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Queens Bar Bulletin
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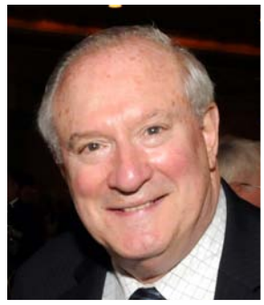
Review of Family Law - 2016

By: Michael Dikman and David S. Dikman

In 2016 there were significant changes in our Family Law, both legislative and decisional. Last year at this time, the most significant change discussed and outlined was the "new" maintenance law, with its formulaic approach to both temporary and post-divorce maintenance, removal of enhanced earning capacity as a distributable asset and the provision of an advisory maintenance duration schedule, based on the length of the marriage. All but the temporary maintenance provisions were to apply only to actions commenced after January 23, 2016. As a result, it is simply too early to have any body of case law, much less at the appellate level, discussing, interpreting and/or applying the new law. By next year we should have some guidance and decisions to review.



We have selected several decisions for discussion, from our appellate courts, which will be presented in the chronological order in which they were decided, but with the Court of Appeals decisions taking the lead.

RECORDING CHILDREN' S CONVERSATIONS
("VICARIOUS CONSENT"}

April 5 , 2016 - PEOPLE V .BADALAMENTI, 27 N.Y. 3d 423, 34 N.Y.S. 3d 360 (Court of Appeals).

Prior to this decision, it was very clear that it was a crime to record a child's conversation, except if one of the parties involved in the conversation consented to or made the recording. Such conduct was punishable as prohibited "Eavesdropping" pursuant to Penal Law § 250.00 & 250.05. This was a criminal case, in which a 5 year old child' s father somehow was able to overhear a conversation (over his cell phone) as it took place among the child's mother, her

Continued on page 8

Paternity | Part 1

1. Legislative Authority:

In New York State, Articles 4, 5, 5-A and 5-B of the Family Court Act and § 236 and § 240 of the Domestic Relations Law define the main provisions for paternity and support proceedings.

2. Paternity Establishment:

For a child born to unmarried parents, there is no legal relationship between the father and the child. Paternity establishment refers to the legal process of determining the legally recognized father of a child. When a child is born to unmarried parents, the child has no legal father. In New York, unmarried parents can establish paternity in two ways:

1. By completing and signing a voluntary Acknowledgment of Paternity form.
2. By filing a petition in court to determine paternity.

NY CLS Family Ct Act § 516-a NY CLS Family Ct Act § 542

It should be noted that in Matter of Sebastian, 2009 NY Slip Op 29182, ¶ 10, 25 Misc. 3d 567, 577-78, 879 N.Y.S.2d 677, 685-86 (Sur. Ct.), the Court held "The parentage of a child born out of wedlock is typically established through paternity proceedings, governed by article 5 of the Family Court Act. The proceedings are commenced by a petition (Family Court Act § 523), and require a hearing, at which "The mother or the alleged father shall be competent to testify, but the respondent

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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 Listing

March 2017

Wednesday, March 8	Criminal Law Seminar
Thursday, March 9	Elder Law Seminar
Monday, March 13	Islanders Game w/Deitz Reporting
Monday, March 27	Judiciary, Past Presidents & Golden Jubilarian Night

April 2017

Wednesday, April 5	Equitable Distribution Update
Friday, April 14	Good Friday - Office Closed
Wednesday, April 19	Premise Liability Seminar
Thursday, April 20	Elder Abuse Seminar

May 2017

Thursday, May 4	Annual Dinner & Installation of Officers
Monday, May 15	Coop/Condo Seminar
Thursday, May 18	CPLR & Evidence Update
Monday, May 29	Memorial Day - Office Closed

Upcoming Seminars

Civil Court Seminar • Ethics Seminar • Elder Law Seminar • Surrogate's Court Seminar

New Members

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Publisher's Note

It's Your Bulletin

Notice to all committee chairs: We're coming for you!

By: Walter H. Sanchez

The two thousand members of the Queens County Bar Association appreciate the leadership of the chairs of its committees.

We, the producers of the Queens County Bar Bulletin will be publishing profiles of a few of these extraordinary people every month in our newspaper from here forward.

Next month we will profile Donna Furey, chair of our Elder Law Committee. Donna, as well as being quite involved with Kiwanis, is chairperson of the board of directors of Catholic Lawyers Guild. Members know her as someone who gives her time to our industry in different ways, but did you know she was a top notch softball player in her day?

Readers of the Bulletin will live a day in the life of Gary Miret, the new head of our Academy of Law Committee. Gary is a criminal attorney with the whit of a ringmaster, but did you know he is an avid supporter of McClancy baseball? No we don't mean he just contributes dollars – although he does as well, as anyone can. You can catch him in the dugout sporting a 'form-fitting' McClancy baseball uniform shouting instructions and handing out bunt-signs from the coaches box. Now that's passion.

If you chair a committee, we should be contacting you for a profile within the next few months. You can call us at 718-639-7000.

This month, the Review of Family Law piece (by Michael Dikman, chair of the Family Law Committee and David Dikman) provides a nice overview of some legislative and decisional occurrences which we need to know. Removal of the enhanced earning capacity as a distributable asset is crucial. And in one appellate decision, the court reduced a 50-50 marital property decision to 70-30 based on the short length of a failed marriage.

We hear "sanctuary city" in mainstream media every day. Our piece in this issue by Allen Kaye lets you know what a sanctuary city really is and puts a legal eye on the issue. Courts have ruled the states and municipalities that honor ICE detainers might be held liable for 4th Amendment violations and some counties have had to pay six-figure settlements as a result of holding them more than two days.

President's Message

Your present Board of Managers and Committee Chairs are a motivated and energetic group! Thanks to their hard work we have been involved in certain developments affecting the practice of law in Queens County and have successfully launched several new initiatives since I took office.

First, a serious and well developed outreach program has been launched to familiarize law students with the Association and the benefits it offers to students and newly admitted attorneys. The many facets of this program have resulted in approximately 85 new student members.

Second, the second annual Party for students and newly admitted attorneys was held in February and by all accounts was a resounding success. This Party exposes the students and newly admitted attorneys to seasoned practitioner members of the Association. It gives every promise of being a permanent item on the Association's annual calendar.

Third, the first of our topical seminars aimed at the public is ready to hit the road. This seminar is on Immigration Law and will be given very soon at a branch of the Queens Borough Public Library. Special thanks is due to Judge Agate and Dennis Walcott, library president. I am informed that a program on Family Law is very nearly ready for launch as well.

Fourth, despite strenuous opposition from the Officers, Board Members and Gary Miret (Chairman of the Criminal Law Committee) the City will be contracting out Homicide cases to any agency. This decision will effectively end the involvement of the 18B panel in these cases. The Association has serious concerns regarding this development and its effect on the rights of those charged with homicide. I urge all our criminal practitioners to contact the Board or Gary Miret with any noted problems or observations in this area. I can think of no proceeding more important than a homicide trial. The Association will seriously consider all problems brought to its attention and take whatever steps available to advocate for change when necessary.

Fifth, we continue to move energetically to work to improve the practice of law in Queens County and the relationship between the bench and bar. If you have any suggestions for improvements please send them on to me!

Gregory J. Brown, President

Review of Paternity | Part 1 continued from p.1...

shall not be compelled to testify" (Family Court Act § 531)."

2 (a). Duties of Support:

Each parent of a Child born out of wedlock is chargeable with the support of such Child, including the Child's funeral expenses and, if possessed of sufficient means, or able to earn such means, shall be required to pay child support. A court shall make an award for child support, pursuant to subdivision one of section four hundred thirteen of this act.

NY CLS Family Ct Act § 513

The parents of a Child under the age of twenty-one years are chargeable with the support of such Child and, if possessed of sufficient means, or able to earn such means, shall be required to pay for Child support, a fair and reasonable sum, as the court may determine.

NY CLS Family Ct Act § 413

2 (b). Voluntary Acknowledgment of Paternity:

If there is no doubt about the identity of the father, then the parents may elect to sign a voluntary Acknowledgment of paternity form. Again, Matter of Sebastian, 2009 NY Slip Op 29182, ¶ 10, 25 Misc. 3d 567, 577-78, 879 N.Y.S.2d 677, 685-86 (Sur. Ct.) is illuminative in its holding, "There is an even simpler procedure available to unmarried parents, who both agree as to the man's parentage. The mother and putative father may execute an acknowledgment of paternity, either immediately preceding or following the in-hospital birth of the child (Public Health Law§ 4135-b [1] [a]), or subsequently (Social Services Law § 111-k), in accordance with the formalities enumerated in the relevant statutory provision (Family Court Act § 516-a). After filing the acknowledgment, a new birth certificate issues showing the birth mother and (former) putative father, as the child's "natural" parents (Public Health Law § 4138 [1] [e]). Matter of Sebastian, 2009 NY Slip Op 29182, ¶¶ 10-11, 25 Misc. 3d 567, 578-79, 879 N.Y.S.2d 677, 686 (Sur. Ct.)."

If either parent has any doubt about the identity of the father, then either parent may file a paternity petition, for the court to determine the identity of the father, in order to legally establish paternity (and, accordingly, a legal support obligation, which is enforceable, by the power of the State of New York). Generally speaking, the court will order the Mother, Child, and alleged Father to submit to genetic tests. This paternity determination will be made using genetic marker or DNA tests.

Again, in Matter of Sebastian, 2009 NY Slip Op 29182, ¶ 10, 25 Misc. 3d 567, 577-78, 879 N.Y.S.2d 677, 685-86 (Sur. Ct.), the court held "If the proceeding is contested, DNA or other genetic marker tests may be ordered, and the results of such test(s) are admissible in evidence (Family Court Act § 532; see also Matter of Department of Social Servs. v Thomas J. S., 100 AD2d 119, 474 NYS2d 322 [2d Dept. 1984] [upholding use of the tests against a self-incrimination claim]). Such tests are not, however, necessary where paternity has been conceded, explicitly or implicitly (see Wilson v Lamb, 181 Misc. 2d 1003 [Sup Ct, St. Lawrence County 1999]). If the court finds the male respondent to be the father of the child, it makes "an order of filiation, declaring paternity" (Family Ct Act § 542 [a]), which order is then transmitted to the appropriate officials, so that a new birth certificate may be issued (Family Ct Act § 543; Public Health Law § 4138 [1] [b]). The court may also, if necessary, make an order of support (Family Ct Act § 545), and/or of visitation (Family Ct Act § 549)."

The voluntary Acknowledgment of Paternity is the procedural equivalent to a Court Order, which legally establishes the identity of a Child's parents. It has the same force and effect as a Court Order; therefore, it is legally binding on both parents, regardless of their ages. According to Family Court Act, § 516-a (a), an acknowledgment of paternity, if unchallenged, needs no further judicial or administrative proceedings to ratify it. Matter of Monroe Cnty. Dept. of Human Servs. v. Joshua B., 2009 NY Slip Op 52479(U), ¶ 7, 25 Misc. 3d 1238(A), 1238A, 906 N.Y.S.2d 774, 774 (Fam. Ct.)."

3. Rescinding a Previously Executed Acknowledgment of Paternity:

In New York State, once the document is signed, either parent may rescind it within sixty (60) days, however this can only be accomplished by a Court determination. (In contrast, Iowa uses standardized forms. The completed and notarized form is filed with the state registrar of vital statistics, who registers the rescission.) In the case of a rescission, the Court would be required to order genetic testing,

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unless it determines that it is not in the child's best interests by reason of res judicata, equitable estoppel or the presumption of legitimacy.

After sixty (60) days, the signed acknowledgment can be challenged, only on the basis of fraud, duress, or material mistake of fact. Thus, no paternity order is issued; the acknowledgment, itself, is the legal finding of paternity and is entitled to full faith and credit in other States, until judicially proven otherwise. It is important to note that the acknowledgment of paternity is not automatically accompanied by a support order, unless one of the parties seeks such an order in a separate proceeding.

Pursuant to Family Court Act § 516-a:

Acknowledgment of paternity:

(a) An acknowledgment of paternity executed pursuant to section one hundred eleven-k of the Social Services Law or section four thousand one hundred thirty-five-b of the Public Health Law shall establish the paternity of and liability for the support of a child pursuant to this act. Such acknowledgment ***must be reduced to writing and filed*** pursuant to section four thousand one hundred thirty-five-b of the Public Health Law ***with the registrar of the district in which the birth occurred and in which the birth certificate has been filed.*** No further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity.

(b) (i) Where a signatory to an acknowledgment of paternity executed pursuant to section one hundred eleven-k of the Social Services Law or section four thousand one hundred thirty-five-b of the Public Health Law had attained the age of eighteen at the time of execution of the acknowledgment, the signatory may seek to ***rescind the acknowledgment by filing a petition with the court to vacate the acknowledgment within the earlier of sixty days of the date of signing the acknowledgment or the date of an administrative or a judicial proceeding*** (including, but not limited to, a proceeding to establish a support order) relating to the child in which the signatory is a party. For purposes of this section, the "date of an administrative or a judicial proceeding" shall be the date by which the respondent is required to answer the petition.

(ii) Where a signatory to an acknowledgment of paternity executed pursuant to section one hundred eleven-k of the Social Services Law or section four thousand one hundred thirty-five-b of the Public Health Law had not attained the age of eighteen at the time of execution of the acknowledgment, the signatory may seek to rescind the acknowledgment by filing a petition with the court to vacate the acknowledgment ***anytime up to sixty days after the signatory's attaining the age of eighteen years or sixty days after the date on which the respondent is required to answer a petition*** (including, but not limited to, a petition to establish a support order) relating to the child in which the signatory is a party, whichever is earlier; provided, however, that the signatory must have been advised at such proceeding of his or her right to file a petition to vacate the acknowledgment within sixty days of the date of such proceeding.

(iii) Where a petition to vacate an acknowledgment of paternity has been filed in accordance with paragraph (i) or (ii) of this subdivision, the court shall order genetic marker tests or DNA tests for the determination of the child's paternity. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. If the court determines, following the test, that the person who signed the acknowledgment is the father of the child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated.

(iv) ***After the expiration of the time limits*** set forth in paragraphs (i) and (ii) of this subdivision, any of the signatories to an acknowledgment of paternity ***may challenge the acknowledgment in court by alleging and proving fraud, duress, or material mistake of fact.*** If the petitioner proves to the court that the acknowledgment of paternity was signed under fraud, duress, or due to a material mistake of fact, the court shall then order genetic marker tests or DNA tests for the determination of the child's paternity. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. If the court determines, following the test, that the person who signed the acknowledgment is the father of the child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated.

(v) If, at any time before or after a signatory has filed a petition to vacate an acknowledgment of paternity pursuant to this subdivision, the signatory dies or becomes mentally ill or cannot be found within the state, neither the proceeding nor the right to commence the proceeding shall abate but may be commenced or continued by any of the persons authorized by this article to commence a paternity proceeding.

(c) Neither signatory's legal obligations, including the obligation for child support arising from the acknowledgment, may be suspended during the challenge to the acknowledgment except for good cause as the court may find. If the court vacates the acknowledgment of paternity, the court shall immediately provide a copy of the order to the registrar of the district in which the child's birth certificate is filed and also to the putative father registry operated by the Department of Social Services pursuant to section three hundred seventy-two-c of the Social Services Law. In addition, if the mother of the child who is the subject of the acknowledgment is in receipt of child support services pursuant to title six-A of article three of the social services law, the court shall immediately provide a copy of the order to the child support enforcement unit of the social services district that provides the mother with such services.

(d) A determination of paternity made by any other state, whether established through an administrative or judicial process or through an acknowledgment of paternity signed in accordance with that State's laws, must be accorded full faith and credit pursuant to section 466(a)(11) of title IV-D of the social security act (42 U.S.C. § 666(a)(11)).

It is relevant to note that the Court of Appeals has conducted a careful review of the issue of estoppel, as it applies to paternity cases. In Shondel J. v. Mark D. (7 NY3d 320, 853 N.E.2d 610, 820 N.Y.S.2d 199 [2006]), the Court stated, "New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our reason has been and continues to be the best interests of the child (citing Jean Maby H. v. Joseph H., 246 AD2d 282, 676 N.Y.S.2d 677 [Second Dept., 1998], and Matter of L. Pamela P. v. Frank S., 59 NY2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983))". See Shondel J. v. Mark D. 7 NY3d 320, 853 N.E.2d 610, 820 N.Y.S.2d 199 (2006). Matter of Monroe Cnty. Dept. of Human Servs. v. Joshua B., 2009 NY Slip Op 52479(U), ¶ 5, 25 Misc. 3d 1238(A), 1238A, 906 N.Y.S.2d 774, 774 (Fam. Ct.)."

According to Family Court Act, § 516-a (b)(i), an acknowledgment of paternity . . . may be rescinded by either signator's filing a petition with the court to vacate the acknowledgment within the earlier of sixty days of the date of signing the acknowledgment or the date of an administrative or judicial proceeding (including a proceeding to establish a support order) relating to the child in which either signator is a party. Subsection (b)(i) of this provision indicates, "The court ***shall*** order genetic marker tests or DNA tests for the determination of the child's paternity" (emphasis added), but further, ***No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman.***

If the Court determines, following the test, that the person who signed the acknowledgment is the Father of the Child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated. (Emphasis added.) Thus, a GMT is the norm in a support proceeding, where there is a question about who is the father, ***but a GMT is not to be ordered if the court finds a basis therefore under res judicata, equitable estoppel, or the presumption of legitimacy.*** *Matter of Monroe Cnty. Dept. of Human Servs. v. Joshua B.,* 2009 NY Slip Op 52479(U), ¶ 7, 25 Misc. 3d 1238(A), 1238A, 906 N.Y.S.2d 774, 774 (Fam. Ct.)

EXAMPLE:

A trial court properly dismissed petitioner's action, pursuant to N.Y. Fam. Ct. Act § 516-a, seeking to

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boyfriend and the (crying) child. The defendant (boyfriend) threatened to hit the child and also referred to prior beatings, after the father started recording the event. When the recording was offered into evidence against the boyfriend, the defense objected, inasmuch as the recording was made illegally and inadmissible pursuant to CPLR § 4506. However, the trial court accepted the prosecution's argument that the father had "vicarious consent" , the ability to consent to the recording on behalf of his child, who was present during the recorded conversation and was the victim of abuse. The resulting conviction was upheld in the Appellate Division, Second Department, and leave to appeal to the Court of Appeals was granted.

The Court of Appeals affirmed the conviction and with it the concept of "vicarious consent" . But the decision made clear that video or audio recording of conversations to which the child is a party would be limited to situations where "a parent or guardian has a good faith, objectively reasonable basis to believe that it is necessary in order to serve the best interests of the child" . Judge Leslie E. Stein (a former matrimonial attorney and Fellow in the American Academy of MatrimonialLawyers) wrote a dissent in which Judges Rivera and Abdus-Salaam concurred. The strong public policy protecting citizens against insidious electronic surveillance or eavesdropping resulted in the CPLR § 4506 prohibition against receiving conversations obtained by illegal eavesdropping into evidence. The dissent concluded that the parent-child relationship was insufficient to controvert the plain language of the eavesdropping statute, and that the decision, adopting the "vicarious consent" doctrine "usurps the legislative prerogative". However, we are now governed by the majority in this 4-3 decision. Although that majority attempted to fix clear limitations to the doctrine, they will unquestionably result in varied situations which will require rulings as to whether or not the subject recordings are within or violative of those stated limits . As applied to divorce, custody and criminal proceedings, whether various, secret recordings of children will be viewed as criminal acts or proper invocations of "vicarious consent" will undoubtedly be the subject of future litigation . Did the parent or guardian have a good faith belief that the recording of the child and one or more third parties was necessary to serve the child's best interests? Was there an objectively reasonable basis for that belief? The "jury is out" regarding the extent to which this type of recording can or will be curtailed or limited . In our opinion, this decision cannot help but increase the amount of surreptitious recording of children already going on, and that is unfortunate.

"THE TERM PARENT EXPANDED FOR CUSTODY STANDING"

August 30, 2016 BROOKE S.B. v. ELIZABETH A.C.C. and ESTRELLITA A. v. JENNIFER L.D. , 28 N.Y. 3d 1, 61 N .E. 3d 488, N.Y. 39 N.Y.S. 3d 89 (Court of Appeals)

The decision in these cases resulted in the overturning of the Court's 25 year old ruling in ALLISON D. v. VIRGINIA M. , 77 N .Y. 2d 651, 569 N .Y.S. 2d 586 (1991) . In that decision, the court ruled that a member of an unmarried couple, with no biological or adoptive relationship with a child, has no standing as a parent to seek custody or visitation under DRL § 70 (a). Given the marked change in the law and attitudes concerning same sex couples and marriages in more recent years, the Court EVOLVED and found the 25 year old definition of "parent" had become unworkable and expanded what it called a "needlessly narrow interpretation". Where DRL § 70 confers the right to either parent to apply for custody or visitation, there is no statutory definition of the term "parent" . The Court did not accept the 25 year old definition, which disallowed the right to seek custody or visitation by anyone without a biological or adoptive relationship with the child. Accordingly, where, for example, there was a same sex couple named Amy and Barbara, and Amy was artificially inseminated and gave birth to a child,

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Referrals accepted from members of the bar

Holiday Party 12-8-16

Photos by Walter Karling

The Mystic band

Hon. Jodi Orlow and Cliff Welden

Art Terranova and Lisa Mevorach

Peter Metis - President, Hellenic Lawyers Assn, Janet Keller - President, Brandeis Assn, Hector Santiago - Past President, LLAQC, EJ Thorsen - President, QCWBA and Greg Brown - President, QCBA

Tara Corsello, Geo Nicholas and Wendy Giakoumas

Members dancing to the music of The Mystic band.

Holiday Party 12-8-16

Photos by Walter Karling

Jeff Blum, Hon. Jodi Orlow and Greg Newman

Geo Nicholas, Hon. Margaret Parisi McGowan, Joe Trotti and Edward Bailey

EJ Thorsen, Hon. Margaret Parisi McGowan, June Briese, Geo Nicholas and Diana Gianturco

Dom Chiariello, Joe Carola, David Wasserman and Bob Bellone

Dave Adler, Art Terranova and Peter Metis

Abby Goldstein, Claudia Lanzetta and Hilary Gingold

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order directing DNA or genetic marker testing, as the petitioner failed to show that he made the acknowledgment based upon fraud, duress, or a material mistake of fact as required by the statute, because statements made by petitioner in an affidavit established that he did not justifiably rely on respondent's purportedly fraudulent statements, when he signed the acknowledgment, and furthermore, petitioner had acknowledged to the court that he knew he was not the father when he signed the acknowledgment. Matter of Demetrius H. v Mikhaila C.M., 35 A.D.3d 1215, 827 N.Y.S.2d 810, 2006 NY Slip Op 9812, 2006 N.Y. App. Div. LEXIS 15475 (N.Y. App. Div. 4th Dep't 2006).

A trial court properly dismissed a petitioner's application, in a proceeding to vacate a prior acknowledgment of paternity of respondent's daughter, because the fact that petitioner claimed he had to acknowledge the girl in order to qualify his family for public assistance so his son could receive cancer treatment did not constitute duress for purposes of N.Y. Fam. Ct. Act § 516-a (b). Matter of Wimberly v Diabo, 42 A.D.3d 599, 839 N.Y.S.2d 822, 2007 NY Slip Op 5795, 2007 N.Y. App. Div. LEXIS 8152 (N.Y. App. Div. 3d Dep't 2007).

In a N.Y. Fam. Ct. Act § 516-a proceeding, seeking to vacate an acknowledgment of paternity by filing a petition more than one year after appellant signed the acknowledgment, his testimony that he believed his signature served solely to expedite the child's adoption and facilitate respondent's ability to leave the hospital was belied, inter alia, by appellant's admission that he could read and understand the acknowledgment. Matter of Miskiewicz v Griffin, 41 A.D.3d 853, 839 N.Y.S.2d 180, 2007 NY Slip Op 5748, 2007 N.Y. App. Div. LEXIS 8062 (N.Y. App. Div. 2d Dep't 2007).

An acknowledged father could not vacate his acknowledgement of paternity, when he waited nearly ten years after the child was born, because the fact that the mother confirmed that he was not the biological father was insufficient to constitute a mistake of fact to vacate the acknowledgement under N.Y. Fam. Ct. Act § 516-a (b), and stating that he and the mother did not know how to vacate the acknowledgment was likewise insufficient. Matter of S.E.R. v M.S.C., 845 N.Y.S.2d 701, 2007 NY Slip Op 27459, 238 N.Y.L.J. 102, 2007 N.Y. Misc. LEXIS 7494 (N.Y. Fam. Ct. 2007).

3 (b). Limitations, Presumptions and Burdens of Proof in Paternity Proceedings:

Many paternity Petitions are filed in the context of child support proceedings. Typically, the mother is seeking support and the father is contesting it. In such a case, the Court is empowered to order a DNA test. NY CLS Family Ct Act § 418. However, no such test shall be ordered, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman.

EXAMPLES:

A Mother was barred by doctrine of res judicata, from bringing paternity proceeding, which involved the same parties and same issues as those in a prior dismissed proceeding; she was also precluded, by the doctrine of collateral estoppel, since she was party in original proceeding, wherein another individual was adjudicated father. Mary SS. v Charles TT., 209 A.D.2d 830, 619 N.Y.S.2d 187, 1994 N.Y. App. Div. LEXIS 11345 (N.Y. App. Div. 3d Dep't 1994).

The doctrine of equitable estoppel did not bar paternity proceeding commenced, when child was twelve years old, since the child never believed herself to be the legitimate child of mother's husband, and husband never recognized child as his own. Vilma J. v William L., 151 A.D.2d 758, 542 N.Y.S.2d 781, 1989 N.Y. App. Div. LEXIS 9171 (N.Y. App. Div. 2d Dep't), app. denied, 74 N.Y.2d 614, 547 N.Y.S.2d 847, 547 N.E.2d 102, 1989 N.Y. LEXIS 3083 (N.Y. 1989).

In Marilyn C. Y. v. Mark N. Y., 2009 NY Slip Op 5856, ¶ 1, 64 A.D.3d 645, 646, 882 N.Y.S.2d 511, 512 (App. Div.) the Court held "[I]n cases involving paternity, child custody, visitation and support, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy" (Matter of Charles v Charles, 296 AD2d 547, 549, 745 N.Y.S.2d 572; see Matter of Griffin v Marshall, 294 AD2d 438, 742 N.Y.S.2d 116). "The issue does not involve the equities between [or among] the . . . adults; the case turns exclusively on the best interests of the child" (Matter of Shondel J. v Mark D., 7 NY3d 320, 330, 853 N.E.2d 610, 820 N.Y.S.2d 199; see Matter of Gina L. v David W., 34 AD3d 810, 811, 826 N.Y.S.2d 338; Matter of Griffin v Marshall, 294 AD2d at 438). "Courts are more inclined to impose equitable estoppel to protect the status of a child in an already recognized and operative parent-child relationship" (Matter of Greg S. v Keri C., 38 AD3d 905, 905, 832 N.Y.S.2d 652 [internal quotation marks omitted]; see Matter of Shondel J. v Mark D., 7 NY3d at 327; Matter of Antonio H. v Angelic W., 51 AD3d 1022, 1023, 859 N.Y.S.2d 670)."

An order of filiation would not be granted in a proceeding brought by a married woman, separated from husband, where the husband was living in the vicinity and was known to have visited complainant and evidence was not sufficient to establish that child was illegitimate. Saratoga County Comm'r of Public Welfare v A. B., etc., 131 N.Y.S.2d 634, 205 Misc. 1004, 1954 N.Y. Misc. LEXIS 3347 (N.Y. Child. Ct. 1954).

However, in People ex rel. Campbell v. Lewis, 17 Misc. 2d 1077, 1077, 1957 N.Y. Misc. LEXIS 2961, 164 N.Y.S.2d 607 (N.Y. Child. Ct. 1957), the Court held "Testimony shows to the entire satisfaction of the court that the complainant has sustained the burden of proof and that the defendant is the father of said child. Prior to the bringing of this proceeding, I am satisfied that the defendant on one or more occasions was accused of being the father of the child and that he at no time flatly denied such accusations. On the entire evidence, I feel that an order of filiation should be granted herein. (Matter of Saratoga County Comr. of Public Welfare v. "Waters", 205 Misc. 1004.)"

In AMS, Ill v. EDG, 2012 NY Slip Op 51096(U), ¶ 17, 35 Misc. 3d 1244(A), 1244A, 954 N.Y.S.2d 757, 757 (Fam. Ct.), The Court held "Family Court Act § 417 entitled "Child of ceremonial marriage" provides that: A child born of parent who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage. It is well settled that "A child born during marriage is presumed to be the biological product of the marriage and this presumption has been described as one of the strongest and persuasive known to the law". Marilene S. v. David H., 63 AD3d 949, 882 N.Y.S.2d 155 (2d Dept. 2009)(internal quotations omitted). See also, Walker v. Covington, 287 AD2d 572, 731 N.Y.S.2d 485 (2d Dept. 2001). However, the presumption may be rebutted by clear and convincing proof "excluding the husband as the father or otherwise tending to disprove legitimacy". Alberto T., v. Tammy D., 274 AD2d 587, 712 N.Y.S.2d 392 (2d Dept. 2000) (internal citations omitted).

In Hansom v. Hansom, 75 Misc. 2d 3, 7, 346 N.Y.S.2d 996, 1001 (Fam. Ct. 1973), the Court held "The issue of legitimacy of a child, born to a married woman, may be raised by the respondent husband in an action for support. (12 Zett-Edmonds-Buttrey-Kaufman, N. Y. Civ. Prac., § 22.02.) The husband may raise the issue of legitimacy at any time after the birth of a child, although a paternity action may not be commenced more than two years after the birth of a child, unless there has been a written acknowledgment of support. (Family Ct. Act, § 517.)

The Hansom court further held that "A New York Court held that a blood test exclusion overcame the presumption of legitimacy, even though the husband and wife shared the same bed during the critical period of possible conception of the child. (Zaskorski v. Luizzi, 1956, 3 A. D. [2d] 659)". (Schatkin, Disputed Paternity Proceedings [4th ed., 1967], p. 257.) In paternity proceedings, the result of a blood grouping test is admissible only where definite exclusion is established. (Clark v. Rysedorph, 281 App. Div. 121, supra; Anonymous v. Anonymous, 1 A D 2d 312; A. C. v. B. C., 12 Misc. 2d 1; Matter of Crouse v. Crouse, 51 Misc. 2d 649, supra.)"

In conclusion, the Hansom court held "The presumption of legitimacy, at one time in the law, was held to be unrebuttable and conclusive. It is now an ordinary evidentiary presumption, which can be overcome by competent proof, such as exclusion of paternity by blood grouping test (emphasis mine), as in this case. (Matter of "Anonymous" v. "Anonymous", 43 Misc. 2d 1050; Matter of Findlay, 253 N. Y. 1, supra.)"

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Barbara could not seek custody or visitation under the ALLISON D. holding, regardless of how long or how much she had been involved in the child' s upbringing. The 2016 Court found the 25 year old definition "unsustainable, particularly in the light of the enactment of same-sex marriage in New York and the U.S. Supreme Court's holding in OBERGEFELL v. HODGES, 576 U .S. I 135 S. Ct. 2584 (2015) " .

While this 25 year old disqualification was lifted by the BROOKE Court, the exception created was very limited, and made "the element of consent by the biological or adoptive parent critical". The Court of Appeals established the following test to determine "standing" to seek custody or visitation.
The applicant without the biological or adoptive relationship must prove by "clear and convincing evidence" : a) that the petitioner is not a biological or adoptive parent; b) there was a pre-conception agreement; and c) the agreement was between him or her and the biological parent to conceive and raise the child as co-parents. That was the situation found to be the case in the cited and jointly decided cases. Both petitioners alleged that there was such a pre-conception agreement. The Court held that if this was proven by clear and convincing evidence, it would be sufficient to establish standing. The decision does not get to the next question a trial court must answer. Regardless of "standing" the court must then move on to the well known, albeit inexplicit issue: "the best interests of the child." The Court made clear that these two cases had been decided solely upon their specific facts. It expressly did not intend to adopt a test for other types of cases, with other fact patterns . For example, the Court declined to address whether standing could be established in cases where a parent-like relationship or agreement was made AFTER conception. Whether standing could be established and if so, what factors had to be shown, were matters the Court deferred for another day and upon a different record.

CUSTODY HEARINGS MOST OFTEN REQUIRED

June 9, 2016 - S.L. v .J.R. , 27 N.Y . 3d 558, 36 N .Y.S. 3d 411

The Second Department affirmed a decision on a motion, awarding custody to a father without a hearing, based upon "adequate relevant information". That included a forensic report, several affidavits and a recommendation by the children 's attorney. The Court of Appeals reversed this ruling and remitted the case for a hearing. Although the Court acknowledged that the right to a hearing was not absolute, the "undefined and imprecise adequate relevant information standard" applied by the court below was not found to be sufficient to assure the best interests of the children or the right of a parent to "control the upbringing of a child" . The Court commented that reliance upon the forensic report involved hearsay statements, opinions and credibility untested by either party. The general exception to the requirement of a hearing is narrow and the high court made clear that a court making that exception must clearly articulate the factors which were or were not material to its decision. This leaves no doubt that the best practice would be to hold a hearing in the vast majority of cases.

BASELESS ALLEGATIONS OF SEXUAL ABUSE PENALIZED

March 16, 2016 - KORTRIGHT v. BHOORASINGH, 137 A.D . 3d 1021, 26 N .Y.S . 3d 714 {2nd Dept.)

Most family law practitioners have encountered custody cases in which allegations of sexual abuse against one party have severely prejudiced and delayed the accused, even though the allegations wound up never having been established. Those situations cause us to applaud our Second Department for its decision in this case. Custody of the child was transferred from the mother to the father by the Family Court, based upon the mother 's repeated, baseless allegations of sexual abuse by the father. The mother's

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actions resulted in the child' s having to submit to various physical examinations and were found to have negatively impacted the child and her relationship with her father. Her conduct was found to render her an unfit parent and our Appellate Division affirmed.

EQUITABLE DISTRIBUTION IN SHORT MARRIAGES

March 24, 2016 - DOSCHER v. DOSCHER,
137 A.D. 3d 961, 26 N.Y.S. 3d 866, (App.Div. 2nd Dept.)

In this decision, the Second Department reduced a 50- 50 marital property division to 70% - 30%, primarily based upon there having been a short (5 year) marriage.

RECOUPMENT OF CHILD SUPPORT OVERPAYMENT

May 18, 2016 - GOEHRINGER v .VOZZA- NICOLOSI, 139 A.D. 3d 949, 30 N.Y.S. 3d 566 (App. Div. 2nd Dept.) .

It has, for a long time, been established that where temporary child support payments are ultimately determined to have been too high, public policy precluded the payor' s recouping the over payments against future support or otherwise HOLTERMAN v. HOLTERMAN, 3 N.Y . 3d 1, 781 NYS 2d 458 (Ct. of Appeals) . However, that rule has been somewhat eroded . In 2006, in COULL v. ROTTMAN, 35 A .D . 3d 198, 828 N .Y .S. 2d 295, the First Department reiterated the above rule insofar as it precluded recoupment against future child support, but added: "On the other hand, public policy does not forbid offsetting add-on expenses against an over payment. Therefore, plaintiff is entitled to a credit ... against future add-on expenses" . This year, in GOEHRINGER (supra) our Second Department, citing COULL v. ROTTMAN, allowed the same offsetting of over payments against add-on expenses .

February 11, 2016 - WEIDNER v. WEIDNER,
136 A.D. 3d 1425, 24 N .Y .S . 3d 845 (App. Div . 4th Dept .)

In this decision, the court went even further, when it specified that against strong public policy, the wife would be entitled to recoup child support over payments, with no limitation to add-on expenses. In play, however, was a large disparity between the wife' s income and the much higher income of the husband.

CHILD SUPPORT IN SHARED CUSTODY CASES

May 25, 2016 - COTTER v. COTTER, 139 A.D. 3d 995, 30 N.Y.S. 3d 828, (App. Div. 2nd Dept.).

We have been operating under what we believe to be a questionable ruling for 18 years, pursuant to BAST v. ROSSOFF, 91 N.Y. 2d 723, 675 N.Y .S. 2d 19 (Ct. of Appeals, 1988) and BARABY v. BARABY, 250 A .D. 2d 201, 681 N .Y.S. 2d 826 (App. Div . 3rd Dept., 1998), to the effect that in joint custody cases, where the parents share parenting time roughly equally, the party with the higher income shall pay child support to the other and, for child support purposes, be considered to be the non-custodial parent. In the COTTER case (supra) the court imputed $43,750 in income to the defendant-father, but failed to award him any child support . Despite the parties' shared custody arrangement, the court concluded that the father was not entitled to any child support. Notably, there is nothing in the decision that reflects the wife's income. But it can reasonably be inferred that it was higher than the husband's, because: (1) to question whether HE should get child support suggests that conclusion as well as (2) the fact that he had been awarded a $12,500 counsel fee. Calls to the wife' s lawyer, to confirm that inference, have not been returned. But if our inference is correct, this decision represents a departure from the prior rule, although with no reasoning or factors discussed, except for the court's expressed consideration of "the circumstances of this case" (which is of no help to us at all).

NOTEWORTHY LEGISLATION

Chapter 365 of the Laws of 2016 -

This amendment to DRL § 245 now eliminates the need to exhaust all other remedies before being entitled to seek contempt of court adjudication in Supreme Court (a requirement never required in Family Court, pursuant to FCA § 454).

CPLR § 2103 (b) (2)

This section was amended to add five (5) days to the prescribed time period, where papers are served upon an attorney by mail from within the state. Six (6) days are to be added if the mailing is from outside the state.

"Sanctuary Cities," Trust Acts, and Community Policing Explained

By: By Allen E. Kaye

The term "sanctuary city" is often used incorrectly to describe trust acts or community policing policies that limit entanglement between local police and federal immigration authorities. These policies make communities safer and increase communication between police and their residents without imposing any restrictions on federal law enforcement activities.

1. What is a "sanctuary city" and where did the term come from?

Currently there are 326 counties, 32 cities and four states which limit local law enforcement's involvement in federal immigration enforcement.

• The phrase "sanctuary city" was born out of a church-centered movement in the 1980s. During that time, thousands of Central American refugees came to the United States seeking protection from civil wars, and many were denied asylum. Churches, synagogues, and other religious institutions banded together to oppose the return of these refugees to the countries where they had been persecuted, and this became known as the Sanctuary Movement.

• The term "sanctuary city" is a misnomer when used to describe community policing policies which attempt to eliminate fear from those who worry that reporting a crime or interacting with local law enforcement could result in deportation. Some have confused "sanctuary city" policies with the notion that immigrants in these communities are insulated from any immigration enforcement action against them. In fact, nothing in a so-calle sanctuary city policy prevent federal enforcement actions. Some cities and localities—including San Francisco—have used the term "sanctuary" in their community policing policies in solidarity with the movement of the 1980s.

2. Why do localities, cities, and states adopt community policing or trust laws?

Several hundred state and local police departments across the country have enacted community policing policies because they make communities safer and they help ensure that law enforcement officers do not run afoul of the law by detaining persons they do not have legal authority to hold (i.e., in violation of the constitutional requirements of the Fourth Amendment). Of the hundreds of jurisdictions with such policies, all but six were enacted after 2011. These policies were largely in response to a program called Secure Communities, which the Department of Homeland Security (DHS) had fully operationalized by 2012. Under Secure Communities, Immigration and Customs Enforcement (ICE), a division of DHS, began getting fingerprints for every individual as soon as they were booked and taken into custody by state and local law enforcement. As a result of this information sharing between local law enforcement and ICE, many undocumented immigrants were taken into immigration custody and deported under Secure Communities. The program shattered trust between immigrant community who feared that with the police their loved neighbors to deportations. Secure

and other members interactions could expose ones and the risk of Although Communities was discontinued in November 2014 and replaced with the Priorities Enforcement Program (PEP), the practice of sharing of fingerprints at the time of booking continues under PEP. Consequently, ICE has information about noncitizens who enter the criminal justice system and is able to make decisions—with or without the involvement of local law enforcement—about whether to pursue immigration enforcement.

How do community policing policies make communities safer?

Community policing policies encourage all members of the community, including immigrants, to work with the police to prevent and solve crime. As Tom Manger, Chief of Police for Montgomery County and President of the Major Cities Chiefs Association, said,

"To do our job we must have the trust and respect of the communities we serve. We fail if the public fears their police and will not come forward when we need them. Whether we seek to stop child predators, drug dealers, rapists or robbers—we need the full cooperation of victims and witness. Cooperation is not forthcoming from persons who see their police as immigration agents. When immigrants come to view their local police and sheriffs with distrust because they fear deportation, it creates conditions that encourage criminals to prey upon victims and witnesses alike."

Law enforcement agencies and associations from across the country have echoed this sentiment by supporting community policing policies and opposing attempts by the federal government to mandate immigration enforcement cooperation.

The Law Enforcement Immigration Task Force, comprised of more than 30 police chiefs, sheriffs, commissioners, and lieutenants from across the country, explained, "Immigration enforcement at the state and local levels diverts limited resources from public safety. State and local law enforcement agencies face tight budgets and should not be charged with the federal government's role in enforcing federal immigration laws."

According to Dayton Police Chief Richard Biehl, Dayton's community policing policies "have been successful in building trust and making our city safer," and have led to a nearly 22 percent reduction in serious violent crime and a 15 percent reduction in serious property crime in Dayton since the adoption of those policies.

What does all this have to do with complying with the Fourth Amendment?

In addition to the serious public safety benefits that community policing policies provide, many communities limit their involvement in immigration enforcement because the legality of detainers is in question. Under the Fourth Amendment, a person generally may not be detained without a warrant. Courts have ruled that states and localities that honor ICE detainers (i.e., ICE requests to hold a person even though they are otherwise eligible for release from criminal custody) may be held liable for Fourth Amendment violations. Several counties have been forced to pay six-figure settlements to individuals as a result of holding them on detainers longer than 48 hours. As a result, many jurisdictions require DHS to obtain a judicial warrant in order to justify detaining a person for immigration enforcement.

3. Isn't immigration enforcement a federal responsibility?

Immigration laws and policies affect a broad range of U.S. interests. As the U.S. Supreme Court noted in Arizona v. U.S., "The Government of the United States has broad, undoubted power over the subject of immigration…The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."

There is no local or state community policing policy that prevents ICE from enforcing federal immigration laws. When a law enforcement agency takes a suspect into custody and books him or her, the person's fingerprints are sent automatically to ICE, which has ample resources to investigate and initiate enforcement actions against noncitizens who fit within the agency's enforcement priorities.

Conclusion

Instead of attempting to micromanage how states and localities interact with DHS, Congress should get to the important job of passing immigration reform. There is no doubt that our nation is safer when everyone is accounted for and fully documented. A major benefit of comprehensive immigration reform is that every person in this country would get documents and be "on the grid" of U.S. life—with driver's licenses, social security numbers, and other forms of identification. Rather than continue to leave millions of immigrant families in a desperate limbo of fear and uncertainty, such a system would help us make smarter and more strategic decisions about our nation's safety and security, and in a way that respects due process.

AILA provides here a legal and policy backgrounder on sanctuary cities and detainers and possible executive actions that President Trump might take on sanctuary cities and detainers.

AILA Backgrounder on Possible Executive Actions Including Sanctuary Cities and Detainers

By: By Allen E. Kaye

Legal and Policy Background: In recent years, several jurisdictions have expressly limited their roles and activities with respect to immigration enforcement, including limiting police investigations into the immigration status of persons with whom they come in contact; and declining to hold an individual after a scheduled release date solely at the request of a federal immigration detainer. Some people refer to these as "sanctuary" policies or "sanctuary cities" and argue that they should be penalized. There is no clear and widely-accepted definition of "sanctuary city."

A 2016 Department of Justice (DOJ) Office of Inspector General (OIG) investigation suggested that 10 different city policies and ordinances may run afoul of 8 USC section §1373. Nothing in federal law requires localities to enforce immigration laws. Section 1373 merely addresses the exchange of information regarding citizenship and immigration status among federal, state, and local government entities and officials. Specifically the statute prohibits local and state governments from enacting laws or policies that limit communication with the Department of Homeland Security (DHS) about information regarding the "immigration or citizenship status" of individuals and prohibits restrictions on "[m] aintaining" such information. Section 1373 does not impose on states and localities any affirmative obligation to collect information from private individuals regarding their immigration status, nor does it require that states and localities take specific actions upon obtaining such information.

In recent years, detainers issued by U.S. Immigration and Customs Enforcement (ICE) have peppered the federal courts:

Galarza v. Szalczyk: The Third Circuit found that the county did not have to enforce the detainer because it was voluntary. The court found that the county could be found responsible for unlawfully holding the plaintiff for ICE because it was not required to comply with the detainer but chose to do so.

Morales v. Chadbourne: The First Circuit held that detaining someone beyond their release date is an arrest under the Fourth Amendment. The court found that the Fourth Amendment requires ICE to have probable cause to issue a detainer.

Miranda-Olivares v. Clackamas County: The Federal District Court in Oregon held that it does not matter what immigration status the plaintiff had, being held on a detainer violated her Fourth Amendment right against unlawful arrest and detention, and the detainer does not provide sufficient probable cause to allow the local jail to hold the plaintiff for ICE.

Jimenez-Moreno v. Napolitano: In October 2016, the Northern District of Illinois held that nearly all ICE detainers issued by the Chicago Field Office were invalid because ICE has limited authority to arrest without a warrant, and that detainers on individuals in local custody generally exceed this authority. ICE needs to get a warrant to seek the arrest of an individual in local custody, or make an individualized finding of risk of escape prior to issuing the detainer.

Possible Actions: Detainers. President Trump might attempt to make compliance with detainers mandatory, possibly under the threat of a loss of federal funding. If the President takes this route, he will likely stir a fury of litigation and community outcry.

Possible Actions: Sanctuary Cities: President Trump might announce that federal funding for sanctuary cities will be limited. He could provide guidance to DOJ that §1373 should have a stricter interpretation, which could result in several local policies not being able to receive funding. Federal administered grants, including State Criminal Alien Assistance Program (SCAAP), Justice Assistance Grant (JAG), Community Oriented Policing Services (COPS), community development block grants, or other DHS and DOJ funding could be denied to jurisdictions found to be out of compliance with federal statutes, regulations, policies, guidelines, or requirements.

DOJ has already added language to various federal criminal justice grants regarding the requirement that grant recipients must certify compliance with all applicable federal laws, including 8 USC Section §1373If the DOJ Office of Justice Programs receives information that a grantee is in violation of federal laws, the grantee may be referred to the OIG and may be subject to penalties.

Litigation would likely be brought on new interpretations of Section §1373. Administrative policy seeking to direct local or state governments to take part in immigration enforcement would face significant challenges under current interpretations of the Tenth Amendment of the U.S. Constitution.

Allen E. Kaye, a Phi Beta Kappa graduate of Queens College of the City of New York, Colombia Law School (JD) and New York University Law School (LLM), is the President of the Law Offices of Allen E. Kaye and Associates and Of Counsel to Pollack, Pollack, Isaac and DeCicco. He is a past National President of the American Immigration Lawyers Association and Co-Chair of the Immigration Committee of the Queens County Bar Association. He has been selected by Martindale-Hubbell as a 2014 “Top Rated Lawyer” in the practice of Labor and Employment (for Immigration) and listed in the 2017 Edition of The Best Lawyers in America.Questions for publication may be sent to Mr. Kaye at 225 Broadway, Suite 307, and New York, N.Y. 10007 or by email at AllenEKaye5858@gmail.com or aek@ppid.com

Obituary
Bernard G. Helldorfer

BERNARD G. HELLDORFER of Maspeth, after a valiant struggle with cancer, died on Thursday, December 15, at the age of 61. He was the beloved husband of Linda (Sturm) Helldorfer. He was born August 4, 1955 to Lillian and Bernard Helldorfer. He is survived by his mother Lillian, his sister Susan Prince, his brother-in-law Jim Prince, and his nephew/godson James Prince. He is also survived by his sister-in-law Lori Kazlausky, his niece Grace Warmbier and her husband Michael Warmbier, his nephew Jimmy Kazlausky, and his nephew/godson Johnny Kazlausky. He is also survived by his godson Stephen Helldorfer, his godson Nicholas DiBari, his goddaughter Katrina Lewis, his uncle John Helldorfer, his Aunt Claire Helldorfer, his Aunt Maryann Helldorfer, his in-laws Richard and Helen Sturm, and many cousins.

Bernie and his wife were married at Our Lady of the Miraculous Medal Church in Ridgewood on June 14, 1980, celebrated by Rev. John Garkowski. Msgr. Nicholas Sivillo and Rev. John Garkowski concelebrated their 25th wedding anniversary Mass in June 2005.
They have a dog Patch. Their first dog Smokey died in 2013.

Bernie Helldorfer graduated with a Bachelor's degree in accounting from St. John's University College of Business in 1977. He attended St. John's University School of Law and attained a J.D. in 1980.

Following graduation from law school, he was offered a position as in-house counsel for Mobil Oil Corporation and stayed there until 1983. In 1983 he began teaching undergraduate law at the College of Professional Studies and served as the first chair of the Division of Criminal Justice and Legal Studies. He and his colleague Oscar Holt founded the Mock Trial Team as an academic activity for undergraduate students. In the 25 years of competition the team has made it to the National Finals 21 times, with its best finish as the #2 team in the USA in 2000.

Bernie maintained a private practice of law in Maspeth, Queens, specializing in elder law, trusts and estates, and real property. He was a long-time member of the Blackstone Lawyers Club.

Bernie was admitted to the bar in federal district court and before the U.S. Supreme Court. He was also admitted to the bar in the states of Pennsylvania and Montana in addition to New York.

In 1996, due to the nomination of one of the members of the Mock Trial Team, Bernie was chosen as one of the Torchbearers of the Olympic Flame.
Bernie was also a fourth degree Knight of Columbus, a Knight of the Equestrian Order of the Holy Sepulchre of Jerusalem, and was given a papal honor of being made a Knight of the Order of St. Gregory the Great.

He was a member of the Board of Trustees at his alma mater, Christ the King High School.

He was an active member of his parish of Our Lady of Hope, participating as a Eucharistic Minister, Pre Cana presenter, Holy Name Society member, trustee, counter, and member of their Senior Goal Group.

He and his wife Linda were two of the original members of the Relay For Life of Middle Village of the American Cancer Society.

A Mass of Christian Burial was offered on Thursday, December 22, at Our Lady of Hope Church, Middle Village, followed by interment at St. John's Cemetery, under the direction of Village Chapels Funeral Home, 67-67 Eliot Avenue, Middle Village.

In lieu of flowers, donations in Bernie's memory would be appreciated for any of the following:

St. Jude's Children's Research Hospital
262 Danny Thomas Place
Memphis, TN 38105

Bernard Helldorfer Memorial Scholarship Fund
Christ the King High School
68-02 Metropolitan Avenue
Middle Village, NY 11379

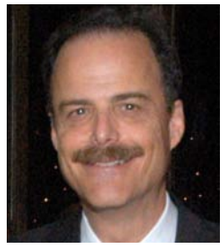
The Humane Society of the United States
1255 23rd Street, NW, Suite 450
Washington, DC 20037

St. John's University (special designation for the Mock Trial Team)
8000 Utopia Parkway
Jamaica, NY 11439

American Cancer Society
131-07 40th Road
Suite E28
Flushing, New York 11354

SOME DISCIPLINARY THOUGHTS

by: Stephen David Fink



My late friend and colleague James "Jimmy" Richman was fond of saying that there are three parts of every case: (1) the retainer and fee arrangement; (2) the dispute over the fee; and (3) the disciplinary complaint.

With that in mind, let's take a look at how attorneys get in trouble by being disorganized and even lazy.

1. The failure to watch your employees and escrow account.

The classic case here is that of Nassau County attorney Peter Galasso and his former partner James R. Langione. The reader is referred to an extensive review of the case by Nassau County Justice Vito M. DeStefano in Galasso, Langione & Botter, etc., v. Signature Bank, et al, 2016 WL 5108541, 2016 N.Y. Slip Op 51308 (U) (Sup. Ct., Nassau Cty. Sept. 19, 2016).

In 1993 Peter decided to help out his brother Anthony by giving him a job with the firm. Eventually Anthony took over the complete direction of the firms bank accounts. Unfortunately, Anthony opened various fraudulent accounts and even forged the name of the various firm partners. It was not until 2007 that Anthony admitted to the thefts which involved losses of more than four million dollars. He pled guilty to various criminal charges and went to jail.

Disciplinary proceedings were commenced against Peter Galasso in the Second Department. Peter admitted that he had turned all monetary matters over to his brother and rarely (if ever) reviewed the firm bank accounts. He blamed his brother as well as the various banks involved but he could not explain his complete failure to supervise the various accounts - especially the IOLA accounts.

At the disciplinary hearing the Referee rejected these purported defenses and the Second Department agreed. A two year suspension was ordered. His partner James Langione received a six month suspension. Multimillion dollar lawsuits have continued over the years with no end in sight.

Lessons to be learned:

(1) Let no one take control of your accounts and certainly not your IOLA;

(2) If you are using a "bookkeeper", review the accounts periodically with her/him to detect errors or worse.

2. Take careful care of your IOLA

Even where no one is stealing funds from your IOLA account, problems can arise. As per Rule 1.15(d) of the Rules of Professional Conduct (22 NYCRR 1200.0) attorneys are required to keep a ledger or similar record showing the source of all funds, a description of the funds, and the names of all persons to whom such funds were disbursed.

The failure to keep careful records in compliance with the Rules may lead to an inadvertent deficiency and/or bounced checks. Even if the attorney derived no personal benefit from these funds, his failure as a fiduciary has been held to warrant suspension. See, e.g., Matter of Paul Steinberg, 2016 WL 5107931, 2016 N.Y. Slip Op 06087 (2d Dept. Sept. 21, 2016) [Six month suspension ordered].

The lesson to be learned here is to keep careful escrow records, no matter how difficult it may seem. While we attorneys are usually not accountants, a simple ledger is not too much to ask so as to prevent a grievance or worse.

3. Stay out of trouble or it will catch up with you eventually

Even if the errors you make are relatively minor, if there is too much contact with the Disciplinary Committee, serious problems will result.

In the disciplinary proceeding against the attorney Eliot F. Bloom, 2016 WL5207961, 2016 N.Y. Slip Op 06078 (2d Dept. Sept. 21, 2016), the allegation against him was that he had failed to disclose his personal relationship with an adverse party in a pending action. It was also alleged that he had neglected the civil action.

There was an extensive hearing on the issues raised wherein the Referee found, among other things ". . . .an inherent conflict of interest. . . ." The attorney argued that the issues involved were ten years old and that no one was actually harmed. However, the Second Department specifically noted the "respondent's extensive disciplinary record . . . ." He had been both censured and admonished in prior matters, and even sanctioned in the amount of $10,000.00. There were also four "cautions" caused by certain questionable actions. Mr. Bloom was suspended for six months.

The lesson to be learned is to minimize your contact with the Grievance Committee. The only way to do that is to stay out of trouble by following the Code of Professional Conduct. If it appears improper, it probably is! Your license is valuable and should never be compromised.

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Vishnick McGovern Milizio LLP Announces Partner and Counsel Promotions

Managing Partner **Joseph G. Milizio** is pleased to announce that effective January 1, 2017 the firm has promoted three of its outstanding associates:

- Rockaway Park resident **Eun Chong (EJ) Thorsen** has been named partner;
- Far Rockaway resident **Avrohom Gefen** has been named partner; and
- Williston Park resident **John P. Gordon** has been named counsel.

ABOUT EUN CHONG (EJ) THORSEN

Known to all as EJ, Ms. Thorsen has been a member of the Commercial Litigation, Matrimonial and Family Law and LGBT Representation Practice Groups at Vishnick McGovern Milizio LLP since 2007. She represents individuals, families and businesses in a wide range of litigation matters and counsels them in disputes and appeals in matrimonial and family law, trusts and estate litigation, guardianships and commercial and employment law. EJ is appointed by the Courts of New York to serve in Guardian ad Litem and in other fiduciary capacities. By appointment of the former Chief Judge Jonathan Lippman, she serves on the NYS Commission on Statewide Discipline. By appointment of the Honorable Randall T. Eng, Presiding Justice of the Appellate Division, Second Department, she serves on the Committee on Character and Fitness for the Second, Tenth, Eleventh and Thirteenth Judicial Districts. EJ serves as the first Asian-American president of the Queens County Women's Bar Association for the 2016-2017 term and as the executive vice president of the Korean American Lawyers Association of Greater New York (KALAGNY). She was elected to the board of directors of the St. John's University School of Law Alumni Association in 2015 and serves on the board of directors of the Judges and Lawyers Breast Cancer Alert. Born in Daegu, South Korea, EJ and her parents settled in New Jersey when she was in kindergarten. She received a Bachelor of Arts degree at Boston College before earning a Juris Doctor degree at St. John's University School of Law. Ms. Thorsen is admitted to practice law in New York and New Jersey.

ABOUT AVROHOM GEFEN

Avrohom Gefen, an attorney at Vishnick McGovern Milizio LLP since 2006, specializes in commercial and employment litigation. His extensive experience includes representing businesses and individuals in a wide variety of matters before federal and state courts and administrative tribunals such as the EEOC, US Department of Labor, NYS Labor Department, and the NYS and NYC Commissions on Human Rights. In addition to his litigation practice, Avrohom advises employers on topics that include termination decisions, employee discipline, personnel policies and compliance with federal, state and local statutes including the Fair Labor Standards Act (FLSA), Title VII, Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA) and Family and Medical Leave Act (FMLA). Named a Rising Star by New York Super Lawyers in 2015 and 2016, Mr. Gefen received his Juris Doctor degree from Fordham University School of Law and is a summa cum laude graduate of Touro College. He is a member of the Labor and Employment, Commercial and Federal Litigation Sections of the NYS Bar Association, as well as the Queens County and Nassau County Bar Associations and serves on the board of the Brandeis Association. He is member of the Board of Trustees of Congregation Chesed V'Emes in Bayswater, New York and a member of the Advisory Board of Rutgers University Jewish Experience. Mr. Gefen is admitted to practice in New York State and before the United States District Courts in the Southern and Eastern Districts of New York.

ABOUT JOHN P. GORDON

John P. Gordon, who joined Vishnick McGovern Milizio LLP is 2006 and heads the firm's Residential Real Estate Practice Group, is a member of the firm's Real Estate Law, Business and Transactional Law and Exit Planning for Business Owners Practice Groups, where he concentrates in the purchase, sale, lease and finance of residential and commercial real estate and provides advice on business formation, planning, ownership transfers, entity dissolutions and other transactions. He also works with the firm's Trusts and Estates Practice Group, formulating and implementing estate and gift tax plans for individuals and succession plans for business owners. Additionally, Mr. Gordon advises charities and other not-for-profit organizations on formation, application for tax-exempt status, compliance and governance. John is president of the Chamber of Commerce of the Willistons; a member of the Queens County and NYS Bar Associations; and Nassau County Bar Association, where he serves on the Real Property Law Committee. Mr. Gordon received his Juris Doctor degree from Fordham University School of Law and a Bachelor of Arts in Classics and Philosophy from the College of the Holy Cross; he is admitted to practice law in New York.

ABOUT VISHNICK MCGOVERN MILIZIO LLP

Founded in 1969, Vishnick McGovern Milizio LLP (VMM) is a full service law firm with offices in Lake Success, New York City and New Jersey. The firm maintains a diverse legal practice with many relationships spanning 40 years or more. VMM clients include businesses, individuals and families, professionals, entrepreneurs, not-for-profits and others who rely on the collaboration among the firm's senior and junior attorneys and highly-skilled staff. Practicing in the areas of Trusts and Estates Planning, Administration and Accounting, Trusts and Estates Litigation, Guardianships, Elder Law, Commercial Litigation, Alternated Dispute Resolution, Business and Transactional Law, Employment Law, Matrimonial and Family Law, Real Estate Law and LGBT Representation, VMM attorneys hold prominent positions on boards of directors and in civic, charitable and professional organizations.

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Small Claims Court

Supervising Judge Jodi Orlow has announced that Small Claims Court will be returning to a full schedule beginning February 14, 2017 as follows:

- Evening sessions [calendar call at 6:30 PM]: Monday through Thursday
- Day sessions: Tuesday and Thursday

The Court is also seeking members of the bar to act as Arbitrators. Please contact the Bar Association if you are interested in volunteering as an Arbitrator.

Gregory J. Newman
Chair, Civil Court Committee

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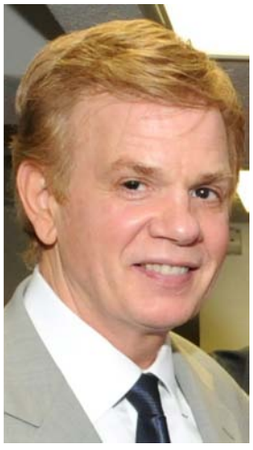
New 2017 Wage Laws in a Nutshell

by: Stephen D. Hans - Chairperson, Labor Relations Committee



Businesses throughout New York State are now being impacted by new minimum wage increases that went into effect on December 31.

These increases are somewhat historic, as for the first time ever there will be different minimum wage rates for different geographic regions of the state, and in New York City there will be different rates for large and small businesses.

Because of this, the formerly simple question of "what is the minimum wage" has become a bit more complicated.

Beginning on December 31, the minimum wage for employees working in any of the five boroughs of New York City for a business with 11 or more employees is now $11 per hour.

Employees working for a small business with 10 or fewer employees have a lower minimum wage rate of $10.50 per hour.

Employees working for businesses on Long Island (Nassau and Suffolk Counties) or in Westchester County must be paid a minimum wage rate of $10 per hour, while the applicable minimum wage rate for the remainder of upstate New York is now $9.70 per hour.

All regions of the state will see further scheduled annual increases in the minimum wage over the coming years, with rates for New York City businesses eventually rising to $15 per hour by the start of 2019 for large employers and 2020 for small employers.

Rates for Long Island and Westchester rise at a slower pace, reaching $15 per hour by the start of 2022.

Upstate counties will see the minimum wage rate rise the slowest, increasing incrementally until reaching $12.50 per hour at the start of 2021, with any further increases thereafter to be set by the Commissioner of Labor based upon economic indices.

There are also new salary levels for certain exempt "white collar" employees, including those classified as overtime exempt under the administrative and executive exemptions.

Although the anticipated federal salary level increase to $913 per week ($47,476 annually) was stayed by a federal court judge and did not go into effect as previously anticipated on December 1, New York employers still saw an increase in the required minimum salary levels for such exempt employees.

As of December 31, these levels are now set at $825 per week for large city-based employers (11 or more employees), $787.50 per week for small employers (10 or fewer employees), $750 per week for Long Island and Westchester employers, and $727.50 per week for upstate employers.

Just as with the minimum wage rate, these minimum salary levels will also be rising annually over the next several years, eventually reaching $1,125 per week in most regions.

Along with the minimum wage increases, there are also new rates for allowances, including tip, meal and lodging credits, and new rates for uniform maintenance pay.
As with the minimum wage, these rates vary by industry, as well as geographic location and employer size, and employers should consult the relevant wage order applicable to their particular industry.

These wage orders, along with other important information including required workplace postings and forms, can be accessed at www.labor.ny.gov.

Stephen D. Hans, a Long Island City-based labor attorney, is chairperson of the Queens County Bar Association Labor Relations Committee, and has been representing small businesses for over 35 years in Queens

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