Matrimonial Law

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The Crossroads of **Immigration and Family Law**

BY ARLENE G. DUBIN AND REBECCA A. PROVDER

Long viewed as the land of opportunity, the United States of America attracts hundreds of thousands of immigrants each year. In the last few decades, immigration has exploded. From 1980 to 2010, the foreign born population surged from 14.1 million to 40 million.[1]

A foreign national may obtain lawful permanent resident status in the United States in a variety of ways, such as through employment or a visa lottery. Historically, the most popular method of obtaining permanent residency is through a family-based sponsorship, particularly through marriage to a U.S. citizen.[2]

One out of every five married couple households consists of at least one spouse born in a foreign country.[3] At the same time, divorce continues to be on the rise.[4] It is estimated that between 40 and 50 percent of all marriages end in divorce.[5]

This article will address various considerations that arise when immigration and matrimonial law are at a crossroads.

Before You Say 'I Do'

When a U.S. citizen is involved in a relationship with a noncitizen, the couple may marry sooner than they would have otherwise if their relationship naturally progressed. For example, the noncitizen's visa may be about to expire, and he/she would need to leave the country unless he/she marries. In another case, the foreign national may be out of status (he/she may have remained here for a longer time than permitted), and marriage may be the only option to remain in the United States. Under these circumstances, among others, a prenuptial agreement can be a powerful protective document.

> According to applicable law, marriages entered into by a U.S. citizen and a foreign national that **end in divorce in less than two years** are presumed to have been entered into based on **fraud**.

It must be noted, though, that a prenuptial agreement cannot be used as a mechanism to obtain protections in a marriage that is not bona fide and is a "sham." If it is determined that a marriage was entered into for the sole purpose of obtaining a green card, a prenuptial agreement may be invalidated. For example, in *Heilbut v. Heilbut*,[6] the appellate division determined that the parties' prenuptial agreement violated public policy. The court upheld the invalidation of the prenuptial agreement because it was based upon a "scheme to circumvent immigration laws in the United States."[7]

When used in a bona fide marriage, a prenuptial agreement can be an important tool that allows a couple to tailor the law to meet their specific needs. It also can help limit losses in case there was more opportunism involved in the relationship than the U.S. citizen realized before getting married.

No Prenup? Try a Postnup.

If a couple rushed to the altar, such as to avoid a spouse's departure from the country, there may have been insufficient time to execute a prenuptial agreement. In lieu of a prenuptial agreement, the couple could enter into a postnuptial agreement.

A postnuptial agreement also may be useful in situations when marital strife arises and one spouse does not have unconditional permanent residency.[8] During the immigration process, the parties may resolve the issues ancillary to a divorce in a postnuptial agreement without having to initiate a formal divorce proceeding.

Happily Ever … For Less Than Two Years

According to applicable law, marriages entered into by a U.S. citizen and a foreign national that end in divorce in less than two years are presumed to have been entered into based on fraud.[9] Such marriages are subject to challenge by the Immigration Service. In an effort to deter people from entering into "sham" marriages, the noncitizen's permanent resident status is conditional during the first two years of marriage.[10]

In the immigration context, a sham marriage is a marriage entered into for the sole purpose of obtaining immigration benefits. Some red flags for a sham marriage are that the parties have a significant age difference, have different ethnic backgrounds, speak different languages, live in separate households, or failed to notify friends and family about the marriage.[11]

A conditional permanent resident can obtain a green card that is valid for two years.[12] In the event that the conditions are not removed, the foreign national stands to lose permanent resident status unless a waiver is granted. Waivers may be based on "good faith," "exceptional hardship" to the noncitizen spouse, or abuse of the noncitizen spouse.[13]

For the restrictions on the permanent residency to be removed, the conditional permanent resident typically needs to file a petition jointly with his/her spouse.[14] In the petition, the couple is required to represent that they are married and that they did not enter into the marriage for immigration benefits. Additional information must be provided, such as details regarding their place of residence, employment background and the bona fide nature of the marital relationship over the course of the preceding two years.

In a short-term bona fide marriage, a divorce agreement may include provisions that encourage cooperation of the U.S. citizen in the immigration process. For example, the » Page 12

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Child Support Modifications Are Easier After 2010 Amendments

BY HARRIET NEWMAN COHEN AND TIM JAMES

The 2010 legislative package that made New York the final state in the union to adopt "No Fault" divorce included amendments to the Domestic Relations Law and the Family Court Act that made it easier to obtain modification of an existing child support order and required that all new child support orders advise the parties of their right to seek a modification on appropriate facts and the showing required to succeed (the 2010 Amendments).

Most significantly, the 2010 Amendments amend DRL §236(B)(9)(B) and Family Court Act §451[1] to provide that "the court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change of circumstances."[2] Prior to the 2010 Amendments, that standard, set forth in DRL §236(B)(9)(b), was applicable only with respect to child support orders that did not incorporate an agreement or stipulation between the parties, as the courts had long held that, where a contract between the parties is involved, the party seeking a modification of child support had to meet a higher standard.

In *Boden v. Boden*,[3] the Court of Appeals declared:

> Where, as here, the parties have included child support provisions, the court should consider these provisions as [contracts] between the parties and the stipulated allocation of financial responsibility should not be freely disregarded. … *Absent a showing of an unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed.*[4]

Invoking contract principles, the court also allowed that an agreement-based order was subject to modification where "the agreement was not fair and equitable when entered into."[5]

Five years later, the Court of Appeals limited the applicability of *Boden*. In *Brescia* » Page 11

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Trends in **Distributing** A **Business Interest** And **Enhanced Earning Capacity**

BY JUDITH L. POLLER, ELIZABETH S. WARNER AND JOSHUA H. PIKE

One of the more difficult issues plaguing both judges and practitioners in New York divorce actions is the equitable distribution to a non-titled spouse of a marital asset consisting of a business interest, professional practice (Business Interest) and/or professional degree, license, or celebrity obtained during the marriage (EEC).

The ultimate percentage awarded, along with the appropriate calculation of spousal support, are complicated areas to understand and predict largely because of the dearth of published decisions at the trial level on these issues and the lack of factual recitations in appellate division decisions. As a result of this lack of information, there is less guidance for constructive settlement discussions and trial preparation. This article attempts to glean from recent available decisions what, if any, trends exist in distributing a Business Interest and EEC and how the distributive award and the court's calculation of spousal support intersect.

Recent Trends in Awards

It is common knowledge at this point in time that, regardless of the efforts and role of a non-titled spouse during the marriage, cases in which a non-titled spouse is awarded 50 percent of a titled spouse's Business Interest or EEC "represent a distinct minority of the reported decisions and they generally involve situations where there were significant direct contributions made to the business by the non-titled spouse."[1] The Second Department has in fact confirmed that its general practice is to "typically uphold[] awards between 25% and 35% to the non-titled spouse."[2] Although courts have on the rare occasion awarded a non-titled spouse half of the value of a Business Interest or EEC,[3] awards of between 10 percent[4] and 35 percent[5] are far more common. As further demonstrated in an accompanying chart detailing recently published decisions on this issue, the overwhelming majority of cases result in the distribution of a Business Interest or EEC to the non-titled spouse of less than 35 percent.[6]

In recent reported decisions, courts have tended to award a lower percentage of a Business Interest or EEC to a non-titled spouse where both parties shared domestic responsibilities[7] or the non-titled spouse worked outside the subject business,[8] and a higher percentage to a non-titled spouse who was the primary caregiver for the parties' children.[9] Although the number of published decisions on this issue is limited, it appears that there is a trend by the courts to give a greater award to a non-titled spouse whose primary responsibility in the marriage was to run the household and raise the children.

In two of the more recently published trial decisions on the issue of the percentage to be distributed to the non-titled spouse, the courts awarded the non-titled spouse 30 percent of the titled spouse's Business Interest, despite vast differences in the two roles of the non-titled spouses in the marriages. In *V.M. v. N.M.*, 43 Misc. 3d 1204(A), 2014 N.Y. Misc. LEXIS 1383 (Sup. Ct. Albany Co. 2014) (Lynch J.), during their 11-year marriage, the husband developed a successful diamond business in which the wife worked for four years. In awarding the wife 30 percent of the business, the court focused on two primary factors: (1) that the wife "was extensively engaged in the business during the 2004-2008 period" and "played an important role in the business"(id. at **5-6), and (2) that "the parties mutually agreed in 2008 that the defendant would reduce her work efforts to become the primary caregiver of their child." Id. at **6. In justifying this award, the court noted that the wife's "contributions as homemaker are a significant factor in gauging [her] equitable interest" and that the husband was only able to dedicate his time and efforts to the development of the business due to the wife's "efforts in caring for the children." Id. The wife's dual role of contributing to the business and being the primary caretaker for the parties' children justified, in the court's eyes, an award of 30 percent of the Business Interest.

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In another recent decision, *Sykes v. Sykes*, 24 Misc. 3d 1220(A), 2014 N.Y. Misc. LEXIS 2069 (Sup. Ct. N.Y. Co. 2014), the parties were married for 14 years, during which time the husband established a successful hedge fund. During the marriage, the wife initially worked part-time as an art appraiser and adjunct college instructor, but upon the birth of the parties' child, she "stopped working outside the home altogether." Id. at **6. In assessing the wife's entitlement to a share of the Business Interest, the court noted the wife's failure to » Page 12

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Inside

The Prenup Is Signed, Now It's Just Cake And Dancing, Right?

DETROIT FREE PRESS; NYLJ

BY MEG CANBY

Wrong. As I said when I recently had occasion to prepare for an appellate argument, prenups are fundamentally designed to do two things: One is to provide certainty to each party about what will happen and what their entitlements will be in the event of a divorce, and the other is to assure them a streamlined, straightforward and easily implemented process so that they can quickly, and inexpensively, move on with their lives.

That being said, there is still usually some wrangling that happens when there is a prenuptial agreement, especially when the marriage has been of a longer duration. Sometimes that wrangling is emotionally driven, but sometimes, even with a well crafted agreement, it is because it is quite difficult to draft a prescriptive document at the outset of a marriage to cover all possible financial contingencies and arrangements. And then sometimes, it is because people simply have not acted completely consistent with the behavioral outlines of the prenuptial agreement, which, I concede, is also very hard to do over a marriage that lasted for many years. Reflecting that problem of appropriately predicting the future is the public policy that dictates that issues concerning any future children, i.e., custody and support of those children, cannot be determined in advance, despite the favorable view taken by the court of people deciding their own fates by agreement, and those determinations must await the realities of those children, who they are and the lives they live, and their parent's actual circumstances at the time of any future divorce. This is in part because those future children have their own rights regarding custodial relationships to be properly supported separate and apart from the adults who signed the prenuptial agreement when future children were "just a twinkle in their eyes." But it's also a statement about the difficulty of reliably predicting the future. But on the other financial issues that can be agreed upon in advance by prenup, the problems of properly predicting the future remain and the best laid plans can be ruined by failure to act in accordance with those plans during the years that the marriage is intact.

One thing that people may not know when they consider entering into a prenuptial agreement is that there are built in protections—immunities essentially—from division in a divorce for certain categories of assets, which actually coincide with the kind of assets that people are most interested in preserving in their prenuptial agreements: inheritances, closely held family business interests, and assets or interests that you bring into the marriage with you. If those assets or interests are never commingled with income earned from employment during the marriage, or you do not spend any effort or time during the marriage to trade or appreciate or cultivate those assets, then they can be excused from division in a divorce regardless of whether or not you have a prenuptial agreement. It is how you act and behave with regard to those assets that determines whether some part of the appreciation or value of the asset is in the marital pot, instead of being protected as your separate property. So, conduct trumps characterization. How you behave over the course of time protects your assets, not their source alone.

On the other hand, if you spend time during your marriage managing the portfolio you inherited from your grandmother, or you work in the family business, then a prenuptial agreement is a good tool for preventing that "marital effort" from converting the incremental appreciation of that asset over what it was worth initially, into a "marital asset" that is subject to equitable distribution in a divorce. If it is specific in defining any such efforts or appreciation of separate property as not subject to division in a divorce, then the prenup controls and characterization trumps conduct. Similarly, if you have a professional practice, advanced educational degree or special license, or are about to get one, you may have or may be about to acquire a professional attainment or an enhanced earning capacity which, counterintuitively, has a divisible value under New York law. That is a perfect asset to be protected in a prenuptial agreement. The third most popular kind of asset for protection that I see are those that come into play with second marriages: the accounts that may still be actively managed, the residences that may still be renovated or improved, and other assets that you may have received from your prior marriage and want to preserve for any children from that relationship or even just for yourself so you don't have to "divide it again."

But, except in the relatively rare instances where two people coming into a second marriage are equally wealthy and self supporting and they plan to keep their finances utterly separate but simply want to be married, nothing comes without a price. If there is a disparity of resources coming into the marriage, when you sequester any of these types of assets, there is usually a trade off—something is given or conceded, such as a contribution of some separate funds to a marital residence, or a series of fixed payments to the spouse. Marital property of some kind has to be a possibility (or some assets bestowed on the less wealthy party of some kind or financial support provided) or the agreement risks being too stringent to pass muster with the courts and can be thrown out altogether for being a bargain that no one should rightfully or fairly ever accept. So there is often something given for the broad protections that are being afforded by the agreement.

However, one thing that strikes me about prenuptial agreements is that people who have them forget that they can still be trumped by behavior (meaning their actual conduct while married), which can be quite casual or even accidental, and the asset protections codified by prenuptial agreements can be eviscerated. I find that years later, people think of them as a protective shield that is going to allow them to behave as if there is no prenuptial agreement while they are married—that the agreement is a proverbial "get out of jail free card" when the marriage sours. No such luck, I'm afraid.

If you or someone on your behalf creates a joint account or puts a residence in joint name, or if you contribute separate funds to the maintenance of a joint asset or residence, you may not get that money back off the top. If you spend your separate property inheritance and bankroll or invest your earned income (unless that too has been protected) you are not getting that separate property money back. It could mean you get a greater percentage of the marital funds when those are divided, but not necessarily and certainly not dollar for dollar, with very limited exceptions. Often, if there are protections for separate property appreciation, any marital property is commonly to be equally divided by the terms of the agreement itself.

So, in a sense, people who do not have prenuptial agreements may conduct themselves in such a way that they can protect their inheritances or the property that they bring into the marriage from ever being subject to division in a divorce by behaving cautiously, but people with those same kinds of assets can accidentally commingle that wealth, or part of it, with marital property and lose their exemption from property division because they think that they are completely "protected" by the prenuptial agreement.

On the other side of the table, behavior matters as well. There have been many less well off spouses who know that marital property can be theoretically created under the agreement, say from income from employment, for example, and then they never follow up to know or be assured that any such jointly titled assets or property actually exist. So an agreement could exempt a husband's family business interest where he works from being considered marital and his inheritances could also be separate property, and he could spend all his earnings (which would be the only source for creating marital assets) on lifestyle, and at the divorce, there is nothing in the marital pot. And that loss is never adequately made up by the spousal maintenance provisions. Again, conduct controls.

Interestingly, there are some scenarios where a prenup can benefit the person who does not have the greater assets or wealth. For example, when you marry someone who is entirely supported by a trust fund, and works as an undercompensated poet or filmmaker as a result but still enjoys a comfortable lifestyle, it may be great while things are rosy, but at a divorce there is no property to divide and you have to take your chances on whether or not you can get spousal maintenance, which is what we call alimony in New York. However, there can be assets to divide if that trust fund money is put into joint name, or reinvested and actively managed, or put into a business interest that actually has some value at the time of the divorce. But each of those options takes some determined action by the titled spouse when the passive thing—just living of the trust income—seems easy and more likely. So in this circumstance, where it may be that no marital assets are likely to be created, it is the nontitled spouse who stands to gain in the prenup negotiation by saying, in effect, everything you get from the trust will stay yours, except for any residence you or we purchase, and I get spousal maintenance of $X per year for Y number of years, plus a one time payment of $Z, if we divorce. That nonmoneyed spouse may very well be coming out ahead in that negotiation.

One of the things that I say to clients about their parenting agreements and access schedules for their kids is that we hope that they can conclude the negotiations, sign the agreement and throw it in a drawer and just go about living an arrangement that responds organically to what is going on with the kids at the time without actually having to reference the legal document on their respective parenting rights and responsibilities. Obviously, that does not always happen, but it is an aspirational statement I like to make to every custodial parent. The opposite is true with the prenuptial agreements. The titled spouse should know that document backwards and forwards and act accordingly, and have their accountant act accordingly too. And the non-titled spouse should be fully aware of just what is and what is not accumulating along the way in the marital column and ensure that any entitlements that person is potentially awarded under the agreement, actually come to fruition. This is the path to implementing the two goals for prenuptial agreements I described at the beginning. No surprises means no protracted litigation.

As with most things, especially in the law, the devil is in the details. Many lawyers in my department have had clients spend small fortunes litigating the meaning and import of badly drafted prenups. Clearly efforts to save money with less experienced or less knowledgeable practitioners comes back to haunt people because the litigation costs with regard to implementing a defective prenuptial agreement skyrocket since so much is at stake. As my brilliant colleague Caroline Krauss Browne says, " You wouldn't go to a walk-in clinic for brain surgery, don't go to the cheapest most inexperienced place to draft the document that is going to preserve your own assets and your peace of mind in the event of a divorce." What many people don't realize is that, if there is any money at stake, the prenuptial agreement that may have produced only relatively minimal angst in the original negotiation and execution will be intensely scrutinized, as will the parties' actions and finances, by the most skillful practitioners available if the marriage falls apart. You should invest wisely in good counsel in the beginning so you aren't forced into an excruciating litigation at the end. Once again, conduct rules the day.

So have your cake and dance your heart out, but when you are back from your honeymoon, and periodically thereafter, check in with your lawyer to see that your T's are crossed and your I's are dotted as you go along with your married life. If the unfortunate thing happens and you need a divorce, you will consider this advice the best wedding gift of all.

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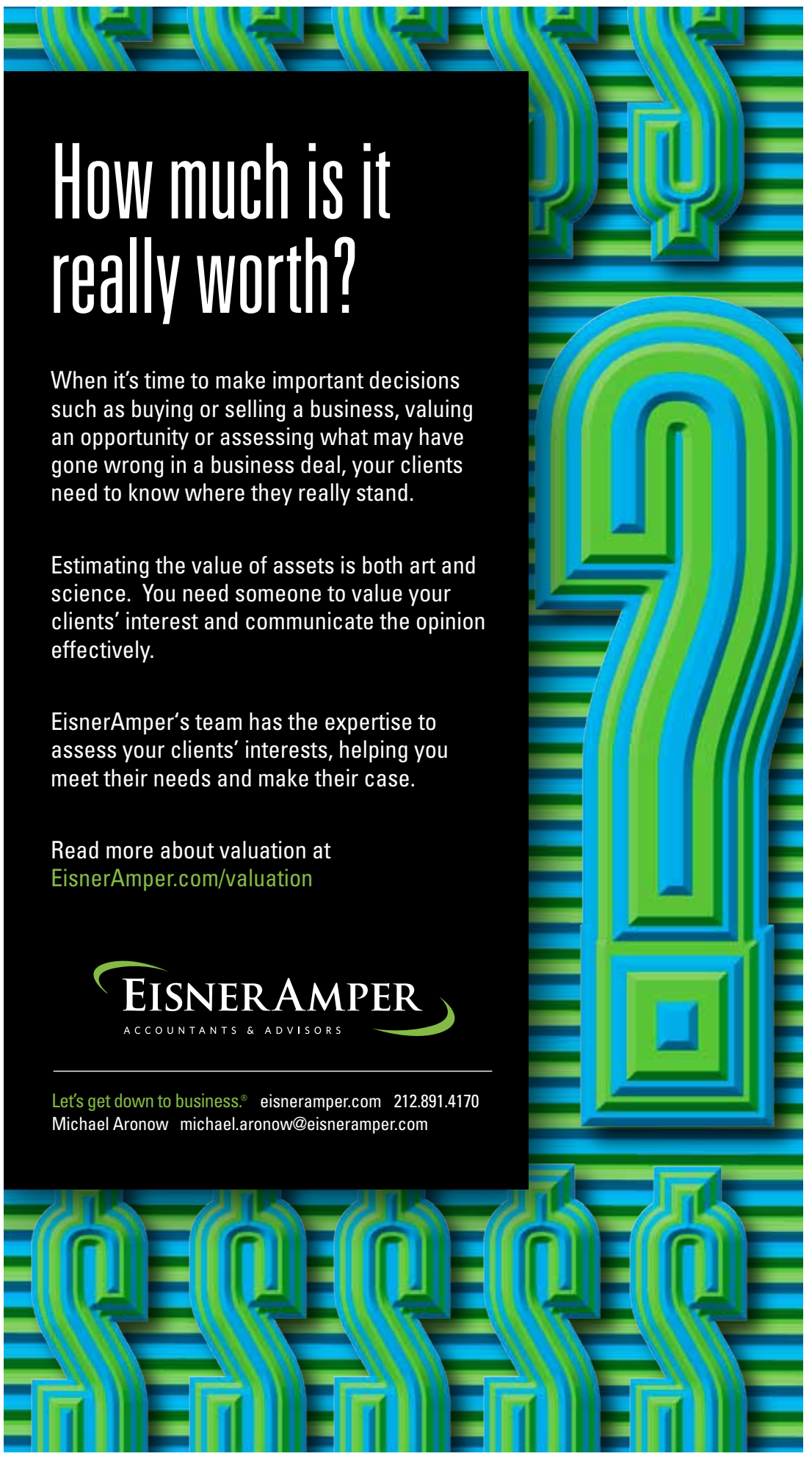

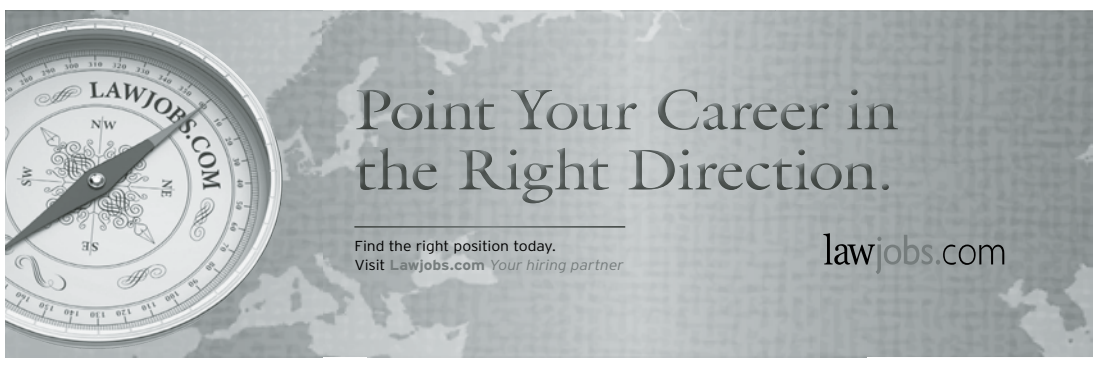

Child Support

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v. Brescia,[6] the court held that the party seeking modification of a contractually established child support level need show an "unanticipated and unreasonable change of circumstances" only "when the dispute is directed solely to readjusting the respective obligations of the parents to support their child,"[7] and not when "the child's right to receive adequate support is at issue."[8]

By amending DRL §236(B)(9)(b) to provide that a "substantial change of circumstances" is sufficient basis for a modification of any child support order, "*including an order incorporating but not merging an agreement or stipulation of the parties*," the 2010 Amendments would appear to have done away with the more demanding "unanticipated and unreasonable change of circumstances" standard established by *Boden*. But it is not that simple.

First, the legislature specifically provided that the 2010 Amendments would affect child support orders that incorporated without merging a stipulation or agreement only "if the incorporated agreement or stipulation was executed on or after this act's effective date [Oct. 13, 2010]."[9]

Second, the legislative history is ambiguous. The Assembly Memorandum in Support of the bill (the Assembly Memorandum) offered contradictory statements as to its intent:

> Currently, there is no uniform statutory standard for modifying child support awards. While the DRL specifies that a child support order may be modified following a showing of a substantial change of circumstances, the FCA is silent on the issue. The courts have not applied this standard to all orders, instead creating two higher thresholds if the order incorporates but does not merge a separation agreement or stipulation of the parties. …
>
> This conforming change of including substantial change in circumstances as a basis for modification in the FCA *is not intended to alter existing case law regarding the standard for modification for orders incorporating but not merging separation agreements*. …
>
> The substantial change in circumstances threshold would apply prospectively to all orders of child support.[10]

Notwithstanding the Assembly Memorandum's disclaimer of any intent "to alter existing case law regarding the standard for modifications for orders incorporating but not merging separation agreements," the courts have thus far read the 2010 Amendments as eliminating the heightened "unanticipated and unreasonable change of circumstances" standard of *Boden* with respect to agreements and stipulations entered into on or after Oct. 13, 2010, while leaving it in place with respect to agreements and stipulations made prior to that date.

In *Overbaugh v. Schettini*,[11] the Third Department, after finding that the court below had erred by applying the "substantial change in circumstances" standard to the mother's application for a modification of child support,[12] explained, in a footnote:

> Contrary to the mother's assertion, a 2010 amendment to Family Ct. Act §451(2)(a) is of no aid to her, as the legislative history makes clear that the "substantial change in circumstances" standard set forth therein applies *only to agreements or stipulations executed on or after the effective date of such amendment*. As the parties' opting-out agreement was executed in 2000, they are bound by the "unanticipated and unreasonable change of circumstances" standard originally articulated by the Court of Appeals in *Matter of Boden v. Boden*. …[13] (emphasis added).

In *DiMaio v. DiMaio*[14] and *Corbisiero v. Corbisiero*,[15] the Second Department likewise found that whether the standard of *Boden* or the "substantial change of circumstances" standard should be applied when deciding applications for modification of child support orders which incorporated stipulations depended on whether the stipulation in question was entered into before or after the effective date of the 2010 Amendments. Judge Colleen Duffy, now a member of the Second Department, took the same view in *A.P. v. D.R.*[16]

In *Malbin v. Martz*,[17] the Second Department, citing the newly created DRL §236(B)(9)(b)(2)(i), erroneously invoked the more lenient "substantial change in circumstances" standard to a father's application to modify a child support order that incorporated but did not merge a stipulation between the parties, even though the underlying stipulations predated the 2010 Amendments, but then found that the father had not met even that standard and reversed the order below granting the requested downward modification.[18] But we have found no case where a court applied the standard of *Boden* to an application for modification of child support that involved a stipulation or agreement entered into after the effective date of the 2010 Amendments.

In addition to establishing the uniform "substantial change of circumstances" standard, the 2010 Amendments made several other changes with respect to modifications of child support.

The newly created DRL §236(B)(9)(b)(2)(ii) provides:

> [U]nless 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. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

In addition to making it clear that the parties may "opt out" of either or both of the foregoing bases for modification (depending on the other pertinent facts), the inclusion in the foregoing provision of the phrase "Unless the parties have specifically opted out of the following provisions. …, " combined with the absence of such language with respect to the availability of a modification of child support based on a "substantial change in circumstances" in the simultaneously created DRL §236(B)(9)(b)(2)(i), strongly implies that the parties to an agreement or stipulation concerning child support *may not* "opt out" with respect to the right to seek a modification based on this ground. We have not found any court decisions that address this subject, but one of us recently had to revise a proposed matrimonial settlement agreement because the New York County Supreme Court judge presiding over the case would not "So Order" it as long as it purported to waive the right to seek modification based on a "substantial change of circumstances." The Assembly Memorandum states expressly that the provisions of DRL §236(B)(9)(b)(2)(ii) were not intended to limit the scope of the "substantial change in circumstances" that may warrant a modification of child support:

> In introducing the two additional bases for modification of child support, the intent of this measure is not to have these issues—change in income of 15 percent or passage of three years[—] … limit or define substantial change in circumstances, nor is the intent to supersede case law interpreting substantial change of circumstances as a standard for modification. Furthermore, the additional bases are not intended to be considered as necessary threshold requirements for modification of child support on the basis of a substantial change of circumstances.[19]

A similar concern motivated the inclusion in DRL §236(B)(9)(b)(2)(ii) of the proviso that "a reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience." The Assembly Memorandum explained that

> [t]he bill also adopts and conforms [to] the rule found in the existing body of case law in order to clarify that a reduction in income may not be considered[,] even under the new 15 percent change in income basis[,] unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience.[20]

See, e.g., *Ripa v. Ripa* ("The burden was on the father to show that he used his best efforts to obtain employment commensurate with his qualifications and experience after losing his job.");[21] *Fragola v. Fragola* ("A parent seeking a downward modification based on a loss of employment must demonstrate that he or she has made 'a good-faith effort to obtain employment commensurate with his or her qualifications and experience.'");[22] *Lewittes v. Blume* ("That plaintiff has taken a lower paying position than what he had at the time of the stipulation does not warrant vacating the agreement, since he should not be rewarded with a decrease in his obligation due to a reversal of his financial condition brought about by his own action or inaction.");[23] *Reach v. Reach* (affirming denial of downward modification where "a fair reading of petitioner's testimony reveals that his decision to leave the military was voluntary");[24] *McKeown v. Wessner* (affirming denial of downward modification where "the record established that the husband was not forced to leave his job. Rather, when his department was downsizing, he was given an attractive incentive to retire[,] which, upon consideration of all of the circumstances, he deemed it 'prudent' to accept.").[25]

It is possibly significant that, while the newly created DRL §236(B)(9)(b)(2)(ii) reaffirms the case law rules that "a reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience," it contains no such reaffirmation of the (mostly) Second Department case law requiring that a party seeking modification of child support based on loss of employment show that the job loss occurred "through no fault of his [or her] own" (*Fragola*, supra;[26] *Muselevichus v. Muselevichus*[27]). That line of case law was apparently descended from *Knights v. Knights*,[28] in which the Court of Appeals upheld the denial of a modification of child support based on the applicant's loss of income due to the fact that he was incarcerated, reasoning that, in deciding whether a modification of child support should be granted,

> the court may consider whether a supporting parent's claimed financial difficulties are the result of that parent's intentional conduct. … Here, it is undisputed that petitioner's current financial hardship is solely the result of his wrongful conduct culminating in a felony conviction and imprisonment. Thus, it cannot be said that Family Court abused its discretion in determining that these "changed financial circumstances" [did not warrant] a reduction of petitioner's child support obligation[.][29]

> Both the **number of modification applications** and the **number of successful applications** are likely to rise significantly over time.

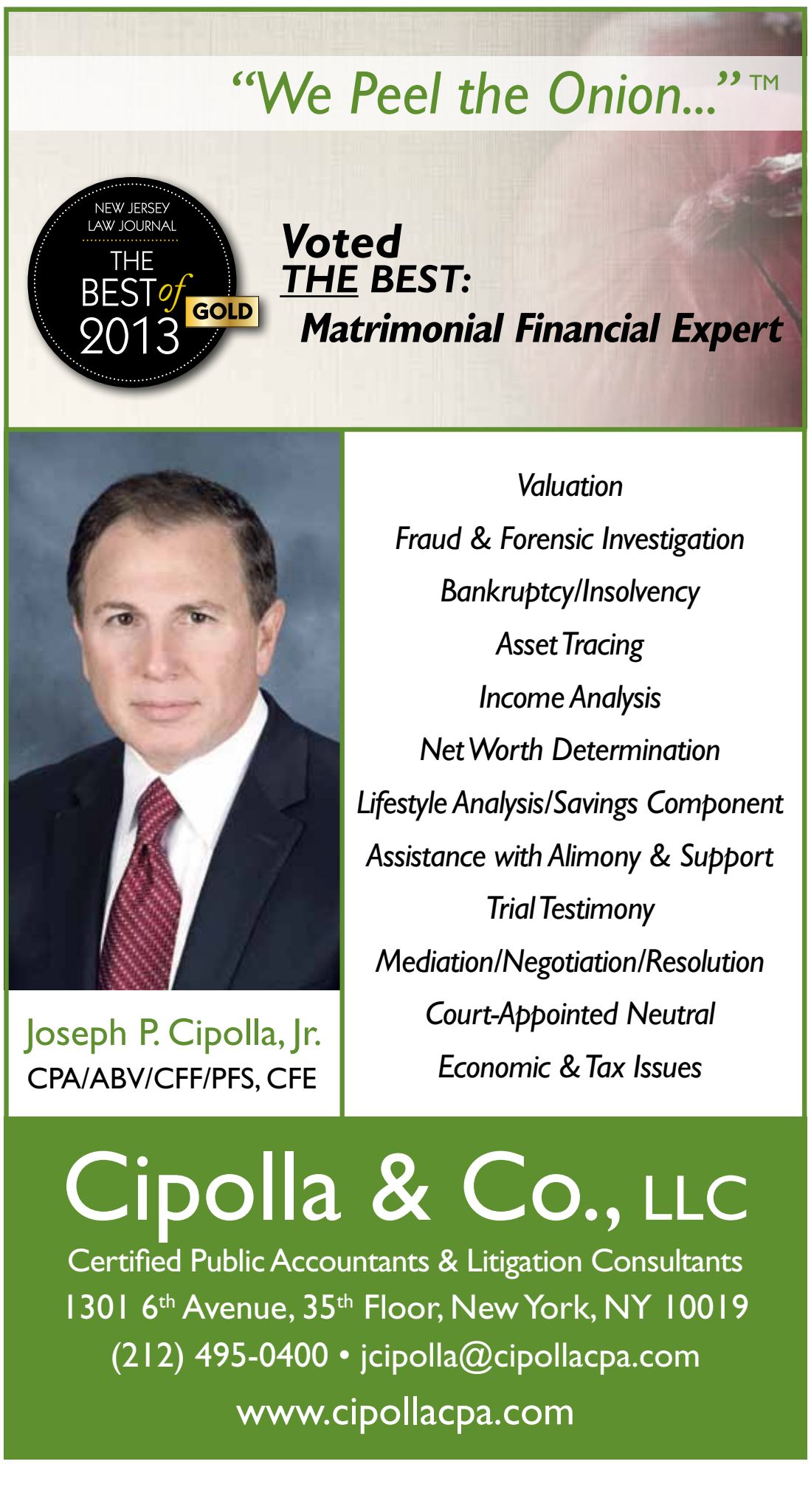
See *Johnson v. Junjulas* ("Here the father admitted that his current financial hardship was the result of his wrongful conduct culminating in the loss of his driver's license" (citing *Knights*)).[30]

The notion that the legislature's failure to reaffirm the Second Department case law concerning intentional misconduct may have been purposeful is supported by its inclusion in DRL §236(B)(9)(b)(2)(i), at the same time, of the following language: "Incarceration shall not be a bar to finding a substantial change in circumstances[,] provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order of judgment." The Assembly Memorandum explained that that language "is intended to address the impact of the New York State Court of Appeals decision in *Knights v. Knights*, 71 N.Y.2d 865 (1988)."[31] But we have not found any case in which a court has considered whether the 2010 Amendments have thus paved the way for a reconsideration of the Second Department's "fault" rule in any context other than incarceration, and the Second Department itself has continued to apply the rule.[32]

In each of the two cases we have found in which incarcerated payor parents sought to invoke the new "incarceration" language, the court found the new statutory language inapplicable to the case at hand. In *Baltes v. Smith*,[33] the Third Department held that the language did not apply because the support order as to which modification was sought was issued prior to the effective date of the 2010 Amendments, which provided that the newly created DRL §236(B)(9)(b)(2)(i) (which contains that language) is applicable only to support orders (and agreements and stipulations) made after the effective date. In *Commissioner of Social Services v. Jessica M.D.*,[34] the court held that the "incarceration" language was inapplicable because it applied only to *modifications* of child support, while the application at hand concerned a petition for an initial child support order.[35]

The Assembly Memorandum states that "the bill is not anticipated to result in an immediate or long-term increase in the number of modification petitions filed." But that statement was apparently for the consumption of the governor's budget office, or the budget office of OCA when viewed in light of the following. The 2010 Amendments create a new DRL §236(B)(7)(d), which mandates that "any child support order made by the court … shall include on its face a notice printed or typewritten in a size equal to at least eight point bold type informing the parties of their right to seek a modification of the child support order" on any of the bases specified in §236(B)(9)(b)(2). As the number of child support orders subject to the liberalizing provisions of the 2010 Amendments increases, and as more and more parties to child support proceedings have in their possession orders that spell out when and under what circumstances a modification may be sought, both the number of modification applications and the number of successful applications are likely to rise significantly over time. That appears to be what the legislature, or at least those of its members who played an active role in the passage of the 2010 Amendments, actually intended. The legislature's recent creation of 25 additional Family Court judgeships[36]—20 as of Jan. 1, 2015, and five more as of Jan. 1, 2016—is certainly consistent with that intent.

1. For simplicity's sake, from this point forward, we will refer only to the pertinent sections of the DRL.
2. DRL §236(B)(9)(b)(2)(i).
3. 42 N.Y.2d 210 (1977).
4. Id. at 212-13 (emphasis added).
5. Id. at 213.
6. 56 N.Y.2d 132 (1982).
7. Id. at 139.
8. Id.
9. L.2010, c. 182, §13.
10. NY Bill Jacket, 2010 A.B. 8952, Ch. 182 (emphasis added).
11. 103 A.D.3d 972 (3d Dep't 2013).
12. Id. at 973.
13. Id., n.4 (citations omitted).
14. 111 A.D.3d 933 (2d Dep't 2013).
15. 112 A.D.2d 625 (2d Dep't 2013).
16. 41 Misc.3d 1227(A), 2013 WL 6038427, at 3, n.2 (Sup. Ct. Westchester Co. 2013).
17. 88 A.D.3d 715 (2d Dep't 2011).
18. Id. at 716.
19. See note 10, supra.
20. See id.
21. 61 A.D.3d 766 (2d Dep't 2009) (citations omitted).
22. 45 A.D.3d 684, 685 (2d Dep't 2007) (citations omitted).
23. 13 A.D.3d 104, 105 (1st Dep't 2004) (citations omitted).
24. 307 A.D.2d 512, 513 (3d Dep't 2003).
25. 249 A.D.2d 396, 397-98 (2d Dep't 1998)
26. See note 21, supra.
27. 40 A.D.3d 997, 998 (2d Dep't 2007).
28. 71 N.Y.2d 865 (1988).
29. Id. at 866-67.
30. 215 A.D.2d 559, 560 (2d Dep't 1995).
31. See note 10, supra.
32. See, e.g., *Rubenstein v. Rubenstein*, 114 A.D.3d 798 (2d Dep't 2014); *DaVolio v. DaVolio*, 101 A.D.3d 1120 (2d Dep't 2012).
33. 111 A.D.3d 1072 (3d Dep't 2013).
34. 31 Misc. 3d 490 (Sup. Ct. Franklin Co. 2011).
35. Id. at 492-93.
36. L.2014, c. 44



Distributing

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directly contribute to the business due to her lack of business expertise and her minimal duties as a "corporate spouse" due to the husband's reluctance to blend business and pleasure. The court's focus instead turned to the parties' understanding and practice that the wife's role was to "be a homemaker and mother" while the husband was the "money-maker and a star in the financial world." Id. at **18. Especially noteworthy for the practitioner should be the court's rejection of the husband's argument that the wife should receive a smaller percentage in the Business Interest because the parties employed personal assistants, cooks, and nannies to assist with the household chores: "[i]t is disingenuous to fault [the wife] for utilizing domestic help .... [The wife] unquestionably ran the Sykes households in New York, East Hampton and Paris despite the presence of cooks, personal assistants and the person who unsheathed the dry cleaning." Id. at **20. Based on her role as a spouse, mother, and homemaker, the court awarded the wife 30 percent of the Business Interest.

Although the reasons for such awards inevitably vary by case, recent published decisions have generally confirmed that the courts are rarely willing to exceed an award of 30 percent of a Business Interest or EEC to a non-titled spouse. However, the factual divergence of *V.M.* and *Sykes*, with the non-titled spouses each receiving a 30 percent interest in the Business Interest despite only one of them having actually worked in the business, highlights the problem with the scarcity of published decisions on this issue: How can it be that a primary caregiver/homemaker who played no role in the business receives the same percentage award as a primary caregiver/homemaker who was extensively engaged in the subject business for a period of years?

Calculating Maintenance

Since courts are now routinely awarding less than 50 percent of the EEC and/or a Business Interest to the non-titled spouse, as indicated above and in the accompanying chart,[10] it should be relatively clear how these awards affect the calculation of maintenance awards. Unfortunately, despite the oft repeated principle stated by the Court of Appeals in *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 705, 709 N.Y.S.2d 486, 491 (2000) that "[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout," the application of this principle is still unclear.

The "double dipping" problem of *Grunfeld* (i.e., using the same income stream in awarding both equitable distribution and maintenance) arises frequently in cases involving EEC and Business Interests because the titled spouse's income is often integral to determining the value of the EEC or Business Interest. To value a titled spouse's EEC, a financial expert will typically calculate the difference between the tax-impacted (i) average lifetime income of a non-degree/license holder, reduced to present value (Baseline Earnings) and (ii) the average lifetime income of a degree/license holder (or, if the holder is experienced, the holder's actual remaining earning potential), reduced to present value (Topline Earnings).[11] Likewise, the capitalized earnings method, which is widely considered the appropriate method to use when valuing a professional practice or a business that trades on services and goodwill[12] (as opposed to tangible assets[13]), is based upon the titled spouse's average annualized earnings, reduced by a number of risk factors.

In *Grunfeld*, the Court of Appeals held that in order for double dipping to be avoided, a court must "reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two." Id. In practice, this typically gives courts two options: (1) award 50 percent of the value of the EEC or Business Interest to the non-titled spouse and dollar-for-dollar reduce the titled spouse's earnings used in the valuation from the calculation of maintenance, or (2) award some amount less than 50 percent of the value of the EEC or Business Interest to the non-titled spouse and consider a lesser amount of the titled spouse's earnings when calculating maintenance, but not a dollar-for-dollar reduction.

Option (1) from *Grunfeld* is straightforward to calculate. An example of this approach is described in *N.K. v. M.K.*, 17 Misc. 3d 1123(A), 851 N.Y.S.2d 71, 2007 N.Y. Misc. LEXIS 7397 (Sup. Ct. Kings Co. 2007) (Sunshine, J.), wherein the court awarded the non-titled spouse 50 percent of the value of the titled spouse's dental license and dental practice, and then only used the titled spouse's Baseline Earnings (determined in the valuation of the license) and rental income (unrelated to the license or practice) for purposes of calculating maintenance. It should be noted here that any of the titled spouse's income that is not converted into a marital asset (i.e., EEC or a Business Interest) is fully available for purposes of calculating maintenance. This includes income totally unrelated to the titled spouse's earned income (such as investment income) and the portion of the titled spouse's earned income that is not converted into an asset. For example with EEC, the amount of income below and up to the Baseline Earnings and income above the Topline Earnings are available for determining maintenance,[14] to the extent such income is not also used to value a Business Interest.[15]

Option (2) from *Grunfeld*, which is used far more regularly by the courts in recent years, is not straightforward like Option (1) is. If a court awards a non-titled spouse some percentage of the EEC or Business Interest, it must reduce some amount of the titled spouse's income for purposes of calculating maintenance,[16] but the appropriate amount for this reduction is rarely ever addressed in published decisions. In *Haspel v. Haspel*, 78 A.D.3d 887, 911 N.Y.S.2d 408 (2d Dep't 2010), the court determined that the value of the EEC was $1,125,000 (based upon the Topline Earnings/Baseline Earnings differential of $75,000 per year over a projected future work life of 15 years [$75,000 * 15 = $1,125,000]) and awarded the non-titled spouse 25 percent of the titled spouse's EEC. To determine the amount of the titled spouse's income available to pay maintenance, the court first calculated 25 percent of the annual amount of the Topline Earnings/Baseline Earnings differential (25 percent * $75,000 = $18,750), then reduced the titled spouse's imputed annual income of $180,000 by $18,750, and determined that only $161,250 ($180,000 minus $18,750) of the titled spouse's income was available to pay maintenance. In the recent case of *V.M.*, 2014 N.Y. Misc. LEXIS 1383, the court likewise awarded 30 percent of the Business Interest to the non-titled spouse, then used 70 percent of the business income to calculate the titled spouse's maintenance obligation. In other words, in calculating maintenance, these courts only reduced the titled spouse's income by the percentage amount of the Business Interest that was awarded to the non-titled spouse. This analysis could easily lead to an inequitable result: On the one hand, the non-titled spouse is receiving, often at the time of the judgment, a lump sum value of his/her share of the EEC or Business Interest, while on the other hand, the titled spouse will only receive any value from the EEC or Business Interest over time, if, as and when the income used to value the EEC or Business Interest is earned. Further, if *Haspel* were to be followed (which no court in a published decision has done), any value of the EEC or Business Interest that is not distributed can be used for purposes of determining maintenance to be paid to the non-titled spouse.

Other courts have taken the entire amount of the titled spouse's income stream used in the valuation of the EEC and a Business Interest off the table for determining spousal support.[17] This analysis could also lead to an inequitable result: While the titled spouse's own "ability, tenacity, perseverance and hard work"[18] may justify a low distribution of the EEC or a Business Interest to the non-titled spouse, that same rationale does not justify denying the non-titled spouse an amount of maintenance necessary for him/her to maintain his/her standard of living and reasonable needs post-divorce.

Glenn Liebman of Klein, Liebman and Gresen, who regularly values EEC and Business Interests in matrimonial cases, suggests that a more equitable approach to avoid double dipping would be to: Step 1: Calculate the percentage of the EEC or Business Interest awarded to the non-titled spouse; Step 2: Assume that an equal percentage of the EEC or Business Interest was awarded to the titled spouse; Step 3: Take the annual Topline Earnings/Baseline Earnings differential and multiply it by both the percentages in Steps 1 and 2; and Step 4: Reduce the titled spouse's annual income by the amount calculated in Step 3. By way of example, using *Haspel*'s numbers, if a court awards the non-titled spouse 25 percent of the EEC, then to calculate support, the court would multiply 50 percent (or double the EEC award) by the $75,000 (the annualized Topline Earnings/Baseline earnings differential), and reduce the titled spouse's annual income by $37,500 (50 percent of $75,000). Thus, while the court in *Haspel* concluded that $161,250 ($180,000 minus $18,750) was available for maintenance, under this scenario, $142,500 ($180,000 minus $37,500) would be available for maintenance.

> In 'Grunfeld', the Court of Appeals held that **in order for double dipping to be avoided**, a court must "reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two."

Even if the arithmetic used to calculate the interplay between spousal support and distributive awards of EEC and Business Interests were clearly defined, the underlying figures used in the valuations of EEC and Business Interests, which figures are often speculative and always debatable, still make the court's decisions in these cases unpredictable. Justice Robert Ross in *F.M.C. v. F.A.C.*, 2006 N.Y. Slip Op. 51081 (June 07, 2006) expressed frustration at "the difficulties of enhanced earnings, [which] New York State Matrimonial trial courts are faced, on a daily basis, with vexing dilemmas regarding inappropriate discount rates, double dipping, double counting, child support machinations and, as in the case here, valuation dilemmas." The court in *F.M.C. v. F.A.C.* found the EEC impossible to value due to the titled spouse's recalcitrance and the lack of sufficient assets to award the non-titled spouse an equitable share. Faced with this dilemma, the court looked to Domestic Relations Law §236(B)(5)(16), which provides that the "contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party" shall be taken into consideration when awarding maintenance. Instead of distributing any value of the EEC to the non-titled spouse, which the court found inappropriate since no proper value was established, it awarded the non-titled spouse two-pronged maintenance: first, a durational maintenance award, based on the non-titled spouse's reasonable needs and ability to become self-supporting, and second, a non-durational maintenance award based on the all statutory factors, including the non-titled spouse's contributions to the titled spouse's career.

Ross, also in *F.M.C. v. F.A.C.*, praised the New York State Matrimonial Commission's Report to the Chief Judge, chaired by Judge Sondra Miller (February 2006), which advocated for legislative changes to eliminate EEC as a marital asset, but would allow for "compensatory maintenance" awards that took into account the contributions of the non-titled spouse. Although the legislature has not adopted this Report, legislation has been introduced in both the New York State Senate (S7266-A) and Assembly (A9606-A) that would eliminate EEC as a marital asset: "The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement." The proposed legislation, while eliminating EEC, would mandate that the court "in arriving at an equitable division of marital property ... [to] consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse." The proposed legislation would serve to rid the courts of the overly complicated and uncertain practice of awarding EEC and hopefully allow practitioners to more accurately predict the outcome of cases involving such issues.

Conclusion

The inherent complexity in distributing the values of EEC and Business Interests and calculating maintenance to properly account for these distributions is compounded by the lack of available case law and the lack of factual details in those available cases. This only serves to heighten the potential for inequity to both parties. It is the recommendation of these authors that, unless and until the legislature addresses these issues, to the extent decisions on these issues are available in the future, they be published so both the bench and the bar may develop consistency in their assessment of the percentage to be awarded of EEC and Business Interests and the appropriate calculation of corresponding maintenance awards.

1. *Sykes v. Sykes*, 24 Misc. 3d 1220(A), 2014 N.Y. Misc. LEXIS 2069, at *13 (Sup. Ct. N.Y. Co. 2014); see *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58 (1995) ("there is no requirement that the distribution of each item of marital property be on an equal or 50-50 basis ... .").
2. *P.D. v. L.D.*, 28 Misc. 3d 1232(A), 958 N.Y.S.2d 62, 2010 N.Y. Misc. LEXIS 4321, at ***22 (2d Dep't 2010).
3. See, e.g., *Turco v. Turco*, 985 N.Y.S.2d 261, 2014 N.Y. App. Div. LEXIS 3182 (2d Dep't 2014) (awarding a wife 50 percent of the additional portion of the husband's business acquired during the marriage); *Rich-Wolfe v. Wolfe*, 83 A.D.3d 1359, 1360, 922 N.Y.S.2d 593, 595 (3d Dep't 2011) (awarding a wife 50 percent of the husband's businesses based on her role in "operating the businesses from their inception and eventually quit her job to labor full time for them").
4. See, e.g., *Esposito-Shea v. Shea*, 94 A.D.3d 1215, 941 N.Y.S.2d 793 (3d Dep't 2012) (affirming an EEC award of 10 percent to the husband where his efforts represented "overall contributions to the marriage rather than an additional effort to support [the wife] in obtaining her license") (internal citations omitted).
5. See, e.g., *Kim v. Schiller*, 112 A.D.3d 671, 978 N.Y.S.2d 229 (2d Dep't 2013) (30 percent of EEC to the non-titled spouse); *Greisman v. Greisman*, 98 A.D.3d 1079, 951 N.Y.S.2d 219 (2d Dep't 2012) (1/3 of EEC to the non-titled spouse); *Bayer v. Bayer*, 80 A.D.3d 492, 914 N.Y.S.2d 169 (1st Dep't 2011) (35 percent of EEC to the non-titled spouse).
6. See chart accompanying article, available at www.newyorklawjournal.com/id=1202664174206.
7. See, e.g., *Esposito-Shea*, 94 A.D.3d at 1217 (husband's contributions to wife attaining her law degree included being the family's primary wage earner and caring for the parties' children while the wife was in school).
8. See, e.g., *Vertucci v. Vertucci*, 103 A.D.3d 999, 962 N.Y.S.2d 382 (3d Dep't 2013) (affirming an award of 15 percent of the wife's law degree and law practice to the husband who owned and operated multiple businesses); *D'Ambra v. D'Ambra*, 94 A.D.3d 1532, 943 N.Y.S.2d 698 (4th Dep't 2012) (affirming an award to the wife of 15 percent of the husband's business given her indirect contributions thereto); *Gallagher v. Gallagher*, 93 A.D.3d 1311, 941 N.Y.S.2d 392 (4th Dep't 2012) (affirming an EEC award of 15 percent where the husband made only modest contributions to the wife's attainment of a master's degree).
9. See, e.g., *Golden v. Golden*, 98 A.D.3d 647, 949 N.Y.S.2d 753 (2d Dep't 2012) (affirming an award to the wife, who was the primary caregiver/homemaker during the marriage, of 30 percent of the marital appreciation of the husband's businesses); *Kim*, 112 A.D.3d at 674, 978 N.Y.S.2d at 233; *Bayer v. Bayer*, 80 A.D.3d 492, 914 N.Y.S.2d 169 (1st Dep't 2011) (affirming an EEC award of 35 percent based on, among other things, "the termination of her own career in order to maintain the marital household, and her absence from the job market during marriage") (internal citations omitted).
10. See chart accompanying article, available at www.newyorklawjournal.com/id=1202664174206.
11. *McSparron v. McSparron*, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995).
12. See, e.g., *White v. White*, 204 A.D.2d 825, 611 N.Y.S.2d 951 (3d Dep't 1994).
13. As the Court of Appeals in *Keane v. Keane*, 8 N.Y.3d 115, 861 N.Y.S.2d 98 (2006) explained, for reasons beyond the scope of this article, the value of a business based on tangible assets does not have the same "double dipping" problem of a business based on intangibles.
14. See *Quarty v. Quarty*, 96 A.D.3d 1274, 948 N.Y.S.2d 130 (3d Dep't 2012) (holding that there was no double dipping where the trial court determined maintenance based on the titled spouse's pre-license income (i.e., Baseline Earnings) and the difference between "the $70,000 topline earnings used in our determination of the value of the license and the $92,000 annual income to which [the titled spouse] testified at trial").
15. If both EEC and a Business Interest are valued in a case, for example, a medical license and a medical practice, or a law degree and a law partnership, the financial expert using the capitalized earnings method to calculate the Business Interest must exclude the income used to calculate the EEC to avoid "double counting" the same income stream in valuing the two separate assets. See, e.g., *Miklos v. Miklos*, 9 A.D.3d 397, 780 N.Y.S.2d 622 (2d Dep't 2004).
16. See, e.g., *Rodriguez v. Rodriguez*, 70 A.D.3d 799, 894 N.Y.S.2d 147 (2d Dep't 2010) (reversing an award of maintenance based on the titled spouse's full income where 30 percent of the titled spouse's EEC and 25 percent of the titled spouse's medical practice had been distributed).
17. See *Quarty v. Quarty*, 96 A.D.3d 1274, 948 N.Y.S.2d 130 (3d Dep't 2012) (affirming an award of spousal support which eliminated from consideration the amount of the titled spouse's income used to calculate EEC, even though the non-titled spouse only received a 25 percent interest in that EEC); see also *Corasanti v. Corasanti*, 296 A.D.2d 831, 744 N.Y.S.2d 614 (4th Dep't 2002).
18. See *Farrell v. Cleary-Farrell*, 306 A.D.2d 597, 599 (3d Dep't 2003).

Immigration

« Continued from page 9

divorce agreement may state that the parties married in good faith for love and affection and lived together as husband and wife. As a protection for a conditional permanent resident, the U.S. citizen may promise in the divorce agreement that he/she will cooperate in filing a joint petition to remove the condition and will furnish whatever evidence is available to substantiate the bona fide nature of the parties' marriage. The divorce agreement also may provide that the U.S. citizen will accompany the noncitizen to a hearing or interview before immigration personnel, if required, regardless of the parties' marital status at the time of the hearing or interview.

If a Joint Petition Is Not Feasible

If the foreign national is unable to file the petition jointly, he/she can file the petition unilaterally under a prescribed set of circumstances. As indicated above, a waiver of requirement to file a joint petition can be obtained on the basis of showing: (i) the marriage was entered into in good faith; (ii) extreme hardship; or (iii) domestic violence.[15]

A waiver based upon the couple's marrying in good faith requires more than just a showing that the parties had a valid wedding ceremony. The noncitizen must demonstrate that it was a bona fide marriage. The noncitizen may produce corroboration that the marriage was genuine, such as by proffering evidence of the parties' relationship prior to marriage, cohabitation after the marriage, commingling of their assets, filing joint income tax returns, and photographs of the couple in happier times.

Another basis for the waiver is a demonstration by the noncitizen that he/she would suffer extreme hardship if required to return to his/her country of origin. For example, if a couple had children, a noncitizen may claim extreme hardship on the basis that returning to his/her native country would preclude active participation in the children's lives. To prevail in obtaining a waiver on this basis, it is helpful for the noncitizen to have sole custody or at least joint custody.

The Violence Against Women Act, a federal law, also provides a basis to obtain a waiver in the event of domestic violence. If making an application on this basis, to the extent possible, corroborating evidence of the domestic violence should be produced, such as police reports, orders of protection, medical records, and perhaps alleging cruel and inhuman treatment as the divorce grounds.

Green Card As a Bargaining Chip?

As a practical matter, in a contested divorce case between a U.S. citizen and noncitizen, the citizen spouse may endeavor to use a green card as a bargaining chip to gain leverage. For example, a foreign national couple and their children may be in the United States based on one spouse having a visa through his or her employment. Thus, the status of the other spouse and children is contingent upon the status of the spouse with a visa through his/her employment. If there is marital strife, and one spouse pursues a strategy to have the other spouse deported from the United States, the spouse who has the employment visa may endeavor to change his/her status, if an opportunity arises for him/her to obtain a green card. If the spouse does so clandestinely, the other spouse and their children may be stripped of their status and unable to remain in the country.

The effort to use a green card as leverage in a divorce proceeding may be poorly received by a court. For example, in *Rocano v. Rocano*,[16] a husband obtained a green card for himself and his wife's daughter, but deliberately failed to obtain a green card for his wife. This fact influenced the court awarding the wife non-durational spousal support and in excess of 50 percent of some of the marital assets.[17]

> If a gift is from a U.S. citizen to a spouse who is a foreign national, the U.S. citizen can gift **only up to $145,000 per year tax free in 2014.**

Sponsorship and Spousal Support Obligations

When immigration is obtained through marriage, the sponsoring spouse must file an "Affidavit of Support" form on behalf of the noncitizen spouse. In an effort to prevent the noncitizen from becoming a public charge, in the Affidavit of Support, the sponsor is required to affirm that he/she is aware of his/her obligations under the Social Security Act and Food Stamps Act.[18] If a noncitizen spouse receives welfare or other public assistance, the U.S. citizen spouse is obligated to repay the government for the benefits received for a period of up to 10 years or until the noncitizen spouse becomes a U.S. citizen, whichever time period is shorter.

State law already imposes an obligation to support a current or former spouse to prevent him/her from becoming a public charge.[19] However, the execution of the Affidavit of Support during the immigration process potentially triggers a greater obligation since it could be used as evidence in court in a matrimonial proceeding.

There's a Tax for That?!

Gifts between spouses who are both U.S. citizens and gifts from a foreign national to a U.S. citizen are exempt from federal gift taxation. If the gift is from a U.S. citizen to a spouse who is a foreign national, however, the U.S. citizen can gift only up to $145,000 per year tax free in 2014.[20]

Pursuant to federal gift and estate tax laws, for deaths in 2014, there is an individual exemption up to $5.34 million from federal estate taxation.[21] For a surviving spouse, however, there is an unlimited marital deduction, provided, however, the surviving spouse is a U.S. citizen.

A noncitizen surviving spouse, even a permanent resident, is ineligible for the unlimited marital deduction.[22] On the other hand, if the foreign national predeceases a U.S. citizen spouse, assets left to the U.S. citizen surviving spouse will be eligible for the unlimited marital deduction.[23]

The rationale behind the distinction in the treatment of U.S. citizen and noncitizen surviving spouses is that the federal government does not want a noncitizen to inherit a substantial amount of money, avoid estate tax, and then return to his/her native country.

Got a QDOT?

In order to ameliorate the estate tax consequences to a noncitizen surviving spouse, a qualified domestic trust (QDOT) may be established for his/her benefit. The trustee of a QDOT must be a U.S. citizen or corporation, such as a bank.[24]

The inherited assets would be distributed to the QDOT, and the noncitizen can receive the income generated from the QDOT free of estate taxes.[25] He/she may have to pay estate taxes upon distribution of principal of the trust property.[26]

If a party is entering into a prenuptial or postnuptial agreement and the U.S. citizen has substantial assets, it may be prudent to include a provision that the U.S. citizen will set up a QDOT trust for the benefit of the foreign national.

Conclusion

As a general matter, divorces are complicated and rife with emotion. In cases involving immigration issues, they can become even more intricate and nuanced.

1. Luke J. Larsen & Nathan P. Walters, "Married-Couple Households by Nativity Status: 2011," American Community Survey Briefs, U.S. Department of Commerce, U.S. Census Bureau (September 2013), http://www.census.gov/prod/2013pubs/acsbr11-16.pdf.
2. Randall Monger & James Yankay, "U.S. Lawful Permanent Residents: 2013," Annual Flow Report, Office of Immigration Statistics (May 2014), http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_2013.pdf.
3. Larsen & Walters, supra note 1, at 5.
4. Taryn Hillin, "New Study Says Divorce Rates Will Increase As Economy Recovers," The Huffington Post (Jan. 28, 2014; http://www.huffingtonpost.com/2014/01/28/divorce-rates_n_4682692.html; and Steve Matthews, "Worsening U.S. Divorce Rate Points to Improving Economy," Bloomberg News (Feb. 18, 2014), http://www.bloomberg.com/news/2014-02-18/worsening-u-s-divorce-rate-points-to-improving-economy.html.
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