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Grandparent Visitation

Can the Fit-Parent Presumption Be Overcome?

Part Two of a Two-Part Article

By Barry Abbott and Alton L. Abramowitz

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

The Presumption in Favor Of the Fit Parent

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

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

continued on page 6

Counsel Fees: A Tipping Point

By Joshua H. Pike and Judith L. Poller

The recent decision in *Sykes v. Sykes*, 41 Misc.3d 1061 (Sup. Ct. N.Y. Cty. 2013), sent shock waves reverberating throughout the New York matrimonial bar for its direction that during the pendency of a divorce litigation, the less monied spouse may be required to use a portion of her share of the marital estate to pay her legal fees, rather than continue to have such fees paid by the wealthier spouse. The court's rationale in *Sykes*, as more fully detailed herein, was that because the wife was receiving significant *pendente lite* maintenance and child support, unless she was responsible for her own counsel fees, she had no incentive to resolve or move the case forward due to her lack of "skin in the game."

As a result of the decision in *Sykes*, matrimonial practitioners are left contemplating when a court might apply this principal of "skin in the game." This article addresses when and why a case may reach the tipping point that pushes it over the equal playing field presumption inherent in Domestic Relations Law (DRL) § 237 to the "skin in the game" analysis, as described in *Sykes*. As will be explained, this different approach appears to depend largely on several factors, including the length of the action, the animosity between the parties, the parties' separate property assets, the legal fees the monied spouse has already paid, and the marital assets at issue.

Background

It has long been the doctrine of New York courts to "create a level playing field" (*Silverman v. Silverman*, 304 AD2d 41, 48 (1st Dep't 2003)) between the parties to a divorce action. Specifically, the courts look to "provide a rough equality in the resources available to each party in the course of the [divorce action]" (*Wolf v. Wolf*, 160 A.D.2d 555 (1st Dep't 1990)) by ensuring that the monied spouse is responsible for the payment of the non-monied spouse's counsel fees.

Under the unamended DRL § 237, courts were charged with the discretion to award counsel fees in a matrimonial action as "justice requires, having regard

continued on page 2

In This Issue

Counsel Fees

continued from page 1

to the circumstances of the case and of the respective parties." In 2010, however, the Legislature amended DRL § 237 to create a "rebuttable presumption that counsel fees shall be awarded to the less monied spouse," while still requiring the court to make such award "as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties." The current version of DRL § 237 further directs that the courts "shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, *pendente lite*, so as to enable adequate representation from the commencement of the proceeding." Although the courts retain discretion to award counsel fees to the non-monied spouse — a necessary term the statute fails to define — the burden has essentially shifted to the monied spouse to demonstrate why such counsel fees should not be awarded to the non-monied spouse. It is under this presumption that the court in *Sykes* analyzed the husband's application that the wife be required to utilize marital assets to pay her own counsel fees.

Despite a reasonably well-developed body of case law regarding the awarding of counsel fees in matrimonial actions, there is little persuasive guidance on how a court is to define which party is the monied spouse and what amount of evidence would rebut the presumption that the non-monied spouse is entitled to have the monied spouse continue to pay his or her counsel fees. These are the primary questions that linger both before and after the *Sykes* decision and that require further inquiry, especially prior to considering whether to make an application for a court to reverse its previous determination of who is the monied spouse in order to ensure that both parties have some "skin in the game."

Facts of *Sykes*

The facts of the *Sykes* case undoubtedly shaped the court's ultimate conclusion. The husband in *Sykes*, a millionaire hedge fund manager, filed for divorce in 2010. As noted by the court in a previous decision in the matter, the parties had an estimated marital estate of nearly $16 million, $12 million of which was held in liquid assets upon the commencement of the divorce action. *See Sykes v. Sykes*, 35 Misc.3d 591, 594 (Sup. Ct., N.Y. Cty. 2013). In fact, as noted by the court, the parties' wealth was such that the husband was able to buy a $3.8 million home and a $70,000 engagement ring for his new fiancée with marital funds without impairing the wife's potential right to receive at most one-half of the marital estate — or $8 million — after trial. Both parties, in the court's own words, were also represented "by [law] firms at the apex of the New York matrimonial lawyer hierarchy." *Sykes*, 41 Misc.3d at 1065.

From the date of commencement through February 2013, the parties engaged in discovery and motion practice costing upwards of $1 million in counsel fees, all paid for by the husband. For the months of March and April 2013, the husband paid the wife's counsel fees to the tune of $668,378 for a month of trial preparation and motion practice, eight days of trial, and her separately retained expert fees; all in addition to his own counsel and expert fees for this same period. In addition to payment of the wife's counsel and expert fees, the husband also paid

continued on page 7

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Making the Judge Happy in a Matrimonial Trial

By George W. Soule

Making the judge happy will help you be more effective at trial. If you follow the rules and procedures, and help the trial run smoothly, the judge may listen to you better and credit your argument. The judge's reaction to your presentations may also influence the jury's feelings about you and your case. You may gain acceptance or favor with a judge by being prepared and organized, acting professionally, and learning from experience. This article suggests specific ways to help make your matrimonial trial successful.

1. Follow the Judge's Standing Orders and Courtroom Procedures

Most judges have standing orders that specify many pretrial and trial requirements. You should diligently abide by these orders. Judges may have additional, unwritten requirements or preferences for trial submissions and courtroom procedures or etiquette. For example, in some courtrooms, you may not re-cross-examine a witness or you may have to tender a witness as an expert before you can ask for opinions. Some judges have expectations as to where lawyers may stand when they are questioning witnesses or addressing the jury. Most judges require the parties to meet and confer on motions and many other aspects of trial practice. Before your next trial, research resources available online, talk to the judge's staff, check with other lawyers who have tried a case before the judge, or watch a trial to learn these requirements.

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2. Make Your Pretrial Submissions Reasonable

Most "[t]rial judges are generalists. … They know a little about a lot. … " Peter R. Bornstein, Persuading a Cold Judge, *Litigation*, Winter 2009, at 28. Research your judge's experience in family law cases. The amount and depth of information needed to assist the judge may depend on whether he or she has tried family law cases on or before taking the bench.

You should submit a trial brief unless the judge will not allow one. A trial brief will give the judge and clerk an overview of your case and help them prepare for trial. The trial brief should be concise, not an in-depth exposition on every expected issue. In a matrimonial case, acquaint the judge with the facts and the issues in dispute, and highlight important evidentiary and legal issues.

Many judges do not like motions *in limine* because often, lawyers file too many and make them too general. Such motions, however, help the judge understand important legal issues and manage the trial. The judge will want to discuss issues such as admissibility of other accidents or subsequent remedial measures before trial. Motions *in limine* should be reasonable in number and length. Resist the temptation to file generic "omnibus" motions or rehash issues resolved at summary judgment.

To reduce the number of motions, confer with opposing counsel to determine which issues will be contested. Make your briefs concise, and specify exactly what evidence you wish to preclude. If there are many motions *in limine*, make a checklist so the judge can keep track of which motions have been granted, denied or deferred.

Streamline your exhibit list as much as possible. In many matrimonial trials, both sides list hundreds of exhibits and use only a fraction. Some judges require the parties to submit copies of exhibits; the result can be many voluminous notebooks that are cumbersome at trial. Work hard before trial to list only exhibits you are reasonably likely to offer. Determine whether the judge expects you to list scientific articles, even though they will not be admitted, or impeachment evidence.

3. Be Prepared

"Preparation is the hallmark of the good trial lawyer. It is also a sign of respect for the judge, the jury, and the entire judicial process." Richard B. Klein, A Dozen Ways to Anger a Judge, *Litigation*, Winter 1987, at 5.

Judges like lawyers who know their case and are prepared. Have your witnesses ready to testify and alert the judge to scheduling problems. When you examine a witness, have paper or electronic exhibits ready to use. Understand the process for qualifying an expert in the jurisdiction. Take time to practice with courtroom technology so there are no interruptions.

When you lay a foundation for a critical exhibit or opinion, have an outline or a copy of the evidence rule at counsel table or podium to guide you in your examination. Be prepared with impeachment materials and know how to use them to impeach a witness.

4. Be Honest

Be faithful to the facts and the law in your presentations to the court and jury. You will gain credibility with the judge by staying true to the record and law. Answer the judge's questions directly. "[N]ever try to blow smoke at the court. …" Sylvia Walbolt, Twenty Tips from a Battered and Bruised Oral-Advocate Veteran, *Litigation*, Winter 2011, at 55. If you make a mistake, "correct it at the earliest opportunity." James W. McElhaney, Talking to Judges, *A.B.A. J.*, Feb. 1991, at 90. Apologize if appropriate.

Keep your promises, If you say you have only 10 minutes of questions, keep your examination to 10 minutes or less. If you say you have only one more question, then make it one question.

5. Preview Issues So There Are No Surprises for the Court

While counsel will not want to divulge trial strategy, some sharing

continued on page 4

Trial Tips

continued from page 3

of information is necessary to avoid surprises for the judge and interruptions in the trial. Show opposing counsel your exhibits and electronic presentations to be used in opening statements. Avoid using contested exhibits or argument in your opening statement, or obtain a ruling from the judge well in advance.

When you intend to offer a controversial exhibit, alert the judge in advance. The court may wish to hear argument or consult legal resources to be prepared to rule on the exhibit. In a product liability trial, counsel may wish to display the actual product, an exemplar product, model, accident simulation, or product testing. Each of these strategies may implicate significant issues affecting their admissibility. Give the judge an opportunity to hear arguments well before you wish to make such displays.

6. Make It Easy for the Judge to Make Rulings

"Lawyers who make judges happy are the ones who make life simple for the judge. I am not talking about the making of decisions; that is part of the job of a judge. What makes life difficult for judges is when information is given to them in a shotgun manner without organization or plan." — Former Minnesota Trial Court Judge

7. Be Organized in Your Submissions

Make sure the judge can quickly get to the heart of the issue. In many cases, the parties will submit prior testimony to be read or displayed by video. Often, such testimony is repetitive and boring. Streamline deposition designations as much as possible. Alert the judge well in advance when rulings must be made on objections to such testimony. Highlight a transcript with the parties' designations and flag the testimony to which objections are asserted. Edit video depositions to delete objections and stricken testimony well in advance of their display to the jury.

In most cases, you can agree with opposing counsel to submit a joint set of preliminary jury instructions. Submit separately only the instructions on which you cannot agree. Most judges are reluctant to depart from pattern jury instructions. When you submit requested instructions, make it clear (with underlining or strikethroughs) how you have changed pattern instructions.

Prepare pocket briefs — just two or three pages in length — dealing with specific legal or evidentiary issues that may arise at trial. A quick read of relevant authorities will assist the judge in resolving these issues.

8. Be Professional in the Courtroom

Show respect for the judge, jury, courtroom staff and opposing counsel in all your courtroom dealings. "[C]ivility is not a sign of weakness, and … incivility and intemperance may be perceived as signs of weakness … and disorganization." Susan Steingass, A Judge's 10 Tips on Courtroom Success, *A.B.A. J.*, Oct. 1985, at 71.

Always stand when addressing the court or jury. Not only does standing show respect (and is required by most courts), it will make your presentation more effective. *Voir dire* will be your first chance to discuss your case with the jury. Do not be argumentative or ask for commitments from prospective jurors to support your case. Object only to questions where the answers really matter. State your objection and briefly state the ground or rule; do not make speaking objections. Do not request excessive bench conferences. Judges hear many objections every day; they can usually deal with objections without argument.

In addition, do not address witnesses or refer to others by first name, unless the witness is a child. Use formal names in the courtroom that do not suggest familiarity. Keep a straight face in the courtroom. Do not exhibit disapproval to the judge, witness or opposing counsel with facial expressions or body language. Do not disrupt opposing counsel's presentation. Do not signal answers to a witness. Do not distract proceedings by rustling papers or loudly conferring with co-counsel. In legal arguments, address the court, not opposing counsel. Be professional in dealings with opposing counsel, and do not denigrate them to the judge or jury. Give your opponent reasonable notice as to when you will call specific witnesses, and expect the same courtesy from your opponent. Often, counsel can agree to exchange the names of the next day's witnesses at the end of the trial day.

Prepare your clients and witnesses to abide by these same rules. They should also be instructed on courtroom rules and cautioned not to violate motions *in limine*. They must not cause distractions in the courtroom.

9. Move the Trial Along

If there is a chance of settling the case, resolve settlement discussions before trial. Settlement talks during trial are distracting and time-consuming. The judge will not want the jury to sit idly while you explore settlement.

Generally, the parties should stipulate as to authenticity of exhibits unless there is genuine dispute. Counsel should agree upon one set of basic exhibits such as medical records or title documents. It will be confusing to have the parties refer to two or more versions of the same documents.

You will want to emphasize your trial themes, but you should avoid excessive repetition. Calling multiple witnesses to address the same issue, eliciting overlapping expert opinions, and repeating questions with the same witness will try the court's patience. If counsel anticipates a problem with a witness or exhibit, raise the issue with the judge in advance, so the judge can hear and resolve the issue before it is time to call the jury. Do not waste the jury's time by raising legal issues when you should be presenting evidence.

10. Think Like a Judge

After you have tried several cases, you will gain insights into how

continued on page 5

Practice Tip

After the Love Is Gone

Settling Divorce Cases

In heated divorce cases, a four-way settlement conference can bring everyone back down to earth. The four-way conference is a great tool that can serve as a mechanism for settling your case, as long as you are organized and prepared.

The timing of the conference in the life of the case is important. Do not schedule the conference too early in the process. Make sure everyone has exchanged financial documentation and that you have had a chance to summarize — for both your benefit and that of your client — the extent of the marital estate. Whenever possible, the goal is to reach a settlement that day.

Be Prepared for the Conference

I prepare by summarizing the extent of the parties' marital assets and liabilities in a spreadsheet format. All attorneys have different ways of illustrating how they summarize the marital estate. I prefer a spreadsheet so that it is easy for everyone at the conference to review and see the bottom-line figures without having to sift through the actual financial statements themselves when discussing a particular asset.

Be Prepared to Make a Settlement Proposal, if Possible

Or at least discuss the terms of an official one to be made once full discovery is complete. In my marital estate spreadsheet, I set up a separate column for each party and designate in each party's column my proposal for how that asset should be divided. For example, if the asset is the Dodge minivan worth $5,000 and I propose that the wife should keep the van, then the $5,000 will appear in the wife's column next to the asset. If, however, the precise value of an asset is unknown because it needs to be valued or because it is being appraised, I will put a note next to the asset, indicating that the value is to be determined and a tentative date for following up on this detail.

Leave the Conference with a To-Do List

The list should be for each attorney and, if necessary, each party. Hopefully, your conference will be so successful that the to-do list for one attorney would be to draft the settlement agreement and the to-do list for the other attorney would be to process the divorce once the agreement is signed. If that is not possible, or if updated financial statements need to be exchanged or assets need to be appraised, then the four of you should each leave with a to-do list and a deadline for each task on the list. If the list is extensive, then it is probably a good idea for one of the attorneys to agree to write a confirming letter after the conference that sets forth everyone's action items and their respective deadlines.

Better Than E-mail

Why is a conference format more productive than e-mail, letter or phone call? Because the act of the conference itself is helpful to moving your case toward the finish line. The advantage of the conference versus the e-mail, letter, or telephone call is that all four of you are together to hammer out the actual settlement. Your client and his or her spouse are looking at each other across a table — just like they did many years ago when they were in love and were out to dinner getting engaged. Your client's spouse is also meeting you, hearing the tone of your voice and your reasons behind the proposal, which will go a lot further to convince him or her that what you are saying is fair than just reading your words on a piece of paper and surmising what you must be like and why you have not allocated everything to him or her.

A settlement conference can also calm the storm between your client and his or her spouse. For example, every divorce case, whether heated or not, can have its own exchange of nasty arguments, text messages and/or e-mails between the parties about all aspects of the case. Forcing the parties to have these conversations in front of their lawyers usually makes both parties better behaved to the point of engaging in a somewhat civil conversation about an overall settlement. In most cases, having the attorneys there during the conversation about their assets and liabilities — a touchy subject even for intact couples — allows us to do the job we were trained to do: resolve the conflict. Clearly, talking to each other in front of counsel is a far quicker and less aggravating way to resolving issues than via a string of nasty exchanges that generally do not resolve anything and only makes matters worse.

Even in those cases where there is no possible way the parties could ever have an ounce of love for each other left, remember that the love was once there. You probably are not going to discover it for them and get these two back together again, but you can at least take advantage of the one thing these two people cannot change: They are both human and were once in love with each other, or so they thought. **— Lisa Shapson**, Berner Klaw & Watson

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Trial Tips

continued from page 4

judges make decisions at trial. When dealing with an important trial issue, put yourself in the judge's place. How is the judge likely to perceive the situation? What information would be helpful to resolve the issue? How can information or arguments be presented to make it easier for the judge? What resolution will move the case along, avoid prejudice to all parties, and preclude

continued on page 7

Grandparents

continued from page 1

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

Three years before its decision in *E.S. v. P.D.*, New York's highest court, the Court of Appeals, stressed the deference that a state must give to the child-rearing decisions of fit parents, taking the following excerpt from the *Troxel* decision:

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

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

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

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'Strong Presumption'

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

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

Best Interests: Review of The Equitable Circumstances

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

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

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

Best Interests: The Children's Wishes

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

What to Tell the Client

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

continued on page 7

Trial Tips

continued from page 5

appeal issues? Your arguments and briefs should be fashioned to make it easier for the judge to rule in your client's favor.

11. Treat the Judge's Staff Respectfully

Show the same respect to clerks, court reporters and bailiffs as you show the judge. Being respectful is the right thing to do, but also the judge will know if you are not treating courtroom staff well.

Assist staff members with their duties. Speak clearly for the record and provide the court reporter with spellings for names and technical terms. At the end of each day, someone on your trial team should help the clerks reconcile exhibits referenced that day. Assist clerks in tracking which exhibits were offered, admitted or denied, and in gathering exhibits for the record. In addition, provide courtesy copies of briefs and other filings to the judge and law clerks. Check on whether they prefer electronic or hard copies or both.

12. Treat an Unfriendly Judge Respectfully

Most judges will try to provide an even playing field to all parties. You may occasionally encounter a judge who does not like you, your client, or your case. The judge may snarl at your arguments, refuse your entreaties for bench conferences, and overrule your objections to all but the most outrageous of your opponent's tactics. Still, you should remain professional and respectful and resist the tendency to react in kind. The jury hopefully will reward you for your best behavior.

In these cases, you may be able to turn the judge around by persistent professionalism. If not, you must make a record of the judge's conduct so you can address it on appeal, if necessary. Insist upon on-the-record discussions and submit written offers of proof. In extreme cases when judges roll their eyes or exhibit other prejudicial body language, it is necessary to recite these instances on the record.

Conclusion

Your goal at trial should be to achieve the best results for your client, and to do so, you need to be the most effective advocate. But "most effective" does not mean a "take no prisoners" approach to advocacy. Making the judge happy will help you be more effective. You are likely to win the judge's favor by being prepared, organized and professional.

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Counsel Fees

continued from page 2

her $75,000 per month in temporary maintenance and child support.

Having paid nearly $2 million in counsel fees, a continuing support obligation of $75,000 a month until the entry of a divorce judgment, and with untold days of trial remaining, the husband brought a motion for the court to direct the release of $1 million in liquid marital funds — frozen as a result of the automatic restraining orders that go into effect upon commencement of a divorce action — to each party for payment of legal fees throughout trial and so the wife could proceed with some "skin in the game." *Id*. at 1063.

In support of his application, the husband argued that for the court to deny his application and permit the wife to "proceed without 'skin in the game' will enable [the wife] to push forward with the litigation without any concern for its cost or any eye towards settlement." *Id*. The wife, however, argued that her lack of income, other than the $75,000 monthly temporary support payments, classified her as the non-monied spouse and "therefore entitled [her] under statutory and case law to have the husband, the monied spouse, pay her interim legal fees." *Id*. at 1064. The court granted the husband's application and directed the release of $1 million of marital assets to each party for the payment of "his or her own outstanding and prospective counsel and expert fees." *Id*. at 1069.

Assessment

The court's willingness to grant the husband's motion in *Sykes* poses numerous questions for matrimonial practitioners that must be considered prior to bringing a similar application. The most glaring of these is how a court will determine who is the monied spouse in a divorce action under DRL § 237. The answer to this question is not as academic as it may appear.

The most authoritative, yet still nebulous, assessment of the monied versus non-monied spouse debate

continued on page 8

Grandparents

continued from page 6

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

Conclusion

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

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Counsel Fees

continued from page 7

was set forth by the Court of Appeals in *O'Shea v. O'Shea*, 93 N.Y.2d 187 (1999):

> [r]ecognizing that the financial strength of matrimonial litigants is often unequal — working most typically against the wife — the Legislature invested Trial Judges with the discretion to make the more affluent spouse pay for legal expenses of the needier one. The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet.

It would appear that the best guidance on this issue is that there is no guidance at all and that the ultimate decision is left to the sound discretion of the trial court.

That being said, however, what can be gleaned from the *O'Shea* decision is that the court is to look to the litigants' "wallet" — read as available assets and income — to level the playing field effectively. Although marital assets may be used by the parties during the course of litigation in certain circumstances (see 22 NYCRR § 202.16-a), the courts in a counsel fee application generally assess the parties' wallets by looking to their separate property assets, including, and most-likely, their post-commencement earnings. Although the courts are also permitted to consider "the relative merits of the parties' claims and their respective financial positions" (*Lyman v. Lyman*, 108 A.D.3d 653 (2d Dep't 2013) (quoting *Levy v. Levy*, 4 A.D.3d 398 (2d Dep't 2004) when making a determination on counsel fees, in practice, it is and has been the case more often than not that a party's post-commencement earnings and separate property assets will, inevitably, guide the court in making its determination as to who is the monied spouse. *See, e.g., Fredericks v. Fredericks*, 85 A.D.3d 1107 (2d Dep't 2011); *Guzzo v. Guzzo*, 110 A.D.3d 765 (2d Dep't 2013).

As demonstrated in *Sykes*, typically the parties' post-commencement incomes and assets initially carry the day regarding the determination of who is the nonmonied spouse. However, after more than two years of litigation and the depletion of $2.5 million in the husband's separate property assets, the court in *Sykes*, after assessing the parties' incomes, separate property, and marital property, ultimately rested its conclusion on the discretion inherent in the court's authority under DRL § 237 and the equities of the case. The "equities" in *Sykes*, akin to the concept of moral hazard in the financial industry, consisted of the fact that the husband was the only party paying the ongoing costs of litigation and support for the wife and children and that, "without any 'skin in the game,' [the wife] does not have the same incentive [to settle] insofar as her litigation costs are being paid for completely by her adversary." 41 Misc.3d at 1069.

Conclusion

While courts should ensure that a spouse is not able to "unlevel" the playing field by outspending the other party in a divorce, it should also act to ensure that both parties have a financial incentive to resolve the action. Unlike most litigation, divorce litigation is often driven by emotion. When a party to a divorce action has no financial incentive to act prudently, the results can be disastrous not just for that party, but for that party's former spouse and children: college tuitions, retirement funds, and any other available assets may all be liquidated to pay for attorneys' fees to continue the feud, all in the name of harming a person that he or she once claimed to love for better or for worse.

The delicate balance for the court in any attorney fee application is to first ensure that the party with less available separate property assets can afford an attorney to represent his or her interests adequately — another conveniently undefined term. The court must then ensure that the litigation is progressing reasonably and that assets are not being depleted imprudently. But where the litigation continues for years and one party has significant post-commencement assets and income and also bears sole responsibility for attorneys' fees, it stands to reason that where a "skin in the game" application is made, the court must take action to ensure that both parties have some financial incentive to progress the case and not permit feelings of "animosity, betrayal and abandonment" (*id*. at 1069) to govern litigation tactics.

From the practitioner's perspective, it is difficult to take any explicit predictive lessons from the court's holdings in *Sykes* with regard to when a "skin in the game" application would be appropriate, except that an argument for granting such application may lie where the divorce litigation has dragged on for years, the monied spouse has spent significant separate property assets on attorneys' fees, and the non-monied spouse is due to receive significant sums in equitable distribution at the conclusion of the divorce. Though this may mean few cases will meet this standard, the court in *Sykes* should be applauded for "creating a more level playing field" by ensuring that both parties have an incentive to resolve the action and bringing this issue to the forefront of discussion.

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