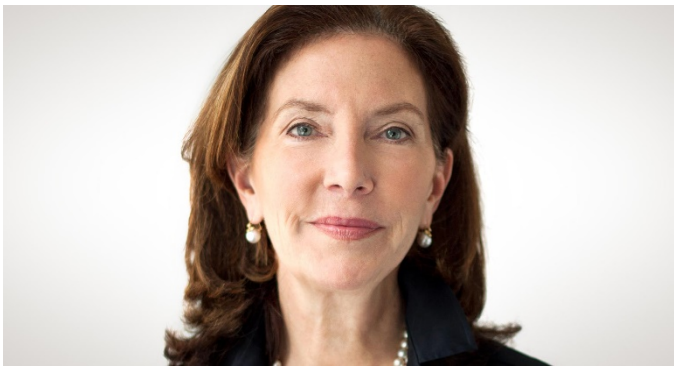
PAMELA SLOAN

Website: www.amsllp.com

Email: sloan@amsllp.com



Pam is a member of Aronson Mayefsky & Sloan, LLP, a firm with offices in New York City and Connecticut, whose practice is limited to divorce and other aspects of family law, including the custody and well-being of a separating couple's children, the identification, valuation and distribution of complex financial assets, the assessment of and entitlement to child and spousal support, the drafting of pre-marital and marital agreements, and the trying of cases when necessary to achieve the best result for the firm's client. Pam is a fellow of the American Academy of Matrimonial Lawyers and of the International Academy of Matrimonial Lawyers. She is a former Chair of the Family Law Section of the New York State Bar Association, a former Chair of the Matrimonial Law Committee of the New York City Bar Association, and a current member of the Association's Committee on the Judiciary.

Although AM&S's practice is focused primarily on the representation of high net worth individuals, Pam is committed to representing people from underserved communities in their family law matters. She also is involved in diverse community organizations. She serves on the Board of Directors of Women's Housing and Economic Development Corp. (WHEDCo) in the Bronx and on the Board of Governors of Bishop Loughlin Memorial High School in Ft. Greene, Brooklyn.

Pam has been recognized by her peers for her skill and integrity: she received and maintains the highest rating from Martindale-Hubbell, she has been listed

in the Best Lawyers in America since 2003 (Woodward/White), and since the inception of New York Super Lawyers (Law & Politics), she has been consistently named as one of New York City's top matrimonial practitioners, one of its Top 50 Women Lawyers, and one of its Top 100 Lawyers.

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SANDRA VERBURGT

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SANDRA VERBURGT

International Family Lawyer
Partner at Delissen Martens
verburgt@delissenmartens.nl

Practice
Sandra is a partner at Delissen Martens. She is in charge of the private clients and international relationships team, which provides specialised advice and advocacy on various practice areas to both international clients and professionals working for international clients. Her practice includes mainly divorces and financial relief (maintenance, divisions and prenuptial agreements), both contentious and non-contentious. Many of these disputes involve complex and financial aspects, often with an international element. Since 2007 Sandra also deals with cross border disputes.

Delissen Martens
Delissen Martens advocaten belastingadviseurs mediation is a powerful, medium-sized law firm in The Hague/the Netherlands, that is able to provide private and corporate clients with legal services of the highest quality.

Publications/Lectures
Sandra is co-author of the chapter on Private International law and Maintenance law in the explanatory commentary "*SDU Commentaar Relatierecht" (SDU, April 2014)* and the online equivalent of Dutch Legal Publisher SDU since 2012.
In March 2018 she lectured at the UCERF symposium at the University of Utrecht on Brexit and international Family law.
Furthermore she has written several publications in Dutch and English law journals.
Sandra is also a member of the editorial board of the IAFL Online News, in which E-journal she publishes frequently.
Sandra is a trainer of DM Academy, the training establishment of Delissen Martens, certified by the Dutch Bar Organisation.
Furthermore she frequently lectures during conferences of the International Academy of Family Lawyers (IAFL).

Memberships
Sandra is an accredited family lawyer/mediator and member of the Dutch Association of Family Lawyers and Divorce Mediators (vFAS) and a fellow of the International Academy of Family Lawyers (IAFL), for which body she is serving as a Vice President of the Executive Committee and Vice President of the European Chapter.

https://www.delissenmartens.nl/en/team/sandra-verburgt

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OREN WEINBERG

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Oren Weinberg
Partner at Boulby Weinberg LLP

Oren has practiced family law exclusively since 2005. He advocates for his clients when negotiating agreements, appearing before trial and appellate courts as well as in mediations and arbitrations. Oren handles all aspects of family law including property and support, custody and access. Oren acts for clients based in Ontario and internationally.

Oren graduated from York University with an Honours Bachelor of Arts in 1995. He obtained a Masters of Arts in 1997 from the University of Toronto. Oren backpacked through Asia and Australia and worked for a major Canadian bank before attending law school. He graduated from the University of Western Ontario with an LL.B. in 2004. He was called to the Ontario bar in 2005.

Oren is a member of the Ontario Bar Association and the Advocates' Society. He is a Fellow of the International Academy of Family Lawyers and is recognized by Best Lawyers.

Oren participated in the Program on Negotiation at the Harvard Negotiation Institute where he completed the Mediating Disputes Workshop. As a mediator, Oren focusses on his client's interests in order to tailor a solution focused process that promotes the parties' participation in resolving their own differences. When asked, Oren will also arbitrate.

Oren has a passion for travel. He is an avid water skier and cyclist.

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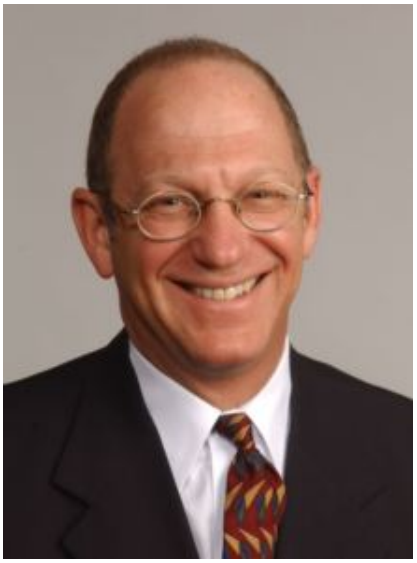

ELLIOT WIENER

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Hastings-on-Hudson, New York 10706-1904
914-393-7871 (voice)
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EMPLOYMENT EXPERIENCE

Phillips Nizer, LLP 666 Fifth Avenue New York, NY 10103 212-841-0726 (voice) 212-262-5152 (fax) ewiener@phillipsnizer.com	2003-present
Hall Dickler Kent Goldstein & Wood LLP	1997 - 2003
Abbott, Duncan & Wiener	1981 - 1997
Juvenile Rights Division, Legal Aid Society of NYC	1977 - 1981

PRINCIPAL AREA OF PRACTICE: MATRIMONIAL AND FAMILY LAW

Matrimonial: Development, management, and trial of equitable distribution and custody cases including expert testimony regarding business valuation and custody/visitation, including appeals

Custody and Visitation: Counsel to parents and attorney for child in numerous custody and visitation proceedings

Child Protective: Obtained favorable judgments after trial in cases involving claims of "shaken baby syndrome" and sexual abuse of children

COLLABORATIVE LAW TRAINING

Training in Collaborative Law 2007

DIVORCE MEDIATION TRAINING

Certificate in Divorce Mediation from Ackerman Institute for the Family 1999

CLINICAL INSTRUCTOR OF LAW

New York University School of Law 1982

Taught trial practice to third year law students including evidence, methods of examining witnesses, arguing before courts and other courtroom skills, procedural rules, and substantive law, case development, and interviewing techniques

PUBLICATIONS

"The Separate Property Credit", *New York Law Journal*, July 31, 2017

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"Conflict Ridden Homes, Harm to Children, and Reform of DRL 234", 2 *AFCC-NY Newsletter* Issue 1 (2017)

"Court Intervention in Child Alienation Cases", *New York Law Journal*, July 25, 2016

"The Impact of Internet Pornography Use and Cybersexual Behavior on Child Custody and Visitation", 10 *Journal of Child Custody 68-98*

"The Chief Judge Clarifies the Role of Attorneys for Children," 40 *Family Law Review* 4

Co-author, "Collecting Support from a Payor Who Has Filed Under Chapter 11," 25 *The Matrimonial Strategist*, Number 11 (November 2007)

"Court-Ordered Psychotherapy in Custody Disputes," *New York Law Journal*, July 30, 2007

"Reforming the Language of 'Custody,'" *New York Law Journal*, August 7, 2006

"Our Dual System to Modify Child Support," *New York Law Journal*, June 6, 2005

"Attorney's Charging and Retaining Liens," 30 *Family Law Review* 4

"Unconscionable Separation Agreements in New York," 31 *Family Law Review* 18

LECTURES

New York College of Matrimonial Trial Lawyers, Lectured and demonstration in continuing legal education program for matrimonial attorneys, 2013, 2014, 2015

NYS Office of Court Administration Continuing Education for Judges, Lecture on Child Custody Issues, 2007

Second Judicial Department Continuing Education for Law Guardians, Lecture on Child Custody Issues, 2007

NYS Bar Association, Expert Evaluator's Testimony in Child Custody Proceeding 2003 and 2005

PROFESSIONAL & BAR MEMBERSHIPS

Fellow, American Academy of Matrimonial Lawyers

Fellow, International Academy of Family Lawyers

Past Co-Chair, New York County Lawyers Association, Matrimonial Law Section

New York County Lawyers Association, Joint Committee on Law Guardians (1997)

Past Co-Chair, Interdisciplinary Forum on Mental Health & Law

Association of the Bar of the City of New York

- Matrimonial Committee (past)
- Family Court (past)
- Children and the Law (past)
- Juvenile Justice Committee (past)

Admitted to Practice

- New York State (1977)
- Federal District Courts, Southern & Eastern Districts of NY (1979)
- District of Columbia (1980)

EDUCATION

J.D., 1976, State University of New York at Buffalo

B.A., *magna cum laude*, Political Science, 1973, Boston University

National Institute of Trial Advocacy, 1980