ALM
LAW JOURNAL NEWSLETTERS

NEW YORK FAMILY LAW MONTHLY®

Volume 9, Number 12 • August 2008

Reentering the Workforce After Divorce

Now What?

By Rona Wexler

For matrimonial clients, making their way through the emotional, logistical, financial and practical obstacles in divorce is obviously challenging. One of the most empowering and intimidating of these challenges for some spouses is beginning new employment, especially after years of absence from the job market. Whether it's an employment gap of 18 months or 18 years, it is scary — and sometimes paralyzing — to return to the workplace. And to make it even more stressful, the non-working spouse usually needs to find employment and income very quickly.

As we all well know, the greatest difficulty in this regard is experienced by women who have put careers on hold while caring for children, aging parents, or both. These women are not alone. According to the latest data from the Bureau of Labor Statistics, nearly 40% of all women in the workforce are mothers with children under 18 years of age. The Center for Work Life Policy says that 60% of working women will step back in their careers or leave the workforce completely. The majority will eventually want to reenter, often doing so in lesser positions or at lower earnings.

On the upside, from the point of view of the divorce attorney, focusing on planning for and

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Constructive Emancipation

Conduct of Child Can Lead to Termination of Support — But Only Rarely

By Jerome A. Wisselman and Eyal Talassazan

In New York State, a parent's duty to provide financial support to his or her child is reciprocal with the child's obligation to visit with the parent and obey parental directives. When a child fails to follow parental mandates and also refuses contact with his or her parent, that child may be emancipated and if so, the parent's obligation to pay child support will terminate. This process is called constructive emancipation, or emancipation by conduct.

Generally, a child may be deemed emancipated if that child becomes financially independent of his or her parents through marriage, through entry into the military service or by his or her physical abandonment of a parent. However, a child may also be deemed emancipated if, without cause, he or she unjustifiably withdraws from parental control and supervision, or unjustifiably refuses contact with the non-custodial parent. A non-custodial parent may seek a termination of support based upon his or her child's refusal to communicate, or on that child's failure to effectuate normal visitation. In other cases, a custodial parent may seek to terminate his or her obligation to provide support for the child due to the child's objectionable conduct or defiance of parental directives or mandates.

The Doctrine's History

In 1971, the Court of Appeals introduced the notion of constructive emancipation in the case of *Roe v. Doe*, 29 NY2d 188 (1971), in line with the State's policy of fostering "the integrity of the family." In *Roe*, the court held that a parent who provides financial support for a child has a reciprocal right to direct and discipline that child. If a child, without cause or consent, voluntarily abandons his or her parent, parental support is forfeited. The court held that where a "minor of employable age and in full possession of her faculties, voluntarily and without cause, abandons the parent's home against the will of the parent and for the purpose of avoiding

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Emancipation

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parental control, she forfeits her right to demand support"

However, the *Roe* court also stated that if a child is merely "at odds with her parents or had disobeyed their instructions, delinquent behavior of itself, even if unexplained or persistent, does not generally carry with it the termination of the duty of a parent to support." The conduct of the child must be more egregious, such as the child's outright refusal to visit with or contact the parent.

The court continued with this concept in *Parker v. Stage*, 43 NY2d 128 (1977), in which the Court of Appeals affirmed a ruling of the Appellate Division terminating a father's duty to support his 18-year-old daughter after the daughter chose to leave home to live with her paramour. The court stated there, "It should be emphasized that this is not a case of an abandoned child, but of an abandoned parent. There is nothing to indicate that the respondent abused his daughter or placed unreasonable demands upon her. There is no showing that he actively drove her from her home or encouraged her to leave in order to have the public assume his obligation of support." Noteworthy was the fact that the appeal was taken by the Commissioner of Social Services, which attempted to intervene and compel the respondent father to continue supporting his daughter.

In 1983, constructive emancipation morphed to include situations where a child of employable age continues to reside with his or her parent but refuses to abide by parental mandates and directives of the non-custodial parent due to interference by the custodian parent in the relationship between the child and the non-custodial parent. In the case of *Cohen v. Schnepf*, 94 AD2d 783 (2nd Dept. 1983), the court ruled that the non-custodial parent's obligation to pay child support was terminated and placed the entire burden of support on the residential parent. In *Cohen*, the father's obligation to pay child support was terminated due to an amalgam of reasons, including his son's decision to use the stepfather's surname, and also to list the stepfather as his parent on his college application. More importantly, the father, who was the non-custodial parent, was denied visitation for five years. Prior to this five-year period, the father had only seen his son five times over the course of several years.

Burden Is on the Parent

It is well settled that the petitioning parent has the burden of establishing the elements of his or her case. *Shabazian v. Shabazian*, 246 AD2d 688 (3rd Dept. 1998); *Wiegert v. Wiegert*, 267 AD2d 620 (3rd Dept. 1999). In *Shabazian*, the respondent father (the non-custodial parent) filed a petition to terminate his child support obligations and alleged that the child was emancipated due to a lack of visitation. The court ruled that the respondent's petition lacked merit and granted the petitioner mother's cross petition seeking an increase in child support based on the child's increased needs. The court disputed respondent's contention that the child was financially independent and had withdrawn from parental control, finding that the child was working approximately ten hours per week and was not self-supporting.

In *Chamberlain v. Chamberlain*, 240 AD2d 908 (3rd Dept. 1997), the court terminated a parent's duty to support a child where the parent made "repeated and meaningful attempts" to mend the parent-child relationship and the child refused all attempts by the parent, without cause and justification. The same result was reached in *Creamer v. Creamer*, 305 AD2d 595 (2nd Dept. 2003), where the children wrongfully refused to visit with their father, thereby forfeiting their right to receive support from him.

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Jerome A. Wisselman, a member of this newsletter's Board of Editors, is the founding partner of Wisselman, Harounian & Associates, P.C., Great Neck. **Eyal Talassazan** is an associate in the firm.

NEW YORK
FAMILY LAW MONTHLY®

New York Family Law Monthly® (ISSN 1528-753X) is published by Law Journal Newsletters, a division of Incisive Media.

Telephone: (800) 999-1916
Editorial e-mail: wendy.ampolsk@incisivemedia.com
Circulation e-mail: almcirc@alm.com
Reprints: lauren.melesio@incisivemedia.com

New York Family Law Monthly P0000-234
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
345 Park Avenue South, New York, NY 10160

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

An incisivemedia company
incisivemedia.com

Hearsay Evidence in Custody Cases

Some More Considerations

Part Three of a Three-Part Article

By Bari Brandes Corbin and Evan B. Brandes

An admission — an act or declaration of a party or his agent that constitutes evidence against the party at trial — is an exception to the rule against hearsay. As a general rule, any declaration or conduct of a party or his agent, oral or written, that is inconsistent with that party's position at trial is admissible at trial as an admission. *Read v. Mc Cord*, 160 NY 330 (1899); Prince, Richardson on Evidence, 11th Edition, 8-201. An example of an admission is a party's statement of net worth. *Fassett v. Fassett*, 101 App Div 2d 604 (3d Dept. 1984) (valuation in statement of net worth of husband is an informal judicial admission).

In those custody cases in which former spouses have remarried, visitation issues are sometimes complicated by the new spouse's role in the household as part-time caretaker for the children — or even just as the person who answers the telephone as the self-proclaimed spokesperson for the former spouse. When the new spouse plays an active role in the visitation process, contact between the former spouse and new spouse is inevitable, and may bring up evidentary problems.

If a party wishes to introduce evidence of the new spouse's attempts to interfere with visitation, the out-of-court statements of the new spouse may be admissible under the spontaneous declaration, state of mind or evidence of abuse or neglect exceptions. If not, it may be admissible as an admission of an agent. In order to introduce the evidence, a proper foundation must be laid. First, the agency must first be established, and then it must be shown that the new spouse, as agent, had the authority to make the statement. An agency between husband and wife cannot to be implied from the mere fact of marriage. *Le Long v. Siebrecht*, 196 App.Div. 74, 76 (2d Dept. 1921). However, actual agency may be implied from the conduct of the parties or may be established by proof of subsequent ratification. *Hyatt v. Clark*, 118 NY 563 (1890); *Cutter v. Morris*, 116 N.Y. 310 (1889); Richardson on Evidence (Prince 10th ed.)254.

An admission — an act or declaration of a party or his agent that constitutes evidence against the party at trial — is an exception to the rule against hearsay.

As to third persons, agency may arise by estoppel. *Hannon v. Siegel Cooper Co.*, 167 N.Y. 244 (1901). The marital relation is a circumstance that may be considered, along with other facts and circumstances, in determining whether a spouse is the agent of the other spouse. *Wanamaker v. Weaver*, 176 NY 75 (1903). The agent must have the authority to make statements such as those the opposing party seeks to introduce. *Loschiavo v. Port Authority of New York* , 58 NY2d 1040 (1983). The authorization may be express, such as where the agent's job description includes the authority to speak for the principal or where the speaking authority may be drawn from circumstantial evidence. *Spett v. President Monroe Bldg. & Manufacturing Corp.*, 19 NY2d 203 (1967). Where an agent's responsibilities include making statements on his principal's behalf, the agent's statements within the scope of his authority are receivable against the principal. *See, e.g., Stecher Lithographic Co. v. Inman*, 175 NY 124 (1903; *see also* Richardson, Evidence (Prince, 9th ed.).

FORMER TESTIMONY

Frequently, a party seeks to introduce into evidence testimony given at a prior hearing involving the parties. CPLR 4517 (a)(I) and (ii) provide that at the trial of an action or hearing, the prior testimony of a party or his agent may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness or for any purpose (evidence in chief) by any party. Deposition testimony of a party or non party witness may also be used to impeach the witness or admitted pursuant to CPLR 3117(a) where the witness is unavailable. CPLR 4517 (a)(iii) sets forth three conditions for the admissibility of former testimony of any person, as evidence in chief, which is taken or introduced in evidence at a former trial: unavailability of the witness, identity of subject matter and identity of the parties. If the witness is available, it may not be introduced into evidence. Prince, 8-502. In addition, there must have been an opportunity to cross examine that witness at the former trial. *Young v. Valentine*, 177 NY 347 (1904); Prince, 8-506. If the former testimony is introduced into evidence, it is subject to any objection other than hearsay. CPLR 4517; Prince, 8-508; *Dean v. Halliburton*, 241 NY 354 (1925). The failure to permit cross-examination is one such objection.

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Bari Brandes Corbin, a member of this newsletter's Board of Editors, maintains her offices for the practice of law in Laurel Hollow, NY. She is co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-West). **Evan B. Brandes**, also a member of this newsletter's Board of Editors, maintains his office for the practice of law in New York, New York. Both are Vice-Presidents of Joel R. Brandes Consulting Services Inc., Jersey City, NJ, and Ft. Lauderdale, FL (www. brandeslaw.com or www. nysdivorce.com), and editors of its Web sites.

Hearsay Evidence

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The original stenographic notes may be read into evidence and proved by anyone whose competence is established by the court. The former testimony may also be proved by anyone who heard it. *McRorie v. Monroe*, 203 NY 426 (1911).

Evidence of Abuse or Neglect

In order to present a *prima facie* case, evidence of previous statements made by the child relating to any allegations of abuse or neglect may be admitted in court if they are corroborated by any other evidence tending to support the reliability of the statements. Thus, in *Eli v. Eli*, 159 Misc.2d 974 (Fam. Ct. 1993), the court suspended visitation premised upon the mother's allegation that the father sexually abused his child. In *Rosario WW. v. Ellen WW*, 309 AD2d 984 (3rd Dept.2003), the court admitted the mother's testimony "revealing statements of the children as to conduct by the father that would constitute acts of abuse and neglect" because it was corroborated by other evidence. In *Mateo v Tuttle*, 26 AD3d 731 (4th Dept. 2006), the court said it was well settled that there is "an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct. Act § 1046(a)(vi)," where the statements are corroborated.

In *Matter of Bartlett v. Jackson*, 849 NYS2d 704 (3d Dept 2008), the mother argued on appeal that Family Court incorrectly admitted hearsay evidence and then relied upon such evidence in its custody decision. The Appellate Division noted that Family Court is accorded considerable discretion in determining whether there is sufficient corroboration for admitting such hearsay evidence. Here, one of the primary grounds asserted as a significant change in circumstances meriting the modification of custody was the alleged pattern of severe corporal punishment that resulted in the child having considerable bruises on his legs and arms as well as an occasional bloody nose. Witnesses at the hearing testified about the child's statements to them regarding such actions by the mother and her boyfriend. While this testimony was hearsay, it involved alleged abuse and was corroborated. Corroboration came from various forms of evidence, including photographs of the child's many bruises. As for the assertion that the mother caused a bloody nose on several occasions by striking the child, corroboration included the eyewitness account of her former boyfriend. The hearsay evidence as to unduly severe punishment was sufficiently corroborated and, as for the other hearsay evidence, the error in admitting such proof was harmless in light of the extensive admissible evidence at the hearing that supported the Family Court's decision.

Past Recollection Recorded

If even after reading a memorandum, the witness remains unable or unwilling to testify as to its contents, the memorandum itself is admissible as evidence of the truth of its contents, provided that otherwise competent testimony establishes that: 1) the witness once had knowledge of the contents of the memorandum; 2) the memorandum was prepared by the witness, or at his direction; 3) the memorandum was prepared when the knowledge of the contents was fresh in the mind of the witness; and 4) the witness intended, when the memorandum was made, that it be accurate. *People v. Raja*, 77 AD2d 322 (2d Dept. 1980).

Not every past recollection will be admitted, of course. In the custody case of *Smith v. Miller*, 4 AD3d 697 (3d Dept. 2004), the court found Family Court properly excluded the mother's journal from evidence despite attempts to have it admitted as a past recollection recorded. Her own attorney had at one part of the proceedings objected to the journal's disclosure as a document prepared for litigation, and the mother admitted that some entries were not made contemporaneously with the events in question. She was, however, allowed to refer to it during the hearing in order to refresh her memory.

One Last Exception: Hearsay Admitted in Error

The admission of hearsay evidence does not automatically constitute reversible error. CPLR § 2002, which codifies the "harmless error" rule in New York, provides that: "An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced." Under this rule the erroneous admission of improper evidence is harmless error, and not a basis for reversal, if the outcome probably would have been the same even if the evidence had been excluded. Where the trial court erroneously excludes competent and relevant evidence, reversal is appropriate only if the excluded evidence probably would have been a "substantial influence" in producing a different result. *See, e.g., Kahn v. Galvin*, 206 AD2d 776 (3d Dept. 1994); *Walker v. State*, 111 AD2d 164 (2d Dept. 1985). *See also Barbagallo v. Americana Corp.*, 25 NY2d 655 (1985).

Although individual errors might be deemed harmless when considered separately, a new trial may be ordered when such errors, considered collectively, cause substantial prejudice to a party. It has been held that an error is harmless where the admissible evidence amply supports the court's determination, and it does not appear from the record that the court relied upon that inadmissible evidence in making its determination. *See generally In re Christina A.M.*, 30 AD3d 1064, 1064 1065 (3d Dept. 2006); *Matter of Michael G.*, 300 AD2d 1144, 1145 (4th Dept. 2002); *In re Sherri M.K.*, 292 AD2d 868 (4th Dept. 2002).

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Reentering Workforce

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finding new employment can help the nervous client to look beyond the litigation, move forward, and envision with optimism a new, rewarding life after divorce.

How does your client get to the place where she can move forward into the job market? She uses expert advice and support from many sources during divorce; for the greatest success in finding lucrative and meaningful employment post-divorce, she must also use all available resources.

Overcoming Low Self-Esteem

One of the most difficult issues for reentry into the workforce is loss of self-esteem. It takes only a few years' absence from the workforce to undermine a client's confidence. Often, a divorcing client feels "rusty," having lost touch with the newer technology and other issues in her industry. Her network of professional contacts may well be outdated. The loss of self-confidence that flows from this can lead to "analysis paralysis" — or procrastination and inertia. When the client confesses, "I don't even know where to begin," what can you say? You are not a career counselor or psychiatrist, but you may want to be able to offer some helpful advice.

Our advice here is to tell your client, "The first step is a step back." Everybody in transition needs to stop, clarify their values, and identify what's important to them in their life moving forward. This must include identifying ways to heal, how to maintain her health and to make room for nourishment and joy in her life. Then she can evaluate employment options and consider how they will work with what is essential to her life and growth. Sometimes, this means temporarily taking jobs that are not ideal, but that meet her financial needs.

Next, because your client's former colleagues (if any) may have moved on and out of contact with her, she may need to call on newer resources to lay the groundwork toward a new career. These might include people in support groups, friends, family, former colleagues and neighbors met while volunteering in the community. Any of these might help her identify her assets and open her eyes to what she has done and is capable of. (After consulting with these people, she may be surprised and pleased to hear what they say!)

Other key resources may be your client's therapist, career/life transition coach, non-profit agencies, and the hundreds of books and articles out there on re-entry into the workforce. Private sector, community and four-year colleges offer programs ranging from a two-hour introductory class to an eight-week workshop on career decision-making. The Internet or a college alumni association offer local listings, as well. These programs can point participants to new resources such as support groups, networking resources (in person and online), professional organizations, government agencies, training programs, sources of advice for prospective entrepreneurs, etc.

What Work Do I Look For?

Is your client planning to re-start a career, launch a new one, or find a less demanding job that allows her to balance family demands or pursue other passions and interests? She might begin by creating an ideal job spec (*e.g.*, restricted hours, light commute, interesting work, minimum compensation, strong career path, professional on-the-job training, or jobs in a growth industry). Remember, this is a starting point — there is no perfect job (as there are no perfect spouses!). She must figure out on what items she is flexible, what items are non-negotiable, and why. She will need to think "outside the-box," picturing a different life with some new freedoms but also with new responsibilities. She will also need to think ahead — how might her job requirements change in the future?

Obtaining professional advice from a therapist, career coach, accountant and financial planner is a good way to kick-start this process. When faced with such decisions, we often return to what's familiar. For example, we look for similar jobs that we had at age 25. But, it's a different world and we're not the same people at age 45! We have new life experiences, learning, skills, attitudes, responsibilities and energy.

Taking the First Steps to Reentry

The reentry process may at first feel overwhelming to your client. The best way for her to begin her quest is by preparing a "map" to chart her course with milestones and time-frames. In creating her plan, she should keep in mind the following things:

There are expenses incurred in returning to work — yes, it costs money to earn money! These may include school tuition or the costs of other training, wardrobe, briefcase for the interview, professional resume preparation, a car to get to work, and a new haircut. If you help her start formulating this "budget" early in the divorce process, these expenses can be built into a settlement.

It will be necessary to build and nurture a network (research shows that between 40% to 70% of employment is obtained through the hidden job market found through a network of personal and professional contacts). Knowing how to effectively use this network is critical and there are many resources to guide this process: If your client had a career before, she could contact old colleagues, join a professional networking group or take a continuing education course related to her field. Most people's skill sets qualify them for more than one field of work, so it is optimal to prepare several résumés; different ones for different types of jobs and industries. Using

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Rona Wexler, M.A., President of Wexler Consulting LLC, New York, is a Vocational Evaluator providing employabilty expert witness services in New York, New Jersey and Connecticut. She is a matrimonial specialist who has made numerous presentations about employment, the job search and career transitions. Ms. Wexler may be reached at www.wexler-consulting.com or at 646-335-5236.

NJ & CT NEWS

Connecticut

Dissipation of Marital Assets May Be Considered

Addressing an issue of first impression, Connecticut's Supreme Court ruled July 1 that, subject to certain limitations, trial courts may consider evidence that a spouse dissipated marital assets prior to the couple's physical separation, for purposes of determining an equitable distribution of property under C.G.S. § 46b-81. The only restriction on a court's consideration of such evidence is that the actions constituting dissipation occurred either: 1) in contemplation of divorce or separation; or 2) while the marriage was in serious jeopardy or was undergoing an irretrievable breakdown. The case is *Finan v. Finan*, --- A.2d ----, 287 Conn. 491, 2008 WL 2492003 (Conn. 7/1/08).

New Jersey

Domestic Violence Law Loses Some Teeth

In a June 18 ruling in *Crespo v. Crespo*, FV-09-2682-04, Superior Court Judge Francis Schultz found that the proof required before a court may issue a restraining order to prevent domestic violence is clear-and-convincing evidence of potential harm, not a preponderance of the evidence. With that ruling, Judge Schultz declared New Jersey's 17-year-old Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.) a violation of the Fourteenth Amendment and, thus, unconstitutional. The decision also deemed the New Jersey statute violated the doctrine of the separation of powers because it legislatively imposed procedures on the courts that directly conflicted with those set forth in court rules. The ruling threw out a restraining order issued in 2004 against a man whose former wife said he was harassing her.

The court looked for guidance in its decision making to the U.S. Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In accordance with *Mathews*, the court found that the higher standard applied because a fundamental right was at stake: the right of a parent to be with his children. The third *Mathews* criterion — that there is a high risk of error if the lower standard of proof is applied — was also persuasive to the court, as it found the quick calendaring and summary nature of domestic violence actions could lead to hasty, inaccurate decisions.

Cohabitation Not Required For Award of Palimony

The New Jersey Supreme Court ruled June 17 that palimony claims need not be thrown out if the parties did not live together. In *Devaney v. L'Esperance*, --- A.2d ----, 2008 WL 2491976, (N.J. 6/17/08) (NO. A-20 SEPT.TERM 2007), Justice John Wallace Jr. wrote for the 6-1 majority, "We hold that cohabitation is not an essential requirement for a cause of action for palimony, but a marital-type relationship is required." Despite its holding, the court declined to give the plaintiff — a woman who carried on a 20-plus-year relationship with the defendant, an ophthalmologist and her former employer — the palimony she wanted. The parties had begun their relationship in 1983, when the plaintiff was defendant's office receptionist. Defendant had supported plaintiff in many ways; for example, paying for her education and buying an apartment for her use. However, the plaintiff was unable to prove that defendant had ever promised to support her, a requirement for palimony under *In re Estate of Roccamonte*, 174 N.J. 381 (2002).

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an old résumé from 10 years ago will not suffice. Résumés are never static. They should be in a constant state of change based on experience and feedback gained in the job search.

Job searchers should expand and update their skills and knowledge, *e.g.*, by strengthening their computer skills, including Microsoft Office applications, or attending seminars on industry issues or to research and prepare for new careers. As noted above, attending such training courses could also lead to making the personal connections that could result in a job lead.

Those with advanced degrees should look into On-Ramp programs (see "Off-Ramps and On-Ramps: Keeping Talented Women on the Road to Success," Harvard Business School Press, 2007; *see also* resource listings at http://www.momsrising.org/files/Opt_In_Individual_Resources.pdf). On-Ramp programs seek to help women who have left a professional field for a year or more to re-enter that field, often with short, intensive courses aimed at bringing them back up to speed.

It may be useful to conduct research into growing industries. For example, the fact that the population is rapidly ageing means that geriatric and retirement industry employment will continue to expand.

Temporary or "contract" employment is a good way to get started because it allows the person re-entering the workforce to experience different company cultures and industries, learn new skills and build a current employment history (with references!). Many temporary positions evolve into full-time employment for an employee who demonstrates a successful work history.

Planning how the family members will adjust to your client's reentering the workforce will ease the transition. This will require them to share more of the responsibilities that mother may previously have shouldered. Despite the hard work involved for others in the household, this can be an empowering growth experience for the family members, who may secretly feel proud of their contributions and new skills. Children who take on more household responsibilities take less for granted and are better prepared when they, too, go out on their own.

It is important for the client to put a plan in place to keep herself motivated, because this can be a

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DECISIONS OF INTEREST

Hearing Needed to Prove Divorce Obtained in Ghana

The court declined to accord full faith and credit to a "customary divorce" obtained in Ghana, where the parties had married, as there were several issues in dispute concerning the conduct of the divorce proceedings in Ghana, and their legality. *T.T. v. K.A.*, (Sup. Ct., Nassau Cty. 6/18/08) (Falanga, J.).

The parties were married in a "customary marriage" in Ghana. Defendant husband alleged the "customary marriage" was "customarily dissolved." He alleged the Circuit Court in Ghana confirmed that the "customary marriage" was dissolved in 1994 and the "customary divorce" was recognized under the laws of Ghana. Plaintiff argued the Ghana divorce was not entitled to full faith and credit as she had no notice of the commencement of an action for divorce. Defendant argued New York must accord full faith and credit to the divorce as it was obtained in full compliance with Ghana's laws.

The court noted that the order was obtained *ex parte* by defendant's uncle and plaintiff's father, and the order did not divorce the parties, but only confirmed that they were divorced "customarily." In addition, issues remained under contention at this point, including whether plaintiff had knowledge of or had consented to or participated in the "customary divorce." Thus, comity did not require recognition of the Ghana divorce, because issues surrounding whether the couple had in fact been divorced could not be determined without a hearing.

Bankruptcy Filing Does Not Stay Execution of QDRO

Because a woman's interest in her ex-husband's retirement fund vested immediately upon judgment of divorce, her allotted portion of the retirement fund could not be included as property of the ex-husband's bankrupt estate, and the bankruptcy filing did not stay the court's execution of the QDRO. *Zettwoch v. Zettwoch*, (Family Ct., Orange Cty. 6/30/08) (Giacomo, J.).

The plaintiff ex-wife submitted a qualified domestic relations order (QDRO) for the division of defendant ex-husband's ERISA-qualified retirement plan. The defendant had, however, recently filed for bankruptcy and argued the bankruptcy filing automatically stayed the signing of the QDRO. The court noted that while the automatic bankruptcy stay applied to most actions, it did not apply to the collection of a domestic support obligation from property that was not the property of the estate. The question, therefore, was whether the QDRO fell under this exception.

The court found that, under ERISA, a spouse does not have any legal right to the property until a QDRO is filed. However, the fact that a QDRO was not yet filed does not negate the fact that the plaintiff had an equitable interest in the retirement fund. The court concluded that plaintiff's interest in defendant's retirement fund immediately vested in her upon the issuance of the divorce judgment and could not be included as property of the estate in the defendant's bankruptcy case. Thus, the bankruptcy filing did not stay the court's execution of the QDRO.

Divorcing Husband Can Not Change Venue of Estate Administration

With regard to venue for administration of decedent's estate, her husband — estranged from his wife at the time of her death — was unable to overcome the decedent's apparent intention to be treated as a resident of the new county to which she had moved. *Will of Mary Susan Wayne*, 348597 (Surrogate's Court, Nassau Cty. 6/3/08).

The decedent, Mary Wayne, was estranged from her husband and was living with her brother in Nassau County at the time of her death. Her husband, who lived in Niagara County, had filed for divorce prior to her death. In anticipation of the divorce, the couple had sold their home in Niagara County. Also, before she died, the decedent made out a will indicating that she was a resident of Nassau County and that she wanted to disinherit her husband.

Upon the decedent's death, her husband moved to transfer venue of the administration of her estate to Niagara County. Decedent's brother, the preliminary executor, opposed such a move, pointing out that the decedent had signaled her intention to change her county of residence by changing her driver's license and the billing address on her charge card to his address. The court found the brother/preliminary executor had met his burden of showing by clear and convincing evidence that the decedent changed her domicile from Niagara to Nassau County. It noted she no longer had a principal and permanent place of residence in Niagara after she and her husband separated and their home was sold, and she did not obtain another residence in Niagara County. Thus, the venue transfer motion was denied.

Court Erred in Ordering *Pendente Lite* Property Sale

Supreme Court, Otsego County, overstepped its authority when it ordered the sale of a couple's real property *pendente lite*. *Buddle v. Buddle*, --- N.Y.S.2d ----, 2008 WL 2609254 (3d Dept. 7/3/08) (Peters, J.P., Spain, Carpinello, Lahtinen and Malone Jr., JJ.).

The parties were married in 1980, they were separated in 2001, and plaintiff commenced this action for a divorce in 2006. Once the divorce was filed for, the defendant began repeatedly to threaten to sell the Otsego County property the wife had moved to, which they owned together. In August 2007, the plaintiff moved by order to show cause for, inter alia, an order granting her

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the exclusive use and possession of the Otsego County property. After a hearing, however, Supreme Court ordered that the property be sold at fair market value. Plaintiff appealed.

Quoting *Jancu v. Jancu*, 241 AD2d 316, 317 (1997), the Appellate Division, Third Department, found it was well settled that, unless the parties consent, "absent the termination of the marital relationship by judgment of divorce, amendment, separation or declaration of nullity, courts do not have the authority to direct, *pendente lite*, the sale of property owned by the parties as tenants by the entirety." Here, the record was unclear as to the precise manner in which the property was held by the parties, although it was undisputed that they were married in 1980, acquired the property in 1988 and that both parties' names were on the title. The court concluded that because the acquisition of real property by married persons creates a tenancy by the entirety unless otherwise specified (see EPTL 6-2.2(b); *Kahn v. Kahn*, 43 NY2d 203, at 206-207), and there was no indication that the parties acquired the property in any other manner, the Supreme Court did not have the authority to order the *pendente lite* sale of the property.

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Emancipation

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It is clear that the non-custodial parent must make attempts to contact and communicate with the child and also must not alienate the child. In *Radin v. Radin*, 209 AD2d 396 (2nd Dept. 1994), the Appellate Division affirmed the Supreme Court's ruling and rejected the appellant father's claim that his children had abandoned him because they would not return his telephone calls and refused voluntary contact. The court noted that the appellant father had contributed to the alienation between himself and his children. The father's duty to support the children was not terminated since the children's failure to contact the father was deemed "reluctance" rather than abandonment.

In *Alice C. v. Bernard G.C.*, 193 AD2d 97 (2nd Dept. 1993), the court did not disturb the father's support obligation to his child because the father had not made a concerted effort to visit or establish a relationship with him. The child testified that the father never attempted to contact him and that he still loved his father. Finally, in *Hiross v. Hiross*, 224 AD2d 662 (2nd Dept. 1996), the court did not terminate a non-custodial parent's obligation to provide his child with financial support simply because the son refused to speak or visit with his father, because the son was only 14 years old at the time of application "and could not, as a matter of law, abandon his father."

Recent cases involving the concept of constructive emancipation include *Bodzak v. Bodzak*, 48 AD3d 724 (2nd Dept. 2008) (children emancipated by conduct after they moved from the mother's home to the father's home and father's obligation to pay child support was eventually terminated); *Foster v. Daigle*, 25 AD3d 1002 (3rd Dept. 2006) (two children, ages 14 and 16, not constructively emancipated from the non custodial parent as they were not of employable age and the non-custodial parent failed to prove the custodial parent had interfered with his relationship with the children); and *Marshall v. Marshall*, 1 D.3d 323 (2nd Dept. 2003) (father's cross motion for constructive emancipation denied because the father failed to present evidence confirming the mother interfered with his visitation rights).

CONCLUSION

The case law confirms that courts are not too eager to relieve parents of their duty to support their children and will do so only under extreme circumstances, and only when strict guidelines are satisfied. Where termination is sought due to refusal to visit or interference with visitation, it is strongly recommended that attempts to contact and visit with the child are clearly documented.

An attempt to terminate support should be viewed as a process: It will likely take several applications before a termination is ordered. Of course, an order for visitation is a prerequisite. Where termination is sought due to failure of the child to abide by parental control, a well documented course of conduct on the part of the parents and the child is a absolutely necessary.

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Reentering Workforce

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discouraging, lonely process. However, friends, family, professional advisers and networking and job-search groups can support her during this transition. Finding the right job is a full-time job. The process can wear a person down. She must be aware of this and make sure to guard her image (tone of voice, energy, body language, articulation) so that she always conveys confidence and a winning attitude.

Above all, you will do your client a great service if you can help her to remember that with great challenges come great rewards. With the right planning and support, the divorce need not leave her totally bereft, but might eventually prove to be one of her most liberating, empowering and exciting periods of growth.

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