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Must I Still Pay Child Support?

Developing Case Law on Visitation, Emancipation And Child Support

Part One of a Two-Part Article

By Jerome A. Wisselman and Randall Malone

Prior to enactment of the Child Support Standards Act (CSSA) in 1989, court holdings often referred to "reciprocal" duties of visitation and child support. Today, generally, it is the public policy of New York State to strictly separate visitation from child support issues. New York's family courts accordingly assign different categories of hearing officers to address these issues separately: A judge or referee will handle issues like custody, family offenses and neglect, while a "Support Magistrate" handles support issues.

There are good reasons for this policy. Issues behind why a noncustodial parent and child are not seeing each other can be complicated, often with deep histories and interlacing areas of fault or failure on everyone's part. Family Court judges have the power to direct parties to special resources — such as expert psychologists and therapeutic visitation programs — to address these problems, sometimes over long periods of time.

On the other hand, particularly since enactment of the CSSA, the state has treated child support as an absolute obligation

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New York Allows Same-Sex Marriage, While National Case Law Evolves

By Janice G. Inman

New York's legislature's decision to permit same-sex partners to marry within the State came June 24, after a nail-biting lead-up. For weeks, many questioned whether the measure would come to a vote at all, and whether enough Republican senators could be persuaded to vote in favor, along with the majority of Democrats (only one Democrat, the Bronx's Ruben Diaz, voted against it). The bill passed after provisions were made to protect religious institutions from being sued or penalized by the State for declining to perform same-sex weddings or permit them to take place in their facilities. The legislation also contains a non-severability clause, which says that if any portion of the law is judicially declared invalid, the entire law will become invalid. This will prevent courts from declaring the religious institution exemptions unlawful while upholding the right of same-sex couples to marry in New York.

The law went into effect 30 days after passage, on July 24, and at press time, wedding plans were being made statewide and beyond (the law allows out-of-state same-sex couples to wed in New York). New York is now the Sixth and largest state to allow same-sex partners to marry; the others are Connecticut, Iowa, Massachusetts, New Hampshire and Vermont. Same-sex marriages may also be entered into in the District of Columbia.

Couples married in accordance with New York's Marriage Equality Act of 2011 will undertake the same responsibilities and enjoy the same protections that married heterosexual couples have. This will eliminate many questions that were generated by a hodge-podge of local rules, state-government policy pronouncements and judicial decisions that previously plagued same-sex couples married in other states but residing in New York: Can we make medical decisions for one another when one of us is incapacitated? Can we file our state tax return as a married couple? Will we be able to divorce if we grow apart? Now, same-sex couples can answer these questions using the same New York State laws that

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apply to opposite-sex married couples in New York.

FEDERAL RECOGNITION A MURKIER ISSUE

Of course, New York's passage of the Marriage Equality Act no more opened up the federal government to recognizing same-sex marriage than did passage of similar legislation in Connecticut or Vermont. The federal Defense of Marriage Act (Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) codified in pertinent part at 1 U.S.C. § 7) (DOMA), remains the law of the land. It not only declares that the federal government does not recognize same-sex marriages (Section 3), but also says that sister states need not give full faith and credit to same-sex unions entered into in other states in which they are legal (Section 2).

DOMA was passed by large majorities of both houses and signed into law in 1996. Since then, several challenges to its constitutionality have been lodged, mostly unsuccessfully. But the Obama administration told Congress, through a letter sent on Feb. 23, 2011 by Attorney General Eric Holder to Speaker of the House John Boehner, that it would no longer attempt to defend challenges to the constitutionality of DOMA's Section 3. This policy was formulated after Holder concluded that because gay and lesbian citizens have suffered a well-documented history of discrimination, they must be treated as a "suspect class" for purposes of evaluating the constitutionality of legislation affecting them. As such, laws that attempt to impose restrictions on them must be subjected to at least the "intermediate," or "heightened," test of constitutionality, in which the government must show that the disputed law is substantially related to an important government interest. The President and the Attorney General did not believe DOMA could sur-

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vive such constitutional review under the strict scrutiny standard. That is why, the Holder letter said, the Department of Justice (DOJ) would no longer defend the law.

Naturally, this does not mean that DOMA is finished. It remains in force nationwide unless and until it is repealed or declared unconstitutional by the highest court in the land. Meanwhile, opponents of DOMA are chipping away at the law, with the assistance of the federal government.

BANKRUPTCY COURT REJECTS DOMA ARGUMENT

The holding in the bankruptcy case *In re Balas and Morales*, 2011 Bankr. LEXIS 2157, caused a big stir when it was handed down by the U.S. Bankruptcy Court for the Central District of California on June 13. In it, DOMA, as applied to the subject legally married same-sex couple seeking bankruptcy protection, was found unconstitutional. Twenty of the 24 justices sitting on the court signed off on its holding — a resounding denunciation of DOMA.

The case involved the bankruptcy petition of two men, Gene Balas and Carlos Morales, who were legally married in California in 2008. Due to health and unemployment issues, they found themselves struggling financially, to the point that they voluntarily filed for Chapter 13 Bankruptcy protection. The U.S. Trustee moved for dismissal of the petition pursuant to Bankruptcy Code § 1307(c) (dismissal for cause), arguing that Balas and Morales were ineligible to file a joint petition in accordance with Bankruptcy Code § 302(a) because it provides for joint filing by married couples only. As two men, Balas and Morales were not married debtors in the eyes of the federal government because of DOMA, said the trustee. The debtors countered that "[T]he only issue in this Bankruptcy Case is whether some legally married couples are entitled to fewer rights than other legally married couples, based solely on a factor (the gender and/or sexual orientation of the parties

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Modification After Opting Out of the CSSA

By Carol Most and Adam Schneid

Recent amendments to DRL § 236 Part B(9)(b) have changed the grounds for modifying a child support award. These changes have caused a profound shift in whether, and under what circumstances, parties should opt out of the Child Support Standards Act (CSSA).

By opting out of the CSSA, the rigid income formula used to calculate child support does not apply, allowing the parties to reach their own agreement on an appropriate amount of support. To properly opt out of the CSSA, a settlement agreement must contain: 1) an acknowledgment that the parties have been advised of the substance of the CSSA; 2) a statement that the basic child support pursuant to the CSSA would presumptively result in the correct amount of child support; 3) a calculation of what the CSSA basic child support payment would have been in the specific circumstances presented, and; 4) the reasons why the agreed-upon child support deviates from that set forth in the CSSA. DRL 240(1-b)(h); *Gallet v. Wasserman*, 280 A.D.2d 296 (1st Dep't 2001).

However, by opting out of the CSSA, the parties also lose the flexibility to easily modify the amount of child support every few years, as authorized by the new amendments to Domestic Relations Law (DRL) § 236 Part B(9)(b)(2)(ii) (the amendment). The amendment provides that "unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where: (A) three years have passed since the order was entered, last

modified or adjusted; or (B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted." Thus, the amended law now accounts for normal fluctuations in income and expenses, even if they do not rise to the level of an "unanticipated" and "unreasonable" change in circumstances warranting modification of support.

The amendment does not apply where the parties have opted out of the CSSA. See *Murphy v. Murphy*, 24 A.D.3d 330 (1st Dep't 2005) ("the court properly declined to refer to the [CSSA] ... since the parties had explicitly agreed not to be bound by its provisions for determining the basic child support obligation"); *People v. Aaronson*, 285 A.D.2d 566, 567 (2d Dep't 2001) (holding court erred in applying CSSA to calculate child support where parties previously opted out of CSSA); *Seda v. Seda*, 270 A.D.2d 475, 476 (2d Dep't 2000) (reversing upward modification of child support where parties opted out of CSSA and plaintiff failed to establish that the agreement was unfair or inequitable at the time that it was made or that there was an unanticipated and unreasonable change in circumstances.)

By excluding opt-out settlements from the CSSA's purview, the law remains consistent with the longstanding policy encouraging settlements. If the law had not allowed parties to opt out, it would have effectively eliminated the ability to settle for anything other than statutory terms. But the amendment adds a new element to the decision making process when parties are considering opting out of the CSSA in favor of determining their own child support amounts.

CONSIDERING THE CONSEQUENCES

If the parties opt out of the CSSA, not only are they deprived of the benefit of the amendment, but the Family Court actually lacks jurisdiction to modify the settlement on that basis. This is because Family Court is a court of limited juris-

diction and only has the authority expressly granted to it. The Family Court Act grants jurisdiction to the Family Court to modify child support where three years have passed or if there is a change of income of at least 15%, but only if the parties have not opted out of the CSSA. See McKinney's Family Court Act § 451(2)(b) (providing continuing jurisdiction over support proceedings to modify child support where three years have passed or a change in income, "unless the parties have specifically opted out" of the CSSA):

The Family Court also lacks jurisdiction to determine whether the opt-out complies with the statutory requirements or to otherwise change the settlement unless there has been a substantial change in circumstances. Practically speaking, a settlement may contain a statutorily deficient opt-out, which would allow application of the amendment. But, because the Family Court is of limited jurisdiction, it doesn't have the jurisdiction to declare the opt-out ineffective and therefore cannot apply the amendment. For example, in *Savini v. Burgaleta*, 34 A.D.3d 686 (2d Dep't 2006), the parties entered into a child support stipulation that was subsequently incorporated but not merged into a judgment of divorce. In connection with an enforcement proceeding, the Support Magistrate determined that the stipulations did not comply with the CSSA and informed the parties that the issue would be considered de novo. The Second Department overturned the Support Magistrate's findings stating: Nowhere in the Constitution, in the Family Court Act, or in the judgment of divorce itself, is the Family Court empowered, in effect, to invalidate a stipulation incorporated into the judgment of divorce entered by the Supreme Court ... Had either party

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CSSA

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questioned the legality of the stipulation, the issue should have been determined by the Supreme Court, which had issued the judgment in which the stipulation was incorporated.

Savini, 34 A.D.3d at 689; see also *Perrego v. Perrego*, 63 A.D.3d 1072, 1073 (2d Dep't 2009) ("Family Court has no power to review a Supreme Court judgment determining the issue of child support or to determine the issue of child support de novo where the issue already has been determined by the Supreme Court and set forth in a judgment"); *Huddleston v. Huddleston*, 14 A.D.3d 511, 512 (2d Dep't 2005) (holding Family Court lacked jurisdiction to determine whether opt-out of CSSA in settlement agreement was defective).

Where there has been an opt-out, the Family Court can only modify a settlement that has been approved by the Supreme Court where there is a substantial change in circumstances. See *Malone v. Malone*, — N.Y.S.2d—, 2011 WL 2040389, *1 (N.Y. App. Div. 3d Dep't May 26, 2011) ("Family Court is authorized to modify an agreement pertaining to child support, which has been

incorporated but not merged into a judgment of divorce issued by Supreme Court, only upon a showing that a change in circumstances warrants such modification."). This standard, however, requires more than a mere change in income because, where the parties have included child support provisions in a separation agreement, courts assume that the parties anticipated the future needs of the child and adequately provided for them. *Boden v. Boden*, 42 NY2d 210, 213 (1977). Absent a showing of unanticipated and unreasonable change in circumstances the support provisions should not be disturbed. *Id.* As a general matter, changes in income and the cost of food, clothing and shelter, without more, do not warrant a change in child support. See *Friedman v. Friedman*, 65 A.D.3d 1081 (2d Dep't 2009) (holding "increase in the defendant's income does not constitute an unanticipated change in circumstances justifying an increase in his child support obligation."); *Patten v. Patten*, 203 A.D.2d 441, 443 (2d Dep't 1994) ("courts generally do not modify an agreement with respect to child support based merely upon a parent's increased income" (quoting *Brevetti v. Brevetti*, 182 A.D.2d 606, 608 (2d Dep't 1992))).

Next, the court considered Bankruptcy Code § 302(a), which explicitly allows any qualified individual and such individual's spouse to file a joint petition. As spouses, Balas and Morales should be able to file jointly, unless DOMA applies to them. In DOMA, the term "spouse" is defined as "a person of the opposite sex who is a husband or wife." The section goes on to state that this definition shall be used in interpreting federal statutes, court decisions and administrative pronouncements. Therefore, DOMA should be used to disqualify the couple from joint filing unless DOMA is unconstitutional.

The court analyzed the issue using a heightened form of constitutional inquiry. (Note, however, that the court said its conclusions concerning the constitutionality of DOMA

CONCLUSION

Practitioners need to consider the Family Court's limited jurisdiction when seeking a modification of a child support order, or efforts at altering the agreement may be wasted by petition to the wrong forum.

Going forward, practitioners should discuss with their clients the impact of the amendment while evaluating whether to opt out of the CSSA. This inquiry is more important than ever because, if the parties opt out as part of a settlement, the parties give up the opportunity to have the amount of child support re-evaluated periodically. In making this determination, the age of the dependent children will take on additional weight. If the dependent child is a teenager, so that child support payments will end soon, the benefit of the amendment is relatively minor. But, if the dependent child is young, by opting out of the CSSA, the parent may forego the ability to regularly update the amount of child support. This may prove to be a major disadvantage when fairness dictates the child should receive more (or less) support, due to a change in a parent's income, yet that change cannot be said to "substantial."

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Same-Sex Marriage

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in the union) that finds no support in the Bankruptcy Code or Rules and should be a constitutional irrelevancy." Debtors' Opp. 5:24-28. They went on to assert that "DOMA, as the U.S. Trustee seeks to apply it in this Bankruptcy Case, is inconsistent with the Constitution's guarantee of equal treatment."

Justice Thomas B. Donovan, writing for the court, first looked at § 1307(c)'s 11 enumerated reasons for dismissal for cause, most of which deal with failure to meet various deadlines. The court found nothing there concerning the sex of married couples filing jointly. Thus, it concluded, dismissal was not warranted on account of § 1307(c).

would have been no different if the least stringent form of constitutional inquiry — using the "rational relationship" test — had been employed instead.)

The first question the court asked in this regard was, "Does the application of DOMA to the bankruptcy proceeding in issue advance an important state interest?" The "important state interests" enumerated by the drafters of DOMA were: 1) The encouragement of responsible procreating and child-bearing; 2) The defense or nurturing of the institution of traditional heterosexual marriage; 3) The defense of traditional notions of morality; and 4) The preservation of scarce resources. The court found the first of these inapplicable, as the debtors have no

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NJ & CT NEWS

NEW JERSEY

PROPOSED LEGISLATION WOULD GIVE STALKING VICTIMS NEW CIVIL CAUSE OF ACTION

On June 13, Assemblyman Peter Barnes III, D-Middlesex, introduced a bill aimed at creating a civil cause of action for victims of stalking, as it is defined in New Jersey Statutes Annotated (N.J.S.A.) 2C:12-10. The right to collect civil damages in accordance with the proposed legislation would not be dependent on a stalker's being criminally charged or convicted, and punitive and compensatory damages would be recoverable, as well as attorney fees. The civil remedy, if passed, will put New Jersey in line with a growing trend to empower those victimized by stalkers; California, Kentucky, Michigan, Nebraska, Oregon, Rhode Island, South Dakota, Texas, Virginia and Wyoming have already adopted similar legislation. Assemblyman Barnes noted that the proposed legislation would give victims a better means to seek redress than the current scheme, in which victims are limited to alleging common law harassment, assault or false imprisonment. Those claims do not permit the accuser to seek attorney fees. If the legislation passes, the attorney fee provision presumably will encourage lawyers to take on the representation of stalking victims who might otherwise not have the means to seek redress from their tormentors.

ARTIFICIAL INSEMINATION PARTICIPANTS MAY NOT CONTRACT CONCERNING PARENTAL STATUS

The Chancery Division, Atlantic County, has held in a case of first impression that a woman who artificially inseminated herself with her friend's sperm cannot, under New Jersey law, relieve him of his parental rights and obligations by executing a contract with him to that effect. The parties in *E.E. v. O.M.G.R.*, FD 01-1112-11, agreed that the man

would provide his sperm to the woman and she would take full responsibility for raising and providing for the child. The woman became pregnant after she inseminated herself with a turkey baster. Following conception, the parties signed and had notarized a contract absolving the man of all duties toward the child. When the child was born, no father was listed on the birth certificate. Soon after the birth the parties signed a consent order, again stating that the man had no parental rights or responsibilities regarding the child. They submitted the consent order to the court but the court refused to accept it, finding that there is no common-law right to contractually dispense with parental rights and obligations. Termination of parental duties can be accomplished in New Jersey only in accordance with statutory law — if the Division of Youth and Family Services has removed a child from a parent, if the parent is declared unfit, or if a third party agrees to adopt the child. None of these circumstances occurred in this case. In addition, in enacting the New Jersey Artificial Insemination Statute, the court determined the legislature showed no intent to permit an artificial insemination procedure to lead to the termination of parental rights unless all of the provisions of the statute were followed. One such provision requires a physician to impregnate the woman with the donated sperm; the court reasoned that if the legislature did not want this to be a requirement for a sperm donor to be relieved of parental rights and obligations it would have eliminated that provision, as other states have done.

JUDGE REPRIMANDED FOR RANTING AT PRO SE LITIGANT

Former Atlantic County presiding family judge Max Baker was reprimanded on June 16 for yelling at a *pro se* litigant who questioned a court-imposed child-visitation

schedule. The reprimand followed Baker's acceptance of the findings and recommendations of the Advisory Committee of Judicial Conduct in the case against him, *In the Matter of Max A. Baker*, 2010-151. The Committee had found Baker erred when he yelled what they termed "repugnant and offensive" comments at the parent, who was appearing *pro se*, in a "hostile, angry and antagonistic" tone. Instead of giving the litigant the opportunity to explain her objections to the judge's visitation plan, the Committee found that he questioned her in a "callous and denigrating" way, and implied that he would have her jailed if she did not cooperate.

CONNECTICUT

COURT DID NOT ERR IN EXCLUDING EXPERT TESTIMONY IN CHILD MOLESTATION CASE

The Connecticut Supreme Court upheld the conviction of a man for sexually molesting his stepson over a period of years, although the trial court had declined to admit the testimony of a defense expert. The expert at issue in *State of Connecticut v. Victor O.*, 301 Conn. 163 (Conn. 6/7/11), would have testified that he gave a test to the defendant (the Abel Assessment of Sexual Interest test) that showed the defendant did not have a sexual interest in men or boys. The State Supreme Court upheld the exclusion, finding that the facts the Abel test has an error rate of approximately 20%, that it relies on self-reporting by the test-taker, and that the scientific community questions whether it is a viable screening tool as well as a treatment tool, meant the trial court did not abuse its discretion in excluding the expert's testimony.



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of each parent, enforced pursuant to statutory mandate. The custodial parent's direct payments of housing and other expenses are generally proportionate to that parent's resources (given the tendency to live at the highest standard of living that income allows), while the noncustodial parent's payments are expressly calculated to be proportionate to his or her income. Thus, the child shares in the standard of living of both parents.

However, visitation and child support issues can become intertwined in extreme cases of visitation denial. Where parental access is unjustifiably frustrated, a noncustodial parent may petition the Family Court (or the NY Supreme Court if the parties are, or were, in a divorce proceeding) to suspend child support. This can be done on one of two bases, both of which have developed over the years solely from case law.

VISITATION ISSUES

Parents often find themselves in conflict over visitation, whether because of scheduling problems, parental animosity during hand-offs or myriad other causes. When do visitation problems rise to a level justifying suspension of child support?

New York courts will suspend child support where a noncustodial parent can show that his or her reasonable access to the child has been unjustifiably frustrated by the custodial parent. *Thompson v. Thompson*, 78 AD3d 845 (2nd Dept. 2010); *Boccalino v. Boccalino*, 59 AD3d 901 (3rd Dept., 2009); *Crouse v. Crouse*, 53 AD3d 750 (3rd Dept., 2008). However, the court will suspend child support only where the custodial parent's actions rise to the level of "deliberate frustration" or "active interference" with the noncustodial

parent's visitation rights. *Thompson, supra*, 78 AD3d at 846.

A prerequisite to any such finding may be that there is a court order establishing visitation. *See Maya B. v. Omar Anthony*, 27 Misc.3d 1227(A) (Family Ct., Queens Cty., 2010); *Y.G. v. A.T.*, 25 Misc.3d 1223(A) (Sup. Ct., Kings Cty., 2009). (However, dicta in both cases may suggest that unjustified frustration of an established parental relationship, by itself, might be held sufficient for suspension of child support.) On the other hand, it is clear that a noncustodial parent consenting to an order suspending all visitation rights "cannot claim an interference with any such rights as a basis to reduce or stay his child support obligations." *See, e.g., Beal v. Beal*, 244 AD2d 550 (2nd Dept., 1997); *Labanowski v. Labanowski*, 49 AD3d 1051 (3rd Dept., 2008).

Routine visitation disputes are not sufficient for suspension of child support. *See, e.g., Boccalino v. Boccalino*, 59 AD3d 901 (3rd Dept., 2009) ("While the mother could have done more to assure meaningful contact between the child and the father, the record as a whole does not support the conclusion that she 'intentionally orchestrated and encouraged the estrangement of the [father] from the child.'"); *see also Crouse, supra* ("With respect to the mother, although she made very little effort to fulfill her duty to 'assure meaningful contact between the children and the [father]'... Under all of these circumstances, we find that the children's alienation from the father resulted from a general breakdown in communication and lack of effort by all concerned.").

Unjustifiable frustration of visitation rights can include cases where the child has been "alienated" from the noncustodial parent to the point that the child refuses a relationship with him or her. Remedies for such problems might normally include attempts to restore the relationship (through therapeutic visitation, etc.), or even to hold the custodial parent in contempt or direct a change of custody. However, such remedies

are not always possible. Thus, in *Thompson, supra*, the lower court found that the subject child "was so closely allied with his mother and her negative view of the father that it appears that the hoped-for reconnection between [the child] and his father was unlikely at that time." The Second Department confirmed that the mother, "by her example, her actions, and her inaction" "deliberately frustrated visitation by manipulating the child's loyalty and orchestrating and encouraging the estrangement of father and son." *Thompson, supra*, 78 AD2d 846-847.

IS THERE A GOOD REASON?

A necessary element for suspension of child support is that the frustration of parental access occurs "unjustifiably." If the court finds the custodial parent's visitation non-compliance to be justified, in whole or even in part, by the noncustodial parent's actions, the court may not relieve the noncustodial parent from child support. *See, e.g., Hecht v. Hecht*, 222 AD2d 589 ("[T]he mother did not comply with certain visitation requirements due to her financial situation, which was made worse by the father's failure to pay over \$5,000.00 in past child support payments").

Moreover, a court will not grant relief if the noncustodial parent has not made real and ongoing attempts to repair and reestablish the relationship, to the extent possible. *Crouse, supra*, 53 AD3d 750 (3rd Dept., 2008) ("By his own admission, [the father] made no effort to resume visitation with his children after the therapeutic visitation terminated Although he regularly sent the children birthday and Christmas cards containing checks, he did not otherwise attempt to contact them, either directly or through the mother, nor did he initiate any court proceedings seeking to enforce his visitation rights.").

While a custodial parent's relocation of the children to a distant state, without permission, may constitute unjustified frustration of visitation (*see, e.g., Miosky v. Miosky*, 33 AD3d

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DECISIONS OF INTEREST

HIGH INSURANCE QUOTE NO EXCUSE FOR BYPASSING ITS PURCHASE

Finding a man in contempt for failing to obtain life insurance in accordance with the terms of his divorce, Nassau County Supreme Court Justice Robert A. Bruno ordered him to purchase the insurance coverage immediately or face six months in jail. *DA v. BA*, NYLJ 1202499023048, at *1 (Sup., NA, Decided June 10, 2011) (Bruno, J.).

The man, who earns \$500,000 per year and has a net worth of at least \$1.3 million, admitted that he was required to purchase the insurance policy, but claimed that he had been unable to do so because past health problems — hepatitis, open-heart surgery and cocaine use — had made the purchase price of a policy prohibitively high. The best rate he could find was \$100,000 per year. The court found, however, that soon after he was served with the contempt application the man had used more than \$500,000 in cash to purchase a \$750,000 home for a woman with whom he had fathered a child. Justice Bruno was unsympathetic with the man's reasons for not buying the insurance, noting that he "decided not to [buy the life insurance] because it would cost \$100,000 per year, which is a situation [the man] created when he decided to use drugs." The man was therefore ordered to buy the insurance and appear before the judge with proof of its purchase.

MOTION GRANTED: LAWYER REMOVED FROM DISRUPTIVE CLIENT'S CASE

An attorney was allowed to withdraw from a client's case when the client failed to follow the terms of the retainer agreement, which were modified mid-litigation due to the client's disruptive behavior during the matter. *M.P. v. A.P.*, Index 04-203531, NYLJ 1202497352102, at *1 (Sup. NA, Decided June 13, 2011) (Falanga, J.).

The attorney had been handling the husband's divorce representation since 2007. He had asked once before to be relieved as counsel because his client was engaging in inappropriate outbursts in court and was sending multiple communications to the judge. The issue was smoothed over in March 2010 when the attorney and his client entered into an amended retainer agreement providing that the client would stop contacting the judges, would behave in court, and would receive mental health therapy, to include the client's taking his prescribed medications. Subsequently, because of the extent of the husband's out-of-court communications with one of the judges, that judge was forced to re-use himself after having handled the case for 26 months and a total of 65 days of trial.

In this second motion to be removed, the attorney claimed his client had breached the amended agreement repeatedly and had become so mentally disabled that he could no longer assist the lawyer in the preparation of the case. He also noted that the client had not paid him more than \$20,000 that was owed for his services. The wife opposed the attorney's motion, arguing that the husband was not in fact mentally disabled, but was manipulating the court in order to delay the conclusion of the divorce matter. Also opposing was the husband who, in what the court described as "an angry and rambling response," said he did not need a guardian to help him continue with his case. He argued that his attorney should be required to continue to serve as his counsel because of the lawyer's familiarity with the litigation.

In his decision relieving the attorney of his duties, Justice Anthony J. Falanga wrote, "Whether the husband is presently in compliance with portions of the amended retainer or not, the court is loathe to compel an attorney to represent a litigant who does not take counsel's advice and who is in violation of other key provisions of the amended retainer,

the exact behavior which was the subject of a prior motion to the court." The court also noted that the non-payment of fees in accordance with the retainer agreement and the breakdown of the attorney/client relationship is a basis for relieving counsel (see *Musachio v. Musachio*, 80 AD3d 738 (2nd Dept. 1/25/11)). However, Justice Falanga declined to appoint a guardian *ad litem* for the client, because the man did not appear to be a danger to himself or others, had returned to work and had started participating in therapy in response to this motion. The husband was admonished, however, to discontinue his previous behavior or risk being held in contempt and facing sanctions.

FINANCIAL OBLIGATIONS NOT TERMINATED BY CONSENT TO STEP-PARENT ADOPTION ALONE

A man who agreed to permit his child to be adopted by the mother's husband remains liable for child support, even eight years later, because the adoption petition was withdrawn before the adoption was finalized. *Solly M. v. Audrey S.*, 2584/11, NYLJ 1202498157831, at *1 (Sup., QU, Decided June 14, 2011) (Siegel, J.).

The parties had a child out of wedlock. Later, the father agreed to give up his parental rights so that the mother's husband could adopt the child. The biological father appeared in court and signed a judicial consent form providing that "the consent becomes irrevocable when executed." However, the proposed adoptive father later withdrew his application, and the adoption never went through. Several years later, the mother sought child support from the biological father. The latter then brought this action seeking a declaration that the signed judicial

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Decisions of Interest

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consent was an equivalent to adoption for the purposes of extinguishing his obligation to pay child support.

The court observed that, although in many states an order terminating parental rights severs the parent-child relationship, New York has no statutes on the books to that ef-

fect. Quoting *Robinson v. Aspinall*, 238 AD2d 255 (1st Dept. 1997), the court also noted that the mother's eight-year delay in attempting to hold the biological father responsible for the child was immaterial as "a parent should not be able to avoid his or her duty to support the child by claiming that the other parent is guilty of laches." As such, and because the question in these

cases comes down to the best interests of the child, it would be against public policy to permit the biological father to avoid his financial obligations to the child. Thus, the court found the consent to adopt failed to terminate the biological father's parental rights and obligations, and denied his motion.



Same-Sex Marriage

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children, and even if they did, their filing of a joint bankruptcy petition would not affect those children any differently than it would the children of an opposite-sex couple. As to the second, because the debtors are already married, permitting them to proceed with their petition "cannot have the slightest cognizable effect on anyone else's marriage," said the court. Concerning traditional notions of morality, the court found no relationship between the filing of a joint bankruptcy petition and morality, "traditional or otherwise." And, finally, the court could see no need for the federal government to expend any more resources on these joint filers than on any of the other thousands of joint filers who have sought bankruptcy through the years.

Justice Donovan wrote that, in reality, "the government's only basis for supporting DOMA comes down to an apparent belief that the moral views of the majority may properly be enacted as the law of the land in regard to state-sanctioned same-sex marriage in disregard of the personal status and living conditions of a significant segment of our pluralis-

tic society. Such a view is not consistent with the evidence or the law as embodied in the Fifth Amendment with respect to the thoughts expressed in this decision. The court has no doubt about its conclusion: The Debtors have made their case persuasively that DOMA deprives them of the equal protection of the law to which they are entitled. The court is of the opinion that the Debtors have met their high burden of overcoming the presumption of the constitutionality of DOMA."

CONCLUSION

The historic passage of the Marriage Equality Act has already changed New York's social, political and economic landscape. For those who fought long and hard to obtain the right to marry, it is cause for rejoicing. Others are already organizing to make sure the legislators who supported the Act get voted out of office next time around. Wedding industry players — coordinators, florists, banquet hall operators — are anticipating an upswing in business. And some companies that were offering medical insurance coverage to their employees' live-in partners are working on changing their policies to once again require marriage before such benefits are given.

On the national and interstate level, much will remain the same as before, since DOMA is still in force. However, when it comes to bankruptcy cases, one thing has changed. Soon after the decision was rendered in *Balas and Morales*, the U.S. Trustee for the Central District of California filed a notice of appeal, confusing many who had counted on the DOJ to stick to its stated intention to stop defending Section 3 of DOMA. Then, on July 6, the Trustee asked for leave to withdraw its appeal, citing the DOJ's opinion that Section 3 is unconstitutional, and its reluctance to waste taxpayer money defending the law in the *Balas and Morales* case when so many other challenges to DOMA are already in the appellate pipeline. At the same time, *Metro Weekly*, a gay, lesbian and transgender news publication out of Washington, DC, reported that it had received a communication from DOJ spokesperson Tracy Schaler, in which she expressed the DOJ's intention to stop seeking dismissal of joint bankruptcy filings made by legally married same-sex spouses. Geidner, *Metro Weekly*, www.metroweekly.com/poliglot/2011/07/us-trustee-withdraws-appeal-of.html (last visited 7/8/11).



Child Support

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1163 at 1167 (3rd Dept., 2006)), a noncustodial parent who does not bring timely court action in response may be barred from requesting suspension of child support based on

the relocation. *See Crouse, supra*. However, where the noncustodial parent acts to enforce rights of visitation but remains frustrated by the custodial parent in exercising those rights, relief may be granted.

In next month's newsletter we will look at more issues that must

be considered when a parent feels child support is no longer warranted because a custodial parent has interfered with visitation efforts, or a child has emancipated him- or herself.



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