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Queens Bar Bulletin

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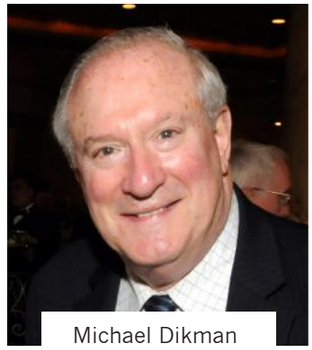
December, 2017 | Vol. 84 No. 3

2017 Family Law Review

By: Michael Dikman and David S. Dikman

THE "NEW" MAINTENANCE LAW

This has not been a year that marked many significant statutory or case law developments. The amendments to the maintenance laws (DRL § 236 B [5-a] and [6]} and numerous other DRL and FCA sections became fully applicable to all actions commenced two years ago - on or after January 23, 2016. Not enough time has elapsed for there to be any significant body of law establishing just how the appellate courts are going to deal with any of the new statutory criteria or advisory durational guidelines. We continue to get varying lower court decisions, with discussion of the many reasons for "deviating" from the temporary maintenance guidelines, which was anticipated in early discussions of this new law. However, there is still a dearth of appellate decisions specifically dealing with the new statutory "presumptive" amounts, deviations and durational decisions. Presumably, these matters will start to appear in 2018 decisions.



Michael Dikman

David S. Dikman

TEMPORARY EXCLUSIVE POSSESSION

L.M.L. v. H.T.N., (Supreme Court, Monroe County) Law Journal, October 20, 2017, 2017 Slip Opinion 51333U. Not long ago Hon. Richard A. Dollinger, known for literary, reasoned matrimonial opinions, wrote this decision knowing full well that he was breaking new ground in connection with requests for temporary exclusive possession of marital residences. We will not review the many decisions he cited and discussed along the way, except to say that it had been well established that in the vast majority of cases, one would not be able to oust a spouse pendente lite, without a clear showing (usually at a hearing) that the other was a danger to person or property or that he or she had established an alternate residence.

His decision on this motion was to GRANT temporary exclusive occupancy, without a hearing, and without either of those two prerequisites having been established. In this case, the motion papers reflected that the parties lived in a house owned as tenants by the entirety, together with their 9 and 12 year old sons. Their affidavits were in substantial conflict as to the underlying facts. Each claimed to be the primary care giver. The wife alleged that

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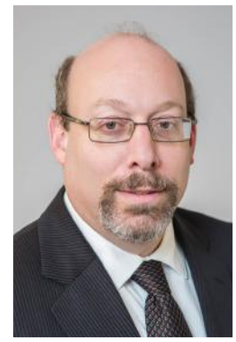
Shared Custody

By: Joshua R. Katz



Under New York law, there is a presumption that both parents have equal rights to their children. There is no longer any gender bias or preference in the law. However, the law does not presume that "equal rights to the child" and "best interest of the child" are one and the same. The rights of the parents and what's best for the children are two separate issues, and the standard by which Courts are supposed to determine custody, according to the law, remains that of the best interests of the children.

Before addressing whether it is fair or reasonable to presume that the best interests of children is, or is not, served by a split residential custody arrangement, let's separate the concepts of legal custody and residential custody.

Legal custody, or decision-making authority, is the right to determine major, life-altering paths for a child, often divided into spheres of medical, religion and education. If one parent is given the right to make each of these decisions, then he or she is granted "sole" custody. If these spheres are divided (i.e., one parent makes religious decisions while the other makes medical or educational decisions), or if the parents are permitted to makes decisions together, they are said to have "joint" custody. Fortunately, such life-altering decisions are extremely rare in most children's lives.

Continued on page 13

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event listings

January 2018

Monday, January 1	New Year's Day - Office Closed
Monday, January 15	Martin Luther King, Jr. Day - Office Closed

February 2018

Monday, February 12	Lincoln's Birthday - Office Closed
Monday, February 19	President's Day - Office Closed

March 2018

Friday, March 30	Good Friday - Office Closed

April 2018

Wednesday, April 18	Equitable Distribution Update

May 2018

Thursday, May 3	Annual Dinner & Installation of Officers

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Jeffrey M. Benjamin
Melissa Britton
Brian A. Campbell
Vivian R. Cedeno
William Halkias
Vishal Hardowar
Ned H. Kassman
Georgia Kosmakos
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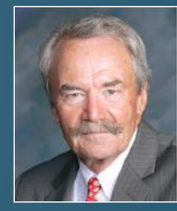

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President's Message

"I am a firm believer that the more we share ideas, the better off we will be as an organization."

I mentioned in my last message that we have entered the busy season following the slower pace of the summer. The Bar Association has been extremely busy this Fall with many CLE events in October and November.

Just last week we had our highly attended Court of Appeals update. I was to extend a personal thanks to Spiros Tsimbinos who has moderated and presented this successful program for about twenty years. Spiros comes up from Florida each year specifically to share with us his knowledge of the past year's decisions in the US Supreme Court. He also assembles an excellent panel to give us updates on both the Civil and Criminal cases of interest from the NY Court of Appeals. This year we were honored to have Court of Appeals Judge Michael A. Garcia attend and speak to our association regarding his view from the bench. We also got to say farewell to a longtime friend of our Association, Hon. Randall T. Eng, the Presiding Justice of the Appellate Division, Second Department, who previously announced that he will be retiring at the end of the year. I was fortunate to be able to present the Judge with an award honoring his many years of service to the entire Queens community.

The Board of Managers has been hard at work handling the day to day needs of the Association as well as the requests of the members and other Associations. I recently had the opportunity to meet with the bar presidents from the NYS Bar Association, NYC Bar, Brooklyn Bar, NY County Bar and Richmond County Bar. While each organization has some individual and unique needs, we all share some common issues and we hope to meet throughout the year to work together to address them. I am a firm believer that the more we share ideas, the better off we will be as an organization. Please feel free to contact me directly at **newlaw@aol.com** if you have any questions, concerns or recommendations. I hope that you will also visit our page on Facebook. We have increased our social media presence by putting more information and photographs of our events on the page in a timely manner. Please also check out our web site at qcba.org to see our calendar of events, including many CLE presentations and our annual Holiday Party, which will take place this year on December 7, 2017.

I look forward to seeing you at our events. If you would like to talk in person please call or email to set up a mutually convenient time. Of course, the best way to find me is to look on the second floor in the Supreme Courthouse on Sutphin Boulevard where I have spent nearly every workday for the past 25 years.

Best regards,
Gregory J. Newman

Editor's Note

By Paul E. Kerson

Our Jails and Prisons - A Correctable Shonda

"It is no longer sufficient for judges and prosecutors to say that this is "Correction's" problem, not ours."

This past summer, I attended the Iowa Summer Writing Festival at the University of Iowa.

I have saved most of my files from practicing law with all of you in our local courts these past 40 years. I brought three of the most moving of these files with me to Iowa.

One was a death penalty case. We in New York actually had the death penalty from 1995 through 2007. Fortunately, because of an especially vigorous criminal defense bar no one was actually executed.

The other two involved a knocked-out eye at Riker's Island and a nearly fatal stabbing in a State Corrections Facility Upstate.

Despite the passage of decades, the emotional impact of these three cases has never left me. In my mind's eye, I always see the defendant's mother's face in my capital case. I always see the nearly blinded prisoner and the nearly killed prisoner. They are with me – these three total failures of our system.

When I started practicing law 40 years ago, Yiddish was the language of the hallways of our Queens County Courts. Jerry Ginsberg, Moe Tandler, Jimmy Richman, Manny Herman, Lenny Herman, Abe Schwartz, Murry Chayt, Gene Lefkowitz – they were all childhood speakers of Yiddish from Brooklyn, Queens, Manhattan or the Bronx who came to live and work in the Queens County Courts in adult life.

Yiddish has philosophical concepts that cannot exactly be explained well in English. My elders at the Queens County Bar taught me the meaning of these concepts in the halls of our local courts.

"Shonda" was one of these concepts. "Shonda" is literally translated as "shame" but it means far more than that. "Shonda" means a shame in front of the whole community, a massive shame, a colossal shame, a giant collective embarrassment, a situation that cannot be allowed to continue.

A jail and prison that takes life from people, that takes eyes from people, that allows a person to be cut from neck to stomach – that system is a Shonda.

"The departed live on in the hearts and minds of those who knew them in life." That is another Yiddish concept.

Jerry, Moe, Jimmy, Manny, Lenny, Abe, Murry and Gene – their teachings about the Shonda we are in - their teachings are still with me, even if they themselves have passed away.

At the University of Iowa this past summer I took their teachings and combined them with the three case files described above to write one short story describing our jail and prison system. In my July, 2017, writing class in Iowa, this story was critiqued and rewritten several times.

This short story, "Not as Long as I'm Alive" will be printed in the our next issue - the Jan. 2018 Queens Bar Bulletin. I hope it will be read and re-read by every law professor, law student, judge, prosecutor, defense attorney, police officer and corrections officer over and over until the message sinks in -our systemic shonda must be changed for the better right away.

It is no longer sufficient for judges and prosecutors to say that this is "Correction's" problem, not ours. Once a defendant is convicted and imprisoned, the prosecutor who convicted him and the judge who sentenced him must be duty-bound to receive monthly reports on the conditions of his confinement – to make sure he does his time unhurt and with every opportunity to study and unlearn bad behavior. And if problems arise, the judge, on his own motion must re-appoint defense counsel to get solutions from "Corrections."

And when a person is jailed pending trial, that duty is even more important. Judges and prosecutors must take personal responsibility for prisoners who have not made bail.

In short the entire "Corrections" system must be placed in the Judicial Branch of the City and State Government, and taken out of the Executive Branch where it has sunk to levels of depravity, violence and corruption which have no limits.

Now that would be a fitting memorial to Jerry, Moe, Jimmy, Manny, Lenny, Abe, Murray and Gene. As you read this Editor's Note and next month's short story, their souls are watching you.

the husband had a violent temper, frequently started fights and had threatened her with a knife. The husband alleged the wife was an alcoholic and that she had threatened to kill him. Each denied the other's allegations. Although the husband acknowledged there were numerous verbal arguments, it was uncontested that he had never been physically violent. There was agreement that the household was rife with arguments, verbal fights and flared tempers. Judge Dollinger emphasized behavioral science observations that "even minimal levels of domestic discord impact children living in a besieged household." He concluded that the current standards and precedents dealt with the conflict between the parents, but inadequately addressed the best interests of the children, who are adversely impacted by living with extensive domestic strife and turmoil. He concluded that a more child-centered approach was required.

Departing from the usual regard for whether or not an alternate residence was available, the court expressed consideration of "the available funds to relocate in the short term" rather than the absolute necessity that a residence be currently available. He reduced the level of marital discord necessary where children were being effected, and rather than consider an available alternate residence, the court emphasized the availability of funds to ACQUIRE such a residence. As a result, the wife's application was granted and the husband directed to vacate within 15 days "to reduce the stress and strain on these children and to further their best interests," although stating that there would be a hearing within the next 45 days and that the holding would not prejudice either parent in connection with the final determination of custody or residential status.

Given the frequent delays in trying cases, having decisions rendered and judgments entered, the lip service given to the idea that the ousted party will not be prejudiced in connection with the ultimate custody decision is clearly not realistic. Judge Dollinger did admit that "siding with one party based on less than a full airing of proof seems contrary to any norms of due process and heightens the possibility of judicial error." However, he elected to quickly remove the marital strife from the children's lives, and give that goal more weight than following the many precedents that require hearings when there are conflicting allegations. In his decision the judge acknowledged that he could not identify the perpetrator of the discord without a hearing. No matter how well-intentioned the decision may have been, we believe that in this case it was improper to "evict" either party without the usually required evidentiary hearing.

MAINTENANCE TAX DEDUCTIBILITY

As of this writing, sweeping new income tax laws appear likely to become enacted, different versions having been passed by the House and Senate, awaiting negotiations to resolve the differences. Of specific interest to our family law practice is now expected discontinuance of the ability of maintenance payors' to deduct spousal support from their taxable income while having the payees report the same as taxable income. In all situations where the spousal support computations yield a presumptive award, the maintenance payor is the far superior earner. This has, for decades, before and after the 2015 spousal maintenance laws were enacted, resulted in the government often losing money. In low income cases the maintenance deduction for the payor may not result in any taxation paid by the payee if their taxable income is less than the filing threshold. Also, if a payor is in a higher income tax bracket than the recipient the same income is taxed at a lower rate and the government loses money. The deductibility of spousal support to the payor, and the tax savings when such income is reported in a lower bracket by the recipient has been a mainstay in our negotiations and court determinations for a long time. The result of this change will have the effect of reducing the available dollars with which to formulate a support proposal to the payee.

Numerous short term problems may be caused by

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2017 Family Law Review | continued from p.6...

reason of the commencement date of any such tax change. At present, the proposal is not to effect orders or agreements pre-dating the effective date of the new law. But this will cause problems with cases that have been tried and tax computations and work sheets made, based upon current law, when the ultimate decision and entry of judgment are delayed until after the effective date of a new law.

RETROACTIVITY OF TEMPORARY SUPPORT OVER-PAYMENTS

It was established law for a long time that in the event a temporary child support or temporary maintenance award was found to be too LOW after trial, the deficiency or under payment was required to be calculated from the date the initial support demand was made, and was recovered retroactively - RODGERS v. RODGERS, 98 A.D. 2d 386, 470 NYS 2d 401 (App. Div. 2nd Dept.); BURNS v. BURNS, 84 N.Y. 2d 369, 618 NYS 2d 761 (Ct. of App.); SHERMAN v. SHERMAN, 304 A.D. 2d 744, 758 NYS 2d 667 (App. Div. 2nd Dept.). However inequitable, as the law developed, over payments did not require retroactive recoupment of the excess - VERDGRAGER v. VERDRAGER, 230 A.D. 2d 786, 646 NYS 2d 185 (App.Div. 2nd Dept.); PETEK V. PETEK, 239 A.D. 2d 327, 657 NYS 2d 738 (App. Div. 2nd Dept.). This inequity was partially remedied by the Court of Appeals in JOHNSON v. CHAPIN, 12 NY 3d 461, 881 NYS 2d 373. Based upon that decision, if temporary maintenance is found to have been excessive, the court may make an adjustment in the equitable distribution award (discretionary, not mandatory). But the claim for recoupment of excess child support payments was rejected based upon strong public policy against it. Such a credit for excess temporary maintenance payments was approved in POBERESKY v. POBERESKY, 71 A.D. 3d 516, 897 NYS 2d 401 (App. Div. 2nd Dept.) and in certain other situations, where public policy required it, for example after the concealment of facts which warranted earlier termination of spousal support - KATZ v. KATZ, 55 A.D. 3d 680, 867 NYS 2d 100 (App. Div. 2nd Dept.).

Insofar as child support over-payments were concerned, regardless of the long standing prohibition against recoupment, the First Department decided that public policy does not forbid offsets of child support over-payments against add-on obligations - COULL V. ROTTMAN, 35 A.D. 3d 198, 828 NYS 2d 295 (App. Div. 1st Dept.) and the Second Department has followed suit - LEWIS v. REDHEAD, 37 A.D. 3d 469, 830 NYS 2d 238 (App. Div. 2nd Dept.); McGOVERN v. McGOVERN, 148 A.D. 3d 900, 50 NYS 3d 408 (App. Div. 2nd Dept.).

The problem remains that there is still substantial, potential prejudice against temporary support payers, when it turns out the order was excessive, after a full evaluation of financial circumstances at trial. Whereas insufficient retroactive payments are required to be repaid, excess payments of maintenance are not so automatic. Adjustments of equitable distribution, for excess maintenance payments, remain discretionary and questionable and excess child support, if adjusted at all, can only be as against "add-on" expenses. This emphasizes an approach we have often recommended before. Precisely because insufficient payments are automatically recoverable and the payee has a clear and absolute remedy, and payors of excess payments do not have such an automatic remedy, equity dictates that courts fixing temporary orders err on the side of minimizing orders, when there are questions about the extent of the payors' income or undocumented claims of unreported income. Once a court makes a temporary order, charging a payor with questionable income or potential, that payor may be irreparably damaged, whereas an insufficient order can and must be rectified.

Of course, faced with disparate allegations of fact raised in motion submissions, some courts will opt to order a hearing to determine temporary support. Although this result may be more likely to avoid inappropriate awards, hearings are generally unpalatable to both the courts and the parties, due to the added time and expense.

ROBERT A. MIKLOS
Medical Malpractice & Personal Injury Attorney

CONTACT ROBERT NOW
(516) 417-0744
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Photos by Walter Karling

Arthur Terranova with Hon. Randall Eng

Assoc. Justice Sheri Roman saying a few words on Presiding Justice Randall Eng's retirement.

Assoc. Justice Valerie Brathwaite Nelson remarking on Presiding Justice Eng's retirement

Attendees to the Recent Significant Decisions and Developments in our Highest Appellate Courts.

Clerk of the Court, Aprilanne Agostino speaking on Presiding Justice Eng's retirement

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Comments from Hon. Michael J. Garcia, Associate Judge at the NY Court of Appeals

Hon. Seymour Boyers, Hon. Phyllis Orlikoff Flug, Donna Furey and Hon. Joseph Zayas

Recent Significant Decisions & Developments from Our Highest Appellate Courts | 10.24.17

Photos by Walter Karling

Hon. Seymour Boyers, Hon. Sheri Roman, Hon. Randall Eng, Hon. Bernice Siegal and Hon. Janice Taylor

Spiros Tsimbinos speaking on recent decisions and developments in the US Supreme Court.

Hon. Valerie Brathwaite Nelson, Thomas Principe, Hon. Randall Eng, Hon. Sheri Roman and Hon. Aprilanne Agostino

Joe DeFelice, Joe Carola, Denisse Gomez and Marie-Eleana First

Tom Principe reflecting on his friendship with Presiding Justice Eng.

Karl Pflanz, Deputy Chief Court Attorney of the Appellate Division, 2nd Dept discussing civil cases

Officers and Members of the Board of Managers

Tom Principe, Claudia Carbone, Hon. Randall Eng and EJ Thorsen

President Greg Newman presenting Presiding Justice Randall Eng with a plaque for his judicial service

President Greg Newman with Spiros Tsimbinos

Presiding Justice Randall Eng speaking on his upcoming retirement.

Shared custody | continued from p.1...

Joint decision making is a difficult process for an intact family, and it is ever more difficult following a divorce. Despite this fact, some form of joint legal custody is appropriate in the great majority of divorces, as long as the process for making decisions is defined in the event the two parents cannot agree.

The Court of Appeals made clear long ago that the awarding of joint custody by judicial decision should be avoided:

"... joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos..." Braiman v. Braiman, 44 NY2d 584 (1978).

The purpose of this article is to focus on physical, or residential custody, rather than legal custody. And, specifically, the concept of split residential custody whereby the children spend equal time in each parent's home following a divorce, which is a growing trend in New York – and specifically in Queens County.

In Queens County Supreme Court, we have four justices assigned to matrimonial parts, who are charged with the responsibility to make custody determinations. In our Family Court, custody cases are normally heard by our 10 highly qualified Court-Attorney Referees, unless there are concurrent issues of neglect or family offenses, or if the litigants insist on their determination being made by a judge. These jurists must consider a totality of circumstances, including important factors such as status quo, which parents have provided the majority of primary caretaking duties, the mental health of the parents, relative reasoning/judgment skills, the type of support structure and ancillary family members available and utilized by the parties, home environments, discipline techniques, the existence of siblings, the ability of the parents to foster a positive relationship with the non-custodial parent, communication skills, medical issues, religion, etc. Custody determinations are a tremendous responsibility for our jurists, and disputed custody litigation is frequently a time-consuming, expensive and evasive process that can tear families apart.

Prior to 1990, Courts would routinely award residential custody to one parent, and establish a visitation schedule for the non-custodial parent. In or around the 1990's, as Courts shied away from the term "visitation" and began utilizing "parenting time" instead, a trend emerged whereby non-custodial parenting times gradually increased. Today, several jurists favor an award of equal parenting time, by schedules that follow repeated patterns such as 5-2-2-5 (five days with mom, two with dad, two with mom, five with dad), 4-3-3-4, or alternating weeks.

But while such schedules obviously are "fair" to the parents, how do they affect the best interests of children?

Shared residential custody is becoming more prevalent – not just in Queens or New York, but worldwide. According to The American Journal of Family Law (Nielson, January 2013):

Until recently, only 5% to 7% of American children lived at least one third of the time with each parent after their divorce. Most lived exclusively with their mother, spending only four or five nights a month - at most - in their father's home. However, in Arizona and in Washington state 30% to 50 % of the children whose parents divorced in the past several years now live at least one-third of the time with each parent, as do 30% of the children whose parents divorced in Wisconsin between 1996 and 2001. Likewise, in Australia, the Netherlands, and Denmark approximately 20% of children whose parents have separated are in shared residential custody. In an international study of 14 countries, rates of shared parenting varied from 7% to 15%. In Norway 25% of children have parents who live apart, 8% of whom live with their fathers and 10% live in shared residence. In Sweden, where the courts have the legal right to order alternating residence even when one parent is opposed, 20% of the children with separated parents live in two homes.

There is very limited empirical research on the effect that split residential custody has on the development of children. Many studies have been conducted around the world on this subject, but none are particularly scientific or dispositive. At least 40 different studies have been conducted worldwide, which were reviewed and summarized for the American Academy of Matrimonial Lawyers by Linda Nielson, Professor of adolescent and educational psychology at Wake Forest University, and author of the study quoted above. Professor Nielson found that none of these 40 studies underwent an anonymous peer review process by experts in the field, and each one has multiple scientific or procedural shortcomings.

According to Susan Silverstein, L.C.S.W. and frequent appointee of our Queens jurists to conduct expert forensic custody evaluations, "split custody arrangements meet the parents' needs, but should not be done without properly assessing the needs of the children." Ms. Silverstein believes that Courts should continue to focus on the needs of the children. "Children need the security of having a stable place to call home." However, Ms. Silverstein agrees that, "If the child has a stable relationship with both parents, and the parents live in a close geographical proximity and have a basic ability to co-parent and communicate without a need for mental health intervention to do so, then the child is able to move from home to home easier."

Custody laws are drafted by legislators who are, usually, lawyers, and not mental health experts. One of the justifications frequently cited for awarding split residential custody is that it will reduce the likelihood that the parents will return to Court in the future. Interestingly, most studies conclude that custody resolutions where the child's time is split equally between the mother and the father do not reduce re-litigation in the future — i.e., these parents are equally likely to return to court to seek modifications.

If there is no benefit to the Court, is there a benefit to the children? There is no evidence that children who were raised in a shared residential custody arrangement benefited or showed improvement as they grow up in:

- behavioral conduct,
- psychological well-being,
- physical condition, or
- academic performance.

And surprisingly, there is also no evidence that children develop better relationships with either parent, as compared with children who lived with one parent and visited the other in a more traditional scenario. Do children benefit from spending more time, or "quality time" with their nonresidential fathers? Does the amount of time or how that time is allocated make any difference? If not, then split residential custody is based on irrational or unwarranted assumptions.

A recent study by Amato and Dorius (2012), concluded that the amount of time nonresidential fathers spend with their children is closely tied to the ongoing quality and endurance of their relationship. Contrary to most researchers, Paul Amato argues that co-parenting and an ability to communicate are less important factors in determining whether split residential custody is good for children, concluding that "Although it is widely believed that cooperative co-parenting is linked to better outcomes for children, almost no studies have actually tested this assumption."

Other studies have found nonresidential fathering time to correlate with other positive outcomes for children, including higher self-esteem (Berg, 2003) (Dunlop, Burns, & Berminghan, 2001), less delinquency and drug use (Carlson, 2006) (Coley & Medeiros, 2007), fewer behavioral problems (King & Soboleski, 2006), and less smoking and dropping out of high school (Menning, 2006; Menning, 2006). In fact, adolescents from intact families who do not feel close to their fathers are more delinquent than adolescents with divorced parents who feel close to their fathers (Booth, Scott, & King, 2010).

It seems obvious that children need to spend quality time, including overnights with noncustodial parents.

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Shared Custody | continued from p.13...

Children who lived more than 30 nights a year with their father were found to be more likely than those who spent fewer overnights to feel comfortable in the father's home, to feel they belonged there, and to feel their fathers knew them well. (Cashmore, Parkinson, & Taylor, 2008).

However, a need to spend time, and even quality time and overnights, does not necessarily mean that children benefit from equal time with both parents as opposed to liberal or substantial time within a more traditional schedule.

Most split-residential custody arrangements ultimately fail.

It is interesting that most residential or split custody arrangements do not last. In more than fifty percent of these cases, the children end up residing with one parent or the other despite the order of the court. As younger children become adolescents, they elect to spend more time with one parent, and establish a "home" at one residence.

According to some recent studies, young adults who were involved in a shared custody arrangement as children believe that it was in their best interests. They asserted this more regularly than children who were raised primarily by their mother. The children of shared residences seem to prefer it. (Lodge and Alexander, 2010), (Haugen, 2010), (Fabricus and Hall, 2000).

Still, we need more research and studies. We need more collaboration between mental health experts, litigators, and legislators.

Of course, if both parents agree to a split custody arrangement, a settlement of the custody dispute is always in the best interests of children. Nobody (except lawyers and forensic experts) benefits from an acrimonious custody litigation. If the arrangement is pursuant to a settlement, then it is far more likely to succeed than if it is forced on a family by a Court.

In this attorney's opinion, split residential custody should only be considered when you have "PPCC":

- Proximity
- Similar Parenting Styles
- Good Communication
- Consent of both parents

If each of the factors exists, then split custody makes perfect sense. Absent these four factors, a shared residential custody arrangement is doomed to fail, and the onus rests upon our jurists to decide which parent should be granted primary residential custody.

Equal parenting time for mom and dad is a fair starting point for a custody dispute, but, except in rare circumstances, is not necessarily the best outcome.

Editor's Note: Joshua R. Katz is a partner in the law firm Plaine & Katz, LLP, a member of the Board of Managers and a Vice-Chair of the Family Law Committee.

APPEAL OF ‘‘GUILTY’’ DETERMINATION AFTER HEARING

By: Hon. George M. Heymann

I read with great interest the recent article by Dennis Boshnack, “Supreme Court Misapplies VTL 238”, Queens Bar Bulletin, October 2017.

It reminded me of the frustrating situation I had six years ago when I received a summons for an expired inspection sticker while parked in front of my family home. Realizing that the summons did not have the correct address or precinct number in the section that requires such information in order to sustain a prima facie case, I appeared before an ALJ to argue my case. I was absolutely shocked when the ALJ had no clear understanding of the law and disregarded my entire testimony because she found the absent officer to be more “credible” than I was because he signed the summons under penalty of perjury, notwithstanding that I was sworn in to tell the truth before I could begin giving my testimony! Moreover, she kept insisting that any errors in the summons were irrelevant because failure to have a current registration or inspection sticker is a “status violation” [a term that did not exist in any relevant statute or case law] which renders any defects to be of no import.

Below is a copy of my appeal, which naturally, received a “pro forma,” one sentence, response that my appeal was denied without any explanation.

I hope anyone taking the time to read this will find it interesting and informative.

OWNER OF VEHICLE: HON. GEORGE M. HEYMANN

DATE OF VIOLATION: 11/7/11

VIOLATION NUMBER: **********

DATE OF HEARING: 11/9/11

I hereby appeal the “guilty” determination rendered on 11/9/11 with respect to the above referenced summons.

PRELIMINARY STATEMENT

On the date the summons was issued [11/7/11] my vehicle was parked in front of the premises known as **-67 *** Street, ***, New York. My parents purchased the house located on that property in 1957. I have parked in the same spot, located immediately to the left of our driveway in front of a strip of property belonging to **-67, for over 40 years. The property line between **-67 and **-57 is clearly delineated by huge evergreens on our property. (See, Exhibits 1, 2 & 3)

Upon a review of the instant summons, I observed that not only did the agent have me parked in “front of” the wrong premises [**-57], but further indicated that the “Place of Occurrence” was located in “Pct 105”, when, in fact, the premises is located in the 111th Precinct. Based on these two erroneous inserts which “misdescribe” the “Place of Occurrence”, the summons is prima facie defective and must be dismissed.

THE HEARING

Although I was initially offered the opportunity to pay a reduced fine of $43, in lieu of a hearing, I opted for the hearing based upon my knowledge of the law, as set forth below, that a defective summons warrants dismissal.

When I testified under oath and explained to the ALJ my reasons as to why the summons was prima facie defective, she cavalierly dismissed my arguments stating that “the wrong address and precinct” in the “Place of Occurrence” portion of the summons are irrelevant because an expired sticker is a “status violation”. Notwithstanding that I showed her photos of where my vehicle was parked, vis a vis, the two properties in question [which included my neighbors’ car parked in front of their premises, while mine was parked behind theirs in front of our premises (See, Exhibits 1,& 3)]; a survey of **-67 demonstrating that my vehicle was parked in front of the property known as **-67 (See, Exhibit 4); and printouts showing that the location is in the 111th precinct (See, Exhibit 5, 6, 7 & 8), she kept repeating the phrase “it’s a matter of credibility”. I also provided proof that I had the vehicle re-inspected within less than 24 hours (See, Exhibit 9).

When I informed the ALJ that I was a former Counsel and ALJ for PVB [having assisted in the writing and revision of a large portion of PVB’s Rules and Regulations] and , thus, familiar with the requirements for obtaining jurisdiction in order to hear and determine the violation itself, in addition to serving on the bench for over 20 years, her arrogant and disrespectful response was “Just because you’re a judge doesn’t mean you know everything” and “maybe you should go back and read the law”. She further kept reiterating that “it’s a matter of credibility” as to whether she should give any weight to my testimony, as opposed to the absent traffic agent who issued the summons.

QUESTION PRESENTED

Does the insertion of the wrong address and precinct in the “Place of Occurrence” section of the summons mandate dismissal pursuant to PVB’s Rules and Regulations §39-02(a)(3)?

For the reasons set forth below, the question must be answered in the affirmative.

APPLICABLE LAW

NYC Administrative Code 19-206 Hearings.

b. Conduct of Hearings. 1. Every hearing for the adjudication of a charge of parking violation shall be held before a senior hearing examiner or a hearing examiner in accordance with the rule and regulations promulgated by the bureau. (Emphasis added)

Chapter 39 of Title 19 of the NYC Administrative Code adopted by the Commissioner of Finance to prescribe the internal procedures and organization of the Parking Violations Bureau, the manner and time of entering pleas, [and] the conduct of hearings states in relevant part:

39-02 Notice of Violation (Summons).

(a) Contents. (1) The notice of violation (summons) ... shall contain ... the date, time and place of occurrence... (Emphasis added)

(3) If any information that is required to be inserted in a notice of violation [i.e.: “Place of Occurrence”; “PCT”] is omitted from the notice of violation, misdescribed, or illegible, the violation shall be dismissed upon application of the person charged with the violation. (Emphasis added)

Traffic Rule 4-08(j)(6) [cited on the summons]

No person shall stand or park a vehicle bearing New York plates unless it is properly inspected and properly displays a current inspection sticker or certificate, in accordance with '306(b) of the Vehicle and Traffic Law ...

Vehicle and Traffic Law 306. Enforcement

No motor vehicle shall be operated or parked on the public highways of this state unless a certificate ...of inspection ... is... displayed upon the vehicle. *** Any violation of this section that occurs while a motor vehicle while parked on the public highways of this state shall constitute a parking violation [subject to §39-02(a)(1) & (3)]. (Emphasis added)

Violation Code [VC] 71 [cited on the summons]

Standing or parking a vehicle without showing a current inspection sticker.

DISCUSSION OF LAW AND FACTS

I

In her Decision And Order, the ALJ states that the “wrong address or ppolice [sic] precinct does not affect the validity of a ‘status violation”. This statement is entirely contradictory to the state statutes, NYC Administrative Code, and the very rules and regulations promulgated by PVB, as set forth above. As clearly shown, there is absolutely nothing contained therein that provides any exception for the prosecution of a “status violation” in contrast to every other violation.

It is black-letter law that in order for a court (or in this case an administrative agency) to hear a case on the merits it must first acquire jurisdiction.

In the instant matter, the requirements for the ALJ to acquire jurisdiction, in order to rule on the substantive aspects of the violation, are clear and unambiguous. As previously noted, the summons shall

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contain the date, time and place of occurrence and any misdescribed information with respect thereto shall warrant dismissal upon application of the person who received the violation. The language is mandatory in nature. The ALJ does not have the discretion to disregard it as irrelevant, or to state that the "wrong address or ppolice [sic] precinct does not affect validity of a 'status violation'". Irrespective of whether an expired registration or inspection sticker does not change based on the date, time or location of the vehicle, there is absolutely no language incorporated in the statutes and/or PVB Rules and Regulations, as previously cited, to the extent that dismissal is not mandated if there is a "status violation".

The summons is defective because the information inserted in the spaces for the location and/or precinct are "misdescribed".

Thus, dismissal "shall" be granted "upon application of the person charged with the violation".

As held in 2525 East Avenue, Inc. v. Town of Brighton, 33 Misc.2d 1029, 228 NYS2d 209:

Construction in its legal sense, has been defined as the art of process of determining the proper meaning of application of provisions contained in statutes or other written instruments. As applied to statutes, this process necessarily presupposes doubt, obscurity, or ambiguity, and consequently, where a statute is framed in language so plain as to make an explanation superfluous, one will not be attempted. (Emphasis added)

A fortiori, on November 15, 2011, the Court of Appeals, in Matter of Raynor v. Landmark Chrysler, NYLJ, 11/16/11, 22:1, succinctly stated:

As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof (citation omitted). Additionally, '[w]here a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded' (citation omitted). (Emphasis added)

The rule enunciated in Raynor , by New York's highest court, is, without a doubt, determinative of the instant matter. Section 4-08(j)(6) does not contain any language that a violation thereof is a "status violation" and, therefore, the provisions of 39-02 do not apply. Additionally, there is nothing in VC 71 that it is a "status violation" exempt from the provisions of 39-02.

ALJs cannot pick and choose what laws they wish to enforce. Had the Legislature intended a different treatment for the disposition of "status violations" it could have simply added the following language at the end of 39-02(a)(3): "except as to status violations". In the alternative, it could have added a separate sentence that: "This section does not apply to a status violation". In the absence of such specific exceptions, one cannot be created by the individual ALJ or the agency adjudicating the instant summons. In fact, the term "status violation" is nowhere to be found in any of the aforementioned statutes and/or rules and regulations!

The statutes and Rules and Regulations in this matter, are clear and unambiguous and there are no exceptions. Courts cannot reach the merits of a case when there is no jurisdiction, regardless of the specific violation alleged.

Here, although nowhere stated in any of the statutes or rules and regulations, the ALJ refers to the violation as a "status violation" as if jurisdiction "automatically" attaches, irrespective of the requirements of Administrative Code 39-02(a)(1)&(3). No such nomenclature exists in any of the statutes and / or rules and regulations regarding an expired inspection sticker. Without an express provision or exception (See, Matter of Raynor v. Landmark Chrysler, supra) a violation for an expired inspection sticker is to be treated and / or disposed of in a manner not inconsistent with every other violation listed in the NYC Traffic Rules, and, therefore, this ticket must be dismissed.

II

As to the ALJ's repeated exhortations that my testimony is a "matter of credibility", since there was no traffic agent present to challenge the truth and veracity of my assertions as to the errors in the summons, my statements are no less credible than those of the absent agent who could not be cross-examined.

In fact, this Appeals Board can take judicial notice that **-57 and **-67 *** Street, are in ***, which is located in the 111 Precinct.

Moreover, the ALJ's assertions that this is a "status violation" and that my testimony is "a matter of credibility" is a contradiction of terms. If, allegedly, there is no defense to a "status violation" [a term not found in any of the statutes or rules and regulations cited in the summons and set forth above] then the necessity for taking testimony and weighing its credibility is superfluous.

III

Assuming, arguendo, that my argument as to which premises my vehicle was parked in "front of" is insufficient to warrant dismissal, this Appeals Board must still dismiss based on the "misdescribed" precinct. As Exhibits 5 - 8 clearly show, the premises is located in "***" and "***" is located in the 111th Precinct. Each precinct has distinct boundaries, generally corresponding to the local community board.

There is no excuse for a traffic agent not knowing what precinct he or she is in, and, even more importantly, what precinct the "place of occurrence" is in, when issuing a summons. The box for stating what precinct the "place of occurrence" is in does not refer to the precinct that the agent is assigned to, if any. Even if traffic agents have city-wide jurisdiction to issue violations, it is incumbent upon them to know the correct precinct within which the violation occurred. The statutes and rules and regulations require it!

Regardless of whether such "misdescribed" information goes directly to the nature of the violation, as the ALJ insists, is of no moment, since the clear, unambiguous and mandatory language of 39-02(a)(3), warranted dismissal if ANY required information on the summons is "MISDESCRIBED", without exception!

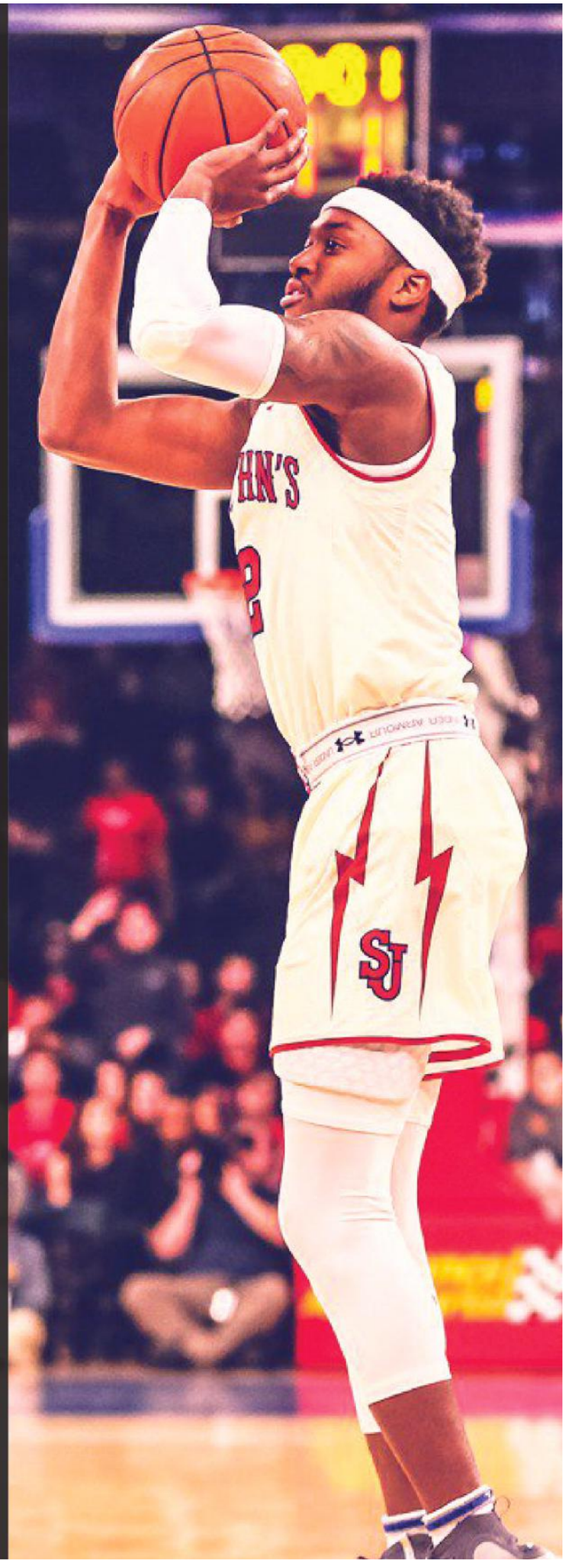
CONCLUSION

Accordingly, the reasons heretofore presented, the summons is prima facie defective and must be dismissed as the ALJ had no jurisdiction since "any" of the requisite information [i.e.: location and precinct] was "misdescribed".

Thank you for your careful consideration of this matter.

Respectfully submitted,

Hon. George M. Heymann



APPLICATION FOR MEMBERSHIP

QUEENS COUNTY BAR ASSOCIATION

90-35 148 STREET ◆ JAMAICA, N.Y. 11435
Tel: (718) 291-4500 ◆ Fax: (718) 657-1789 ◆ Website: www.qcba.org

I hereby apply for membership to the Queens County Bar Association:

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Residence:

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(City or Town) *(State)* *(Zip + 4)*

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(Phone) *(Fax)* *(E-Mail)* *(Website)*

Firm Affiliation: _____
(Street)

_____
(City or Town) *(State)* *(Zip + 4)*

_____
(Phone) *(Fax)* *(E-Mail)* *(Website)*

Mailing Address: Residence ☐ Office ☐

Admitted to Practice on the _____ day of _____ in the year of _____

by the _____ Judicial Dept. _____

College: _____
(Name) *(Degree)* *(Year)*

Law School: _____
(Name) *(Degree)* *(Year)*

Have you ever applied for membership in this Bar Association? _____

Please indicate preference for committee participation, i.e. Torts, Surrogate's Court, Family Law, Criminal Court, etc.

_____

_____ _____
Date *Signature of Applicant*

$350 per year for Sustaining Membership (optional); **$300** per year for applicants admitted more than 10 years; **$225** per year for applicants admitted 5 years but less than 10 years; **$135** per year for applicants admitted less than 5 years but more than 1 year; applicants admitted less than 1 year are free **$60** per year for Associate Membership - office in other than First or Second Department; free for student applicants. Applicants working for a city/state agency (Judges, Corporation Counsel, Legal Aid, Queens Legal Services, Law Secretaries, et. al.) take 30% off from regular rate. 18B Assigned Counsel Plan Members pay 20% less than their respective rate. Applicants that are members of another Queens bar group, that have never been members of the QCBA, dues are prorated 30% less for their first year's dues, 15% for their second year's dues and by the third year paying regular rate.

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E-1 and E-2 Visas

By Michael Phulwani, Esq. and Dev Banad Viswanath, Esq.

Pursuant to the Immigration and Nationality Act a national of any of the countries with which an appropriate treaty of commerce and navigation exists may seek treaty trader/investor nonimmigrant status to enter the United States temporarily.

An individual who wishes to go to the US to carry on "substantial trade", principally between the US and his/her own country, may apply for a treaty trader visa (E1). Someone who is going to the United States to develop and direct the operations of an enterprise in which he/she has invested, or is actively in the process of investing, a substantial amount of capital is welcome to apply for a treaty investor visa (E2). It is not necessary to maintain a business outside the US and E-1 and E-2 visas can be renewed every five years without limits. The E visa can be used by smaller single-investor owned companies as well as by larger several-investor multinational companies. It is also available to key foreign personnel of companies that are Treaty Foreign National (TFN) owned assuming certain requirements are met.

THE E-1 VISA

To qualify for an E-1 trader visa, a foreign business person must be seeking entry into the United States to carry on "substantial trade in goods or services in a capacity that is supervisory or executive or involves essential skills." E-1 visas were previously restricted to a trade of goods and specific services. However, now, trade can be in goods or services without specification or restriction.

The term "trade" means the exchange, purchase, or sale of goods and/or services. Goods are tangible items or merchandise having value. Services are economic activities whose consequences are other than tangible goods. Some examples of service activities include: banking, management consulting, transportation, technology transfer and data processing, advertising, design and engineering, insurance, and communications.
The US and the trader's home country must have a ratified treaty of "friendship, commerce, and navigation," or have some other diplomatic agreement that allows for treaty trader status. At least 50% of the ownership of the trading firm must be in the hands of nationals of the visa applicant's home country. An E-1 visa applicant is often an owner, manager, executive, or someone holding an "essential" position within the company. The applicant must also be a national of the treaty country. Some of the most important criteria for an E-1 visa include the following:

- The trading company must be "trading" as long as the goal of the trade is the development of international commercial trade between the US and the treaty country.
- The trading company must be engaged in "substantial" trade with the US. The visa applicant must show numerous transactions over time and a significant monetary value of business. Technically, there is no minimum amount of trade, however, the visa applicant should at least be able to show the volume of trade is enough to support the business as well as the applicant's livelihood.
- Over 50 percent of the total volume of the company's trade must be between the US and the treaty country.
- The trading must involve an actual exchange of qualifying commodities (whether goods, services, or money) and the consideration must be traceable or identifiable. A transfer of title must pass from the trader of one nationality to the trader of the other.
- Trade between the foreign company and the US must already exist.

The length of time the visa will be issued is determined by agreements between the US and the Treaty country. Visas may not be issued for more than five years, but they may be renewed continuously without a limit on stay in E-1 status. Spouses and children of E-1s are entitled to visas as well.

THE E-2 VISA

To qualify for an E-2 investor visa, the applicant must "develop and direct operations of an enterprise in which he or she has invested or is actively in the process of investing a substantial amount of capital."
A foreign citizen may be issued an E-2 nonimmigrant visa if all of the following requirements are met:

a. You or the firm are TFNs (at least 50% of the company stock is owned by TFNs)
b. You or the firm for which you work will invest or have invested substantial capital (generally in excess of $100,000) which is at risk, meaning subject to potential loss if the business does not succeed, in a bona fide enterprise in the United States. The term "substantial" means:
i. The investment must be significantly proportional to the total investment (usually more than half of the value of the business), or
ii. An amount normally considered necessary to establish a new business.
c. You are an executive or manager or possess special skills that make your services essential to the employer's operations.
d. The essential nature of an alien's "special skills" is determined by assessing the degree of proven expertise of the alien in the area of specialization, the uniqueness of the specific skills, the length of experience and training with the firm, the period of training needed to perform the on templated duties, and the salary the special expertise commands.
e. The investment must not be marginal.
f. The investment enterprise actually exists or you are actively in the process of investing.
g. You confirm you will leave the United States upon termination of this status.
A spouse of an E-1 or E-2 visa holder can work with an employment authorization document. Spouses must file an I-765 application with a regional service center along with proof of the spouse's visa status.
E-1 and E-2 applicants must submit a variety of documents in establishing that an investment or trade between the US and treaty country is substantial. Expect to submit documents that relate to:

- the incorporation of the business in the US;
- the company ownership;
- the capitalization of the business;
- the business plan or model;
- information on business activities;
- ownership or lease material on property;
- financial statements and tax returns for the US business;
- if the company has business abroad, information on the business and finances of the foreign operation;
- information on the proposed position in the US and background information on the proposed executive, owner, manager or essential employee.