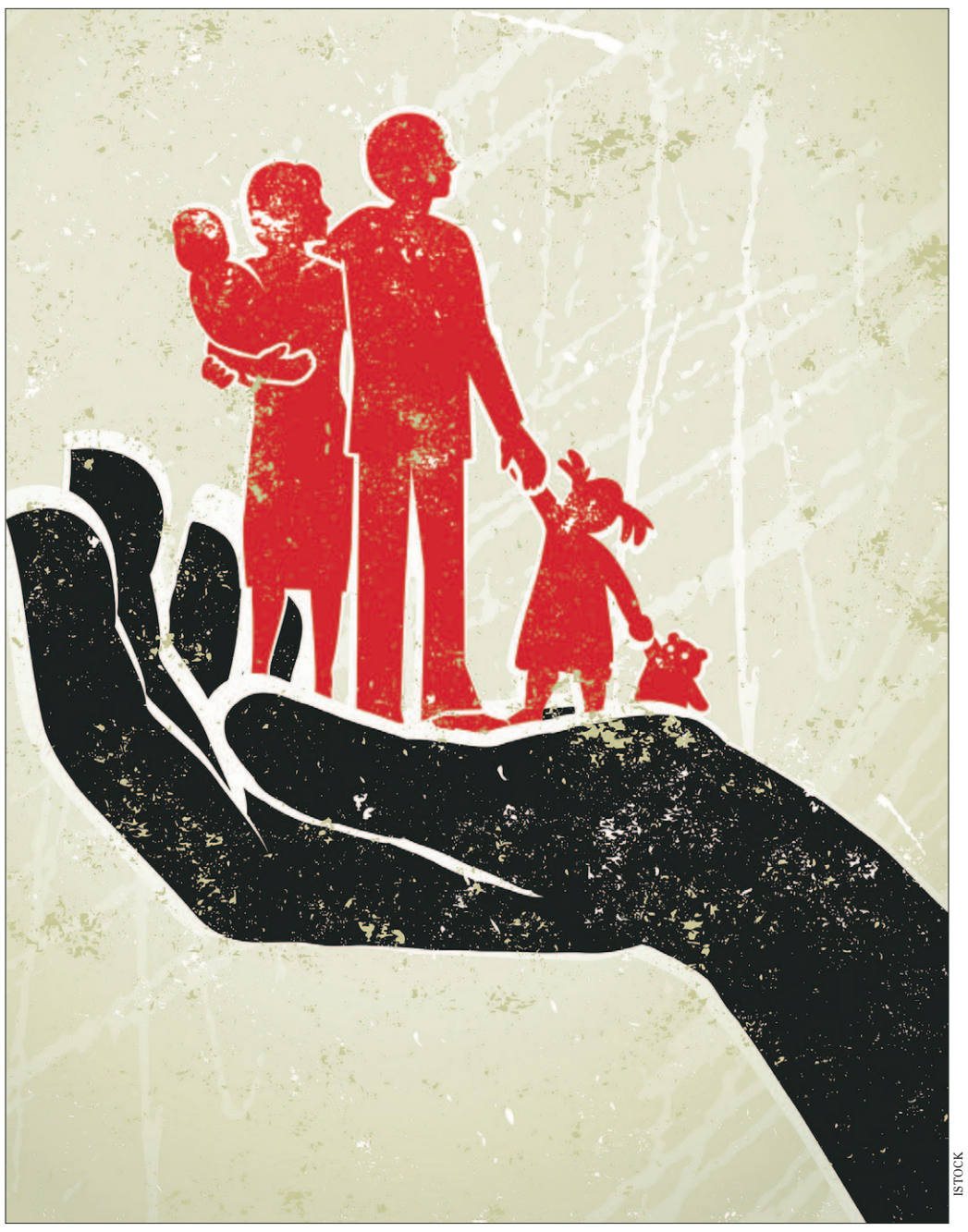
Matrimonial Law

Court Gives **Renewed Force to Policy** Requiring Full Custody Hearings

BY HARRIET NEWMAN COHEN AND TIM JAMES



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This article analyzes an important custody decision handed down by the Court of Appeals on June 9, 2016. While the court declined to adopt what it called a "one size fits all" rule, it cautioned the lower courts that there are only limited circumstances under which a court may make determinations regarding child custody without first conducting full and plenary hearings. And in such limited circumstances, if any, articulate, articulate, articulate.

In *S.L. v. J.R.*,[1] the Court of Appeals gave renewed force to its longstanding policy that, as it had stated in *Obey v. Degling*,[2] "[g]enerally a determination of [custody] should be made only after a full and plenary hearing and inquiry."[3] That policy, the court explained in *S.L v. J.R.*, "furthers the substantial interest shared by the state, the children and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interests of a child."[4] The court gave no indication that it intended to alter the longstanding policy of the courts that a party who seeks modification of an existing custody order is not entitled to a hearing *unless* he or she has made an "evidentiary showing" that there has been a change in circumstances since the time of the previous custody order that would warrant modification of the existing order.[5]

In reversing the Second Department's affirmance[6] (Dillon, J.P., Leventhal, Sgroi and Hinds-Radix, JJ) of an *initial* custody determination made by Supreme Court, Westchester County, Susan M. Capeci, J., and remitting the case to Justice Capeci, for further proceedings, the Court of Appeals, *rejected* long-standing Second Department case law holding that custody may be decided *without a hearing* so long as the court doing so "possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest."[7] The Court of Appeals held that the "adequate relevant information" standard

> tolerates an unacceptably-high risk of yielding custody determinations that do not conform to the best interest of a child—the first and paramount concern of the court. *Nor does this standard adequately protect a parent whose fundamental right—the "right to control the upbringing of a child" (Matter of Adoption of Maxwell*, 4 N.Y.2d 429, 439 [1958] hangs in the balance.[8]

A primary concern of the Court of Appeals was the apparent reliance by the Supreme Court (approved by the Second Department) on what the Court of Appeals described as "*mere 'information*'"[9] in lieu of admissible evidence:

> [I]n rendering a final custody award without a hearing, Supreme Court appeared to rely on, among other things, *hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. A decision regarding child custody should be based on admissible evidence, and there is no indication that a "best interest" determination was ever made based on anything more reliable than mere "information."*[10]

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The report of the forensic evaluator, who, in the absence of a hearing, had obviously not given sworn testimony under circumstances such that the court was able to assess the evaluator's credibility, and had obviously not been tested by cross-examination, was clearly hearsay. *Matter of Chloe W*[11]("[T]he court erred in admitting into evidence at the fact-finding hearing a 2012 evaluation of the mother by a forensic evaluator who did not testify at the hearing. The report constitutes hearsay"); *Matter of Berrouet v. Greaves*[12] ("[p]rofessional reports constitute hearsay, and therefore are not admissible without the consent of the parties").[13] The Court of Appeals explained in *S.L. v. J.R.* that

> Custody determinations … require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child. The value of a plenary hearing is particularly pronounced in custody cases in light of the subjective factors—such as the credibility and sincerity of the witnesses, and the character and temperament of the parents—that are often critical to the court's determination.[14]

The factors previously identified by the Court of Appeals, in *Eschbach v. Eschbach*[15] as being significant in determining custody—some of them highly subjective—include:

- "the quality of the home environment and the parental guidance the custodial parent provides for the child";[16]
- "the financial status and the ability of each parent to provide for the child;"[17]
- "the ability of each parent to provide for the child's emotional and intellectual development;"[18]
- "the desires of each child";[19] and
- "the stability and companionship to be

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The **Gray Divorce** Phenomenon

BY ARLENE G. DUBIN AND REBECCA A. PROVDER

An 82-year-old client wanted a divorce from her husband of 57 years. When asked why, she responded, "I want to live a little before I die."

A study conducted in 2014 reveals that the divorce rate for individuals 50 and older has doubled in the last 20 years.[1] Two decades ago, individuals 50 and older accounted for about 10 percent of divorces.[2] Recently, the divorce rate for this age group spiked to approximately 25 percent.[3] What's more, approximately half of those divorces occurred in first marriages.[4]

When baby boomers walked down the aisle, they typically considered it was "'til death do us part." However, in the intervening years, divorce has become widespread and destigmatized. As a result, divorce rates for people in their 50s, 60s, and older—so called "gray divorces"—have soared.

Common reasons cited for gray divorces: the parties have grown apart; their children have moved out of the house; the parties desire to pursue self-fulfillment and personal goals; or the parties have experienced a change in their circumstances, such as their health or employment status. In addition, improved medical care and increased life expectancy may provide an incentive to exit an unhappy marriage and to pursue a new chapter.

This article will address the particular challenges that present themselves when older couples divorce.

Property Division

In long-term marriages, one or both spouses may have been in the workforce for many years. As a result, a substantial portion of their lifetime earnings may be subject to division in the event of a divorce at an older age.

At any age, divorce can have a devastating financial impact, but it can be especially difficult when it transpires later in life. Individuals who earmarked a certain amount of assets for savings and retirement can face a daunting challenge when their marital assets are split. When older couples divorce, there is less time to compensate for financial losses and rebuild savings.

Income and assets that had been used to pay for one household need to be stretched to support two households after divorce. In certain cases, such as where a spouse has been out of the workforce for a long duration, the financial settlement from a divorce may be his/her primary nest egg. The lump sum divorce settlement may even constitute the sole source of funds during retirement.

In order to help maximize assets, it is often helpful to consult with knowledgeable financial advisors both during divorce negotiations and on an ongoing basis after the divorce is finalized. Furthermore, financial advisors can prepare a budget, which can provide a roadmap for prudent spending in post-divorce life.

Marital Residence

Individuals often become emotionally attached to their homes, especially if they have lived in the same home for a long period of time and raised their children there. Many harbor a desire to keep a large home for when their adult children and grandchildren come to visit. As a result, there may be strong disagreement about who will retain the home in a divorce settlement or it may be a source of dissension if one party wants to retain the home while the other party wants to sell it.

In order to help maximize assets, it is often helpful to **consult with knowledgeable financial advisors** both during divorce negotiations and on an ongoing basis after the divorce is finalized.

Of course, the parties may both prefer to downsize or otherwise start afresh. In certain cases, the only viable option is to sell the marital residence because it may be a couple's primary asset. When approaching retirement, it may be necessary to sell the home in order to obtain liquid assets for self-support.

Retirement Planning

For individuals over 50, retirement accounts often comprise a significant portion of the marital pot. Retirement plans can be turned upside down as parties may need to delay their date of retirement, work part-time and/or reduce their projected retirement lifestyle. Accordingly, the efficient and tax-free division of retirement assets can be critical.

Certain qualified retirement accounts, such as

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Same-Sex Parents Still Face **Obstacles** Under New York's Standing Rules

BY MEG CANBY AND CAROLINE KRAUSS BROWNE

Prior to the tragic events of Sunday, June 13, 2016 in Orlando, Florida, one might have felt optimistic about the evolving societal acceptance of and respect for same-sex families and the corresponding progressive state of family and matrimonial law.

We shared in the sense of uplift from the recent United States Supreme Court decisions in *United States v. Windsor* and, especially, in *Obergefell. v. Hodges*, decided a little over one year ago on June 26, 2015. *Obergefell* dealt in sweeping fashion with discriminatory and unconstitutional objections to marriage for same-sex couples. As set forth in Justice Anthony Kennedy's dramatic and moving language, the need for same-sex couples, and the children of those relationships, to be granted the social dignity and the many societal benefits that go along with stepping into the light of mainstream acceptance by virtue of a nationwide right to marry is required by the equal protection mandates of the 14th Amendment of the U.S. Constitution.

In concluding that its "analysis compels the conclusion that same-sex couples may exercise the right to marry," 576 U.S. 12 (2015), the Supreme Court in *Obergefell* detailed not just the importance of being able to enter the institution of marriage, but the need for same-sex couples to do so on fully equal footing as other couples, through the front door, and stressed in its exhaustive analysis that the focus should not be on how these couples love, but that they love and wish for that love to be reflected in their social standing.

> Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition. *Goodridge*, 440 Mass., at 322, 798 N.E. 2d at 955" cited at 576 U.S. 13 (2015).

As this court held in *Lawrence*, same sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. 539 U.S. at 567. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage

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Inside

Mediation and Arbitration: **Alternatives** to Matrimonial **Litigation**

BY STEPHEN W. SCHLISSEL AND PETER B. SKELOS

A commentator on alternative dispute resolution wrote 31 years ago that although matrimonial matters are a specialized area of law, "[p]arties most often wait up to two or three years to litigate a complex divorce involving property division or financial support among other issues."[1]

Another analyst wrote, 40 years ago:

> The courts cannot handle all of the load now, and even if they could handle all of it well, the judicial process is too slow and too costly … Private mechanisms need to carry the bulk of the case load, if the whole dispute setting process is not to break down with serious consequences.[2]

Both of those comments are unfortunately applicable to the present resolution of matrimonial and family law matters in New York state. It is still a common complaint from judges, lawyers and especially litigants that it takes too long and costs too much to finalize matrimonial litigation. With no decrease in the divorce rate likely, it is clear that the delay that is now endemic in matrimonial actions will not abate, despite the often herculean efforts of the judges who preside in the dedicated matrimonial parts.

However, there are alternatives to litigating these disputes. The most prominent are negotiation between counsel, mediation and arbitration. This article assumes that negotiation has not been successful and proposes, as did both a special task force created by then Chief Judge Judith Kaye,[3] and the Miller Matrimonial Commission Report to the Chief Judge,[4] the use of mediation and arbitration as less expensive, more efficient, and ultimately more client-acceptable alternatives to the resolution of matrimonial matters in the courthouse. The authors suggest it is time for lawyers in New York to more fully utilize these alternatives to matrimonial litigation.

Mediation is a consensual, confidential, neutral and informal proceeding that culminates in a mutually agreed upon resolution of the matrimonial dispute or any portion of the dispute. The authors do not suggest that divorcing couples proceed to mediation without counsel. Rather, properly understood and handled by a neutral mediator, the matrimonial attorney and the clients can work together with the mediator to reach a fair resolution of the issues that might otherwise bind the clients to years of needless litigation expense and the angst that comes with the often pitched battle that is matrimonial litigation.

From its inception, mediation of matrimonial disputes is self-guided because the parties have decided themselves to come to mediation for the very purpose of resolving their dispute. This measure of self-determination is understandably missing in our over-crowded matrimonial parts. Self-determination is an issue about which matrimonial litigants most often complain: "someone not selected by us is telling us what to do with our home, our finances and our children." This complaint can be eliminated from the outset. The parties, not the random selection wheel of the courthouse, select the neutral mediator—a person highly experienced and trained in matrimonial matters. Also, mediation affords the parties, together with their respective attorneys, the opportunity to craft the contract between the parties and the mediator that will govern the entire mediation process. Mediation of matrimonial disputes works because it encourages the parties to take some measure of responsibility for the outcome of their case and, at the same time, affords the parties the objective ear of the neutral who is solely dedicated to hearing their case. The neutral mediator facilitates the parties' willingness to communicate. If the neutral is engaged early enough, and before the parties' positions become intractable, the neutral mediator can offer the parties an objective assessment of the strengths and weaknesses of their cases. The neutral can also assist the parties through the discovery process. When the basic structure of the resolution is reached, the mediator can assist the parties and their attorneys in resolving disputes that may arise when drafting their final agreement. Once the final agreement is signed, it is no different than any other separation agreement or stipulation of settlement and may be enforced as a contract.[5]

Of course, a very important factor for many persons involved in matrimonial disputes is the privacy afforded by mediation. The mediator is bound to maintain the confidentiality of the proceedings. The mediation is conducted in a private and neutral setting away from the public square that the courthouse has become with the ubiquitous media looking for a story.

If the process of mediation does not result in the resolution of some or all of the issues, or if the parties choose to forgo mediation, they may agree to seek a resolution of the matter in the confidential setting of an arbitration forum. Indeed, they may agree to ask the neutral mediator to continue as the neutral arbitrator or they may opt to employ the services of a new neutral arbitrator.

Why should parties choose to arbitrate rather than litigate? Matrimonial arbitration is, compared to litigation in the matrimonial courts, less costly, quicker, more efficient, private, and assures that the dispute will be determined by a person or persons who are experts in the family law field. It provides the divorcing couple with closure and the ability to move on with the rest of their lives.

Arbitration in the family law area is the process by which spouses, or even former spouses facing post-judgment issues, agree to submit one or more of the issues that need to be resolved to a neutral third party or parties outside the court system. Like mediation, arbitration has the distinct advantage of being a private and confidential process. Again, like mediation, the parties start from a perspective of self-determination because they, together with their attorneys, select the arbitrator and participate in the drafting of the contractual relationship between them and the arbitrator. The arbitration contract shapes the rights and obligations of the parties and the arbitrator, specifies the issues to be resolved by arbitration and establishes the timetable for doing so. Arbitration may be utilized throughout the matrimonial process, including during the discovery phase, or it may be utilized after all discovery is complete. Thus, the parties may refer the "trial" of all or select issues to be held before the designated arbitrator. Also, arbitration may be used to resolve post-divorce matters. It can (with some limitations (see infra)) address all outstanding issues, or just those the parties agree to submit to the arbitrator. Today, because of the burgeoning matrimonial dockets, it is not uncommon for litigants and their counsel to have to wait many months for the case to be tried notwithstanding the completion of discovery. Often, costly motion practice addressed to ongoing pendente lite issues occurs during that waiting period because of the contentious nature of most matrimonial disputes. Parties who select arbitration as a means of finally resolving their litigation can have their matter addressed within a very short period of time after engaging the arbitrator.

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Arbitration is an adversarial process in which the litigation skills of the parties' attorneys remain important—but, they are utilized in a more private setting with a "judge" selected by the parties. Working closely with the arbitrator, matrimonial attorneys are better able to exercise control over pre-trial discovery, set a hearing time table and even set a date by which the arbitrator is to render the award, which they would otherwise not have the autonomy to do.

The cost of matrimonial law arbitration is almost always less than a trial in a civil court. This is because the cases are often resolved sooner and, thus, the parties will incur less legal fees. Delays are avoided because the parties' chosen "judge" is a private attorney or former jurist who will not have to interrupt the arbitration proceedings to attend to other litigants' emergency applications or proceedings. A private lawyer or former judge, acting as an arbitrator, or mediator, effectively provides a concierge service to the parties. The arbitrator more often has the ability to clear her or his calendar and conduct the hearing "day-to-day" and all day—this is simply not possible in many matrimonial parts due to the extraordinary caseloads. With "day-to-day" hearings, the additional legal costs necessarily incurred for duplicated preparation when the hearing is adjourned is reduced or even eliminated.

Mediation of matrimonial disputes is self-guided because the **parties have decided themselves** to come to mediation for the very purpose of resolving their dispute. This measure of self-determination is understandably missing in our over-crowded matrimonial parts.

Anecdotal evidence indicates that it is not uncommon to have an arbitration hearing go full day to full day without interruption until completion. Upon completion, the attorneys are bound to submit their post-hearing memoranda and the arbitrator will render the award, all within the reasonable contracted-for deadlines.

There is the potential for significant cost savings by having the arbitrator involved very early in the process. Engaging an arbitrator to address and resolve discovery issues reduces the need for extensive motion practice in the courts, as most of the work can be accomplished in meetings conducted by the arbitrator *with* the parties and their attorneys. In the courthouse, the litigants, except in the rarest of circumstances, have no opportunity to personally address the presiding judge. This is another example of arbitration permitting the parties some measure of self-determination.

One additional cost difference is the fees of the arbitrator. For the long run, the attorney considering arbitration as a cost saving measure should present the client with a reasonable comparison of the costs expected to be saved by not proceeding in a matrimonial court, notwithstanding the additional fee of engaging an arbitrator.

While many arbitrations involve relaxed rules of evidence and procedure, that is often not advisable, especially in the family law area. What *is* suggested is that the arbitration contract specify which rules of evidence and procedure the arbitrator will be bound to follow. In fact, many ADR providers have their own rules and procedures in place that also govern the arbitration process and should be reviewed by counsel. Doing so resolves an oft-cited complaint about arbitration—that an arbitrator need not follow the law. However, he or she *must* follow the rules set forth in the arbitration contract. Indeed, under CPLR article 75, the failure to adhere to the contract and acting outside the bounds of the specifically granted authority is a basis to upset the ultimate award.[6]

Yet another significant cost savings results from the finality and binding effect of the arbitrator's determination (subject only to limited review under CPLR Article 75, unless the parties specifically agree that there shall be no review). Thus, post-determination motion challenges to the award and any appeal(s) are virtually eliminated. Inherent in the arbitration process is that the parties, with the guidance of counsel, will choose a matrimonial law expert as their arbitrator. Because the arbitrator is chosen by the parties, they may have greater confidence in the ultimate result. Thus, as with negotiated agreements, there should be significantly less incentive and ability to challenge or appeal arbitration awards since the parties have participated in choosing and shaping the process.

It is important to the ultimate success of matrimonial arbitration that the parties engage arbitrators with expertise in the area of matrimonial law. This is a significant advantage of arbitration as opposed to court-resolved litigation. Many judges often spend only short periods of time sitting in a dedicated matrimonial part and thus, as a result, have less experience and expertise. Of course, those judges who dedicate themselves to matrimonial law issues often develop such expertise but, unfortunately, they are burdened by very large caseloads.

As part of its support for matrimonial arbitration and to assure well-trained arbitrators, the American Academy of Matrimonial Lawyers (AAML) has been training its fellows to be arbitrators since 1991. As of September 2015, the AAML had certified over 300 fellows as matrimonial arbitrators. The AAML training is an extensive program designed to prepare the fellows, all of whom have a substantial number of years of experience as matrimonial lawyers, to act as arbitrators themselves or to represent clients who decide to participate in matrimonial arbitration. The AAML has created a "Model Family Arbitration Act and Rules," which can be found at the AAML website,[7] as well as recommended forms for matrimonial arbitrations.

Another benefit to any arbitration, and especially matrimonial arbitration, is the fact that it is private. It can be done in the arbitrator's private office, often in a conference room. It is "behind closed doors." Privacy is often a crucial factor for many involved in divorce litigation, whether it is a desire to keep finances private, or the potential for embarrassment due to a "personal situation." While certain New York laws seek to assure the privacy of divorce litigation, too often details find their way to the media because the courtrooms are open to the public, including the media. A person of public or media interest who wishes to keep financial and personal aspects of her or his divorce private would be well-advised to consider arbitration before commencing litigation in civil court.

There are limited aspects of matrimonial disputes for which arbitration cannot be final and binding in New York. Thus, while parties can agree to arbitrate custody and visitation issues, the arbitrator's determinations of such issues are *not* final and binding on the parties. Indeed, New York courts have held that their jurisdiction as parens patriae to determine the best interests of the children involved cannot be usurped.[8] Nevertheless, the parties may, acting rationally, accept the recommendations of the arbitrator as a means of resolving the custody and visitation issues and incorporate those recommendations or some variance thereof in a separately negotiated agreement.

Similarly, some courts do not approve of the arbitration of child support issues.[9] Great care should be taken to assure that any child support issues are arbitrated subject to rules governing child support awards, including those now set forth in the Child Support Standards Act and the case law interpreting that Act.[10] Again, this is a matter of drafting the arbitration contract appropriately so that the arbitrator can apply the relevant law.

As it is obvious that litigants do not want to spend three to five years in a courtroom arguing over their divorce-related issues, matrimonial lawyers with experience in alternative dispute resolution should be consulted at the earliest stage of their separation or divorce situation. In the best interests of matrimonial clients and their families, the time has come for the bar to embrace the use of mediation and arbitration as viable, efficient, cost-effective and self-guided means of effectuating closure for their clients.

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8. See, e.g., *Weisz v. Weisz*, 123 A.D.3d 917, 999 N.Y.S.2d 1336 (2d Dept. 2014); *Glauber v. Glauber*, 192 A.D.2d 94, 600 N.Y.S.2d 740 (2d Dept. 1993).
9. See, e.g., *Berg v. Berg*, 85 A.D.3d 952, 927 N.Y.S.2d 83 (2d Dept. 2011); *Matter of Hirsch v. Hirsch*, 4 A.D.3d 451, 774 N.Y.S.2d 48 (2d Dept. 2004).
10. See, e.g., *Berg v. Berg*, 85 A.D.3d 952; *Matter of Hirsch v. Hirsch*, 4 A.D.3d 451.

Court Intervention in **Child Alienation** Cases

BY ELLIOT WIENER
AND BERNICE SCHAUL

Prevention of the disintegration of families is such an important goal that judges, traditionally cautious, practical, and careful, can be enlisted to actively try to reverse the effects of a family's crisis.

When it appears that a child has been alienated from a parent, or soon will be, the necessity for judicial action is especially powerful. This article highlights the psychological issues involved in alienation, the remedies recommended by the mental health community, and the case law establishing the legal authority for court orders to address this critical problem in families.

Why It Matters

The severing of a relationship between a parent and a child compromises a child's healthy development and is an emotionally devastating experience for the family. There is a substantial body of psychological literature that demonstrates significant negative short-term and long-term consequences for children who become alienated from one parent in the context of a divorce. Research studies, clinical observation, and case reviews show that alienated children suffer from an array of emotional problems. At the very least they begin to have distorted views about personal relationships and poor reality testing, they can become manipulative and callous in ways that compromise their interactions with others, and they have separation and identity issues. Alienated children are at far greater risk for adjustment difficulties and emotional distress than children from litigating families who have not become alienated.[1] There is also evidence that the impact of alienation is long lasting. Low self-esteem, self-blame, and guilt are reported by adults who were alienated as children.[2]

Alienation: What It Is And What It Is Not

The term alienation, which has become a part of the lexicon of high conflict divorce, is frequently misunderstood and misused. At its core, alienation is about a child's disturbed behavior, not about a parent's behavior, and it involves a profound change in a child's reaction to a previously loved parent. This reaction typically occurs in the context of an acrimonious divorce in which the child has been exposed to a great deal of anger and conflict and suddenly begins to reject one parent and become intensely aligned with the other parent. The child's anger at the parent is not based on the reality of what has actually happened between the parent and the child, despite what they may claim. In the most severe cases of alienation, the relationships in the family become completely polarized. There is a good, loved parent and a bad, hated parent. The child has lost the freedom to love both parents.

Although often attributed to "brainwashing," alienation is a complex phenomenon that is caused by a convergence of factors. A history of intense marital conflict, a separation that is humiliating for one parent, persistent denigration of one parent by the other, the personalities of the parents, a child that is vulnerable in one way or another, and aligned professionals and aggressive litigation can all contribute to the creation of this problem. While the persistent denigration by one parent of the other is a necessary pre-condition for alienation, it is rarely the only factor that drives this process.

Some children rapidly become severely alienated from one parent and refuse contact completely, while others become aligned with one parent and want only limited contact with the other. Initially, these latter children may not completely reject the other parent, though the underlying dynamic of polarized family relationships is present. If the issues in these families are not addressed however, the children are at risk of becoming alienated. Therefore it is critical not only to identify the already alienated children but also those children who present with milder or more moderate signs of becoming alienated.

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Alienation is *not* what has been identified as "realistic estrangement" or "justified rejection." There are times when children reject a parent for good reasons, such as when the parent has been violent, abusive, or neglectful or has demonstrated several parenting deficiencies. In these cases the child's rejection of the parent does not reflect unreasonable or unfounded anger toward a previously loved parent. Rather, the rejection is a healthy response to the parent's damaging behavior.

Hostility, denigration, and other expressions of anger by one parent toward the other during a high conflict divorce should also be distinguished from alienation. Parents in these cases frequently attack one another and say nasty and vindictive things. Accusations of alienation quickly follow. However, while this behavior is far from optimal, it is not alienation. Alienation is about the disturbed behavior of a child and the transformation of the parent-child relationship. Anger is about parental behavior and is observed in many high conflict cases. That is, when a child rejects and refuses contact with a parent, alienation is present. When a parent becomes hostile and attacking, it is bad behavior but not alienation. This is one of the most critical concepts to understand.

> When it appears that a child has been alienated from a parent, or soon will be, the **necessity for judicial action is especially powerful.**

What the Court Can Do

There is a consensus in the mental health field about how to improve our approach to alienation cases. While in some cases the alienation may be so severe that they are resistant to intervention, in many others the court can have a significant positive impact on the family. Knowing full well that these cases are extremely complicated and range from severe to moderate to mild, there is agreement that they require:

Early identification is indisputably necessary in these families. Time is of the essence and delay in identifying alienated children, or those at risk, reduces the likelihood of successful intervention. A child's refusal to visit or the suspension of visits is a "red flag," particularly if the parent and child previously did things together before the separation and if there are no clear indicia of realistic estrangement. While a full forensic evaluation may be useful in some cases, early identification of the problem should not await such an evaluation. Instead, careful inquiry and prompt intervention is crucial in these families.

Strong and consistent judicial case management is essential. The court has credibility and authority and the respect of all parties and must play an important role in these cases. Unless the court provides direction, establishes expectations, monitors the family regularly, and ensures consequences for violations of court orders, the likelihood of successfully overcoming the alienation is low.

Clinical interventions must be crafted and ordered by the court and should be structured and responsive to the specific needs of each family and include both parents and the children. A family systems approach to treatment should be utilized with a team of clinicians, objectives of treatment/intervention should be established, and minimum periods of time for treatment should be delineated by the court. Clinicians who work with the family must be knowledgeable about alienation. If they are not, intervention can be useless or even destructive.

Collaboration between the court and mental health professionals is necessary to identify critical issues and to structure interventions and orders that integrate the perspectives of the psychological and legal professions. Any intervention plan should be informed by clinical insights and implemented through the court's authority.

Contact with the rejected parent must not be suspended, even if it requires therapeutic involvement or the presence of another person (not supervision). The moment contact stops, the risk of entrenchment increases.

Mental health professionals agree that remedying a case of alienation is challenging at best but not impossible. The collaborative and multi-pronged approach outlined here offers the best opportunities for addressing the serious problems that these cases present.

Authority for Court Intervention

New York family law reflects an historic interplay between the legal and mental health communities and underscores the authority and responsibility of courts to compel parties to participate in, to facilitate their children's participation in, and to pay for mental health treatment. In *Wolfson v. Minerbo*, 108 A.D.2d 682 (1st Dept. 1985) the First Department "insist[ed]" that the parties "meaningful[ly]" comply with a Family Court order that "directed that the parties and the children submit to counseling and that the father pay the costs therefor" "so that a reasonable relationship can be reestablished between father and children." The court also directed "that petitioner pay for all future counseling sessions." The Second Department joined the First Department in *Resnick v. Zoldan*, 134 A.D.2d 246, 248 (2d Dept. 1987), directing "the parties and their daughter to undergo a program of psychiatric counseling under the court's direction and supervision in an effort to attempt a gradual assumption of visitation." Since then, the appellate and trial courts have repeatedly directed parties to participate in some form of psychotherapy.[3]

Courts have also monitored the parties' attendance in treatment. In *Mark-Weiner v.* » Page 13

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Custody

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gained from keeping the children together."[20]

The Court of Appeals did not take issue with the Second Department's premise that (as courts have previously held) the existence of undisputed allegations (in this case, of the mother's "emotionally destructive and sometimes violent behavior toward [the father] and the parties' two children") may obviate the need for a hearing.[21] But the Court of Appeals rejected the Second Department's conclusion that the facts of *S.L. v. J.R.* presented such a case, finding that "while Supreme Court purported to rely on allegations that were 'not controverted,' the affidavit filed by Mother plainly called into question or sought to explain the circumstances surrounding many of the alleged incidents of 'disturbing behavior.'"[22] The Court of Appeals also concluded that "these circumstances do not fit within the narrow exception to the general right to a hearing."[23] The court eschewed the adoption of what it called a "'one size fits all' rule mandating a hearing in every custody case statewide,"[24] but, nonetheless, set forth a rule of general application obviously designed to limit the number of cases in which custody is determined *without a hearing* and, at the same time, facilitate appellate review in those cases in which a hearing was dispensed with. In the words of the Court of Appeals:

> [W]here, as here, facts material to the best interests analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required. *Accordingly, a court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination and the evidence supporting its decision.*[25]

One legal commentator, discussing *S.L. v. J.R.* on the eve of the release of the decision of the Court of Appeals, observed that "it appears that historically the vast bulk of cases [applying] the 'adequate relevant information' [standard] as an exception to the 'general rule' derive from cases involving pendente lite relief and modification/enforcement of previously existing custodial arrangements."[26] Our review of the Second Department cases that have invoked the "adequate relevant information" standard supports that observation. But that line of Second Department case law began with *Porter v. Burgey*[27] in 1999, in which the Second Department also affirmed *an initial custody determination* made without a hearing, so it cannot be said that the "adequate relevant information" standard was not originally intended by the Second Department to apply to *initial custody determinations* as well. It is worth noting, however, that, of the four cases cited in *Porter* as supporting affirmance despite the absence of a hearing below, three involved awards of temporary custody,[28] and the fourth involved a modification of custody.[29] In *Porter*, the court declared that the court below had "possessed adequate relevant information to make an informed and provident custody determination"[30] and that "[t]he uncontroverted evidence before the court was sufficient to enable it to reach a sound conclusion" as to custody.[31] But it provided no description of the evidence or other "information" that had obviated the need for a hearing, or how the court below had obtained it and could judge it reliable.

We have found 17 other decisions in the 16-plus years between *Porter* and the Court of Appeals decision in *S.L. v. J.R.* in which the Second Department applied the "adequate relevant information" standard in reviewing a determination of *custody* (including *both initial determinations and decisions on modification requests*, as well as temporary and final orders), as opposed to applications concerning only a proposed modification of visitation. In the seven such decisions that were rendered prior to 2013, the "adequate relevant information" standard was cited as justifying affirmance of the custody determinations made below *without a hearing*—or at least without a hearing specifically on the issue of custody.[32] By contrast, of the 10 such decisions from 2013 through March of 2016, *five affirmed* the custody decisions made below *without* a custody hearing (or at least without a *full* hearing),[33] while *five reversed*, finding that the court below had lacked "adequate relevant information" to make a custody determination without a hearing.[34] The other Departments have also affirmed custody determinations made without a hearing on custody,[35] but apparently not so frequently as the Second Department.

In some of the cases in which Appellate Division courts have affirmed custody determinations in the absence of a hearing on custody, they have cited the fact that the lower court (or another court) had recently or contemporaneously completed hearings on other matters involving the same parties, e.g., neglect proceedings, family offense proceedings and violation proceedings. See notes 31, 32 and 34, supra. The facts adduced at a such previously held hearings may, indeed, be sufficient in some circumstances to inform a custody determination. In other circumstances, however, conducting a hearing on such issues, but not a broader custody hearing, may tend to focus the attention of a court too narrowly, so that it does not consider the full range of factors on which a custody determination should be made.

S.L. v. J.R. does not establish a blanket prohibition against making custody determinations without hearings. But it does emphasize that exceptions to the "general" rule that a hearing is required should be rare, must be based on *admissible evidence* (like any summary judgment[36]), and must take into account the full panoply of factors on which custody determinations are to be based, *discussed above*. In addition, it requires that, where a court determines custody without a hearing, *its decision must set forth with specificity the findings upon which the determination was made and the evidence on which those findings were based*—facilitating appellate review and assuring that a court determining custody without a hearing gives thoughtful attention to the question of whether it actually has before it sufficient proofs for a determination of the best interests of the child or children whose future it is deciding.

> The court eschewed the adoption of what it called a **"'one size fits all' rule mandating a hearing in every custody case** statewide," but, nonetheless, set forth a rule of general application obviously designed to limit the number of cases in which custody is determined without a hearing.

1. 2016 N.Y. Slip Op. 04442 (N.Y. Ct. App. 2016).
2. 37 N.Y.2d 768 (1975).
3. Id. at 770.
4. 2016 N.Y. Slip Op. 04442 at 2.
5. See, e.g., *Franco v. Franco*, 127 A.D.3d 810 (2d Dep't 2015) ("[A] parent moving to modify an order regarding custody is not entitled to a hearing on the motion unless he or she first makes an evidentiary showing that circumstances have changed to such an extent that modification is necessary"); *Warrior v. Beatman*, 70 A.D.3d 1358, 1359 (4th Dep't 2010); *Bjork v. Bjork*, 23 A.D.3d 784, 785 (3d Dep't 2005); *David W. v. Julia W.*, 158 A.D.2d 1, 6-7 (1st Dep't 1990) ("To automatically grant the noncustodial parent a hearing would simply facilitate a disgruntled party in harassing his or her former spouse, compelling the latter to expend considerable time, money and emotional anguish in resisting the loss of custody. Certainly, a person who seeks such a change must make some evidentiary showing to warrant a hearing.").
6. *S.L. v. J.R.*, 123 A.D.3d 682 (2d Dep't 2015).
7. See, e.g., id. at 682 (citing *Lazo v. Cherrez*, 121 A.D.3d 1002 [2d Dep't 2014]; *Matter of Zaratizian v. Abadir*, 105 A.D.3d 1054, 1055 [2d Dep't 2013]; *Matter of Schyberg v. Peterson*, 105 A.D.3d 857 [2d Dep't 2013]; and *Matter of Hom v. Zullo*, 6 A.D.3d 536 [2d Dep't 2004]).
8. 2016 N.Y. Slip Op. 04442 at 2. (emphasis added.) The Legislature recognized the "fundamental" nature of parental rights and the attendant Constitutional implications in 1976, when it established a right to counsel in several types of proceedings affecting parental rights. Family Court Act §261 states, in pertinent part:

> Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society … and therefore have a constitutional right to counsel in such proceedings. Counsel is often indispensable to a practical realization of due process of law[.]

Family Court Act §262(a) establishes a right to counsel of one's own choosing for parties to various types of family law proceedings, including"the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine custody"—and the right to assigned counsel for any such party who is "financially unable to obtain" counsel—and requires the court to advise such parties of those rights at the outset of a proceeding. The Legislature's action followed the decision of the Court of Appeals in *Matter of Ella B.*, 30 N.Y.2d 352 (1972), which recognized a right to counsel in proceedings for termination of parental rights.

9. Id. at 3.
10. Id. (emphasis added).
11. 137 A.D.3d 1684, 1685 (4th Dep't 2016).
12. 35 A.D.3d 460, 461(2d Dep't 2006).
13. Practitioners in downstate courts typically complete an affirmation form before being permitted to read the confidential forensic mental health professional's report. The form typically has a check off box for whether the person signing the form consents to the judge reading the confidential report prior to its being introduced into evidence in an evidentiary hearing. One of the choices is "I do not consent," a choice that is provided in the furtherance of due process.
14. 2016 N.Y. Slip Op. 04442 at 2.
15. 56 N.Y.2d 167 (1982).
16. Id. at 172 (citing *Ebert v. Ebert*, 38 N.Y.2d 700, 702 [1976]; *Bistany v. Bistany*, 66 A.D.2d 1026 [4th Dep't 1978]; *Sandman v. Sandman*, 64 A.D.2d 698 [2d Dep't 1978]; and *Matter of Saunders v. Saunders*, 60 A.D.2d 701 [3d Dep't 1977]).
17. Id. at 172.
18. Id. (citing *Sandman*, 64 A.D.2d 698; *Porges v. Porges*, 63 A.D.2d 712 [2d Dep't 1978]; and *Saunders*, 60 A.D.2d 701).
19. Id. at 173.
20. Id. (citing *Ebert*, 38 N.Y.2d 700).
21. 123 A.D.3d at 682.
22. 2016 N.Y. Slip Op. 04442 at 3.
23. Id.
24. Id.
25. Id. (emphasis added).
26. L. Rosenberg, "The Right to Be Heard on an Initial Custody Determination: The Court of Appeals Considers *S.L. v. J.R.*," NYSBA Family Law Review., Vol. 48, No. 1 (Spring/Summer 2016), at 3.
27. 286 A.D.2d 552 (2d Dep't 1999).
28. *Astenza v. Astenza*, 173 A.D.2d 515 (2d Dep't 1991); *Webster v. Webster*, 163 A.D.2d 178 (1st Dep't 1990); *Meltzer v. Meltzer*, 38 A.D.2d 522 (1st Dep't 1971).
29. *Hermann v. Chakurmanian*, 243 A.D.2d 1003 (3d Dep't 1997).
30. 286 A.D.2d at 553.
31. Id.
32. *Matter of Luis O. v. Jessica S.*, 89 A.D.3d 735 (2d Dep't 2011); *Matter of Horan v. Framolaro*, 46 A.D.3d 891 (2d Dep't 2007); *McAvoy v. Hannigan*, 41 A.D.3d 791 (2d Dep't 2007); *Matter of Melikishvili v. Grigolava*, 20 A.D.3d 569 (2d Dep't 2005); *Assini v. Assini*, 11 A.D.3d 417 (2d Dep't 2004); *Matter of Levande v. Levande*, 10 A.D.3d 723 (2d Dep't 2004); *Matter of Malfitano v. Parker*, 7 A.D.3d 715 (2d Dep't 2004). In *Luis O.*, the "adequate relevant information" cited by the Second Department as informing the lower court's decision included the recent neglect finding against the mother made by another court *after a hearing*. Id. at 736. In *Malfitano*, the Second Department noted that the custody determination by the lower court was made soon after the same court had, after a hearing, granted an order of protection against the mother in favor of two of the children at issue. Id. at 715.
33. Matter of *Goldfarb v. Szabo*, 130 A.D.3d 728 (2d Dep't 2015); *Matter of Bell v. Mays*, 127 A.D.3d 179 (2d Dep't 2015); *Matter of Navarette v. Navarette*, 126 A.D.3d 801 (2d Dep't 2015); *S.L. v. J.R.*, 123 A.D.3d 682 (2d Dep't 2015); *Matter of Zabatzian v. Abadir*, 105 A.D.3d 1054 (2d Dep't 2013). In *Goldfarb*, the Second Department held that "although there was not a full hearing … considering the testimony elicited from, among others, the father, the mother, the maternal grandmother, a visitation supervisor, and the neutral forensic psychologist, as well as the reports received from various professionals and agencies, the Family Court possessed adequate relevant information to enable it, without additional testimony, to make an informed and provident determination as to the best interests of the child." Id. at 729. In *Navarette*, the Second Department noted that the custody determination by the lower court was made "immediately following the conclusion of a family offense proceeding in which the mother's inappropriate conduct toward the subject child and others, and the father's positive parental relationship with the child, were amply demonstrated at a hearing[.]" Id. at 802.
34. *Matter of Fielder v. Fielder*, 137 A.D.3d 1129 (2d Dep't 2016); *Matter of Kavorios v. Kirton*, 130 A.D.3d 732 (2d Dep't 2015); *Matter of Velez v. Alvarez*, 129 A.D.3d 1096 (2d Dep't 2015); *Matter of Ruiz v. Scallo*, 127 A.D.3d 1205 (2d Dep't 2015); *Matter of Schyberg v. Peterson*, 105 A.D.3d 857 (2d Dep't 2013).
35. See, e.g., *Fayona C. v. Christopher T.*, 103 A.D.3d 424, 424-25 (1st Dep't 2013) (the court below "possessed sufficient information to render an informed decision based on its extensive history with the parties," which included a contemporaneous hearing in a family offense proceeding in which the court found that the father had "committed acts of domestic violence and/or verbal abuse that were directed at the mother in front of the child"); *Matter of Cerra L.B. v. Richard L.R.*, 48 A.D.3d 1416-17 (4th Dep't 2007) (the court below possessed "'sufficient information to make a comprehensive assessment of the best interests of the child'" as to custody [citation omitted] where "father was incarcerated when the mother commenced the proceeding and thus was incapable of fulfilling the obligations of a custodial parent," but the court below should have held a hearing on the issue of visitation); *Matter of Glenn v. Glenn*, 262 A.D.2d 885, 885-87 (3d Dep't 1999) (the court below "possessed sufficient information upon which to independently evaluate and accommodate the best interests of the children" on motion to modify custody, based on "the detailed findings of fact in the prior custody order" and the court's just-completed hearing on the mother's violation petition, after which it found the father in "offensive violation" of the mother's visitation rights and sentenced the father to six months in jail therefor, and also in light of "the practical considerations attendant to Family Court's direction that [the father] begin serving his sentence immediately"). See also *Webster*, 163 A.D.2d 178; *Meltzer*, 38 A.D.2d 522; *Hermann*, 243 A.D.2d 1003.
36. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Standing

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in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

576 U.S. at 14.

Further, Justice Kennedy singled out the importance of the right to marry to the children of these relationships.

> Excluding same sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families to be somehow lesser. They also suffer the significant costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

576 at U.S. 15.

In New York, the passage of the Marriage Equality Act in 2011 directed that all of the laws, benefits and obligations bestowed by the Domestic Relations Law with regard to marriage be read and implemented without regard to sexual orientation, and, if necessary to do that, in a gender neutral way.

> Section 10-a. Parties to a marriage.
>
> 1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
>
> 2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

Yet, despite the passage of the Marriage Equality Act and the newfound nationwide ability to marry, the courts in New York are contending with circumstances in which same-sex families were formed and children brought into them by using strategies that pre-date the ability of same-sex couples to marry. This approach has potentially devastating consequences when those families and their respective rights are addressed in divorce and family court proceedings. These problems arise from, and the courts continue to wrestle with the vestiges of, a rule established by the New York Court of Appeals a generation ago in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), which set the stage for categorical discrimination against same-sex parents based upon their lack of a biological or adoptive relationship to a child.

The impact of *Alison D.* was eroded somewhat by the Court of Appeals decision in *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010), which, through application of comity, recognized parental standing of a non-biological non-adoptive parent in 2010 based upon Vermont's judicially created rules granting standing based upon the couple's civil union in Vermont. However, without the right to marry or enter into a civil union in New York at the time, children of unmarried same-sex couples in New York were not afforded the same benefits and protections.

This discrimination is not so easily remedied by the directives of the Marriage Equality Act because many of the parents involved in these situation were not or are not married at the time that their children are born and because the conceptual framework for the denial of standing is based upon a biologically based terminology that is found throughout the family and matrimonial law. This terminology reflects a fixation with the biomechanics of conception, a fixation which runs deeper than mere gender assumptions. Instead of a focus on the "best interest" of children, which is the bedrock determination of all other matters related to their custody and welfare in New York matrimonial and family law, the New York Supreme, Family and Surrogate's Courts continue to trip over the threshold issues of "standing" when it comes to same-sex parents because of references to "birth" parents or the heterosexual and gender assumptions implied by the use of the word "paternity." For example, a "paternity" test directed in Family Court proceeding continues to only apply to men and only to establish the biological relationship of men to children obviously born to women. Perforce, this excludes same-sex couples.

One might assume that the marriage of same-sex parents would automatically resolve these problems, but that is not and has not necessarily been the case. In one decision from Monroe County Family Court, *Matter of Q.M v. B.C.*, 46 Misc.3d 594, 995 N.Y.S.2d 470 (2014), the court found that a third-party biological father would not be prevented from litigating his parental rights to the child of a married same-sex couple, in seeming defiance of the common law presumption of legitimacy codified in Domestic Relations Law §24 (which refers to "both birth parents") and Family Court Act §417, because the Marriage Equality Act does not mandate ignoring "essential biology." The court opined that *Alison D.* and *Debra H.* establish that the same-sex spouse of the biological mother was no more than a step-parent, and that the rules of equitable estoppel would only work to prevent such an interloper from upending a heterosexual married couple's rights to continue to exclusively parent a child who had always been held out and was raised to believe that he or she was the natural child of a different father. Equitable estoppel was deemed inapplicable because the other, non-biological mother was not a legal parent and the child was only 17-months-old at the time of the hearing. While the married couple was planning to divorce, it is hard to reconcile the mandate to interpret all laws in a gender neutral way and without reference to, or preference for, a particular sexual orientation with the application of the rules of equitable estoppel, which favor continuing a fiction that a heterosexual couple are the legal parents of a child while denying that same right to same-sex couples because, on the face of the situation, they cannot both be the "birth" parents of that child. This inconsistency has long existed and continues to negatively affect the children born and raised by these couples whose families straddle the rights to marry that are of recent vintage around the nation. The long tail of *Alison D.* continues to rip apart family relationships, cut off children from their parents and wreak havoc on this population regardless of the right to marry.

> The courts are "finding" standing by **cobbling together presumptions and by affording comity** to the rules of more enlightened jurisdictions. But they shouldn't have to go through such contortions.

Thus, in a pro bono matter that our firm, Blank Rome, handled through our affiliation with the Gay and Lesbian Bar Association of Greater New York (LeGal), issues arose due to the use of foreign adoption laws that required same-sex parents to adopt singly and to aver that they were not, in fact, married or, seemingly more importantly to the foreign jurisdiction, "homosexual." The practice of foreign adoption is fairly widespread given the cumbersome, lengthy and expensive process that is adoption in New York. A couple who married in Canada in between two different foreign single-parent adoptions fought over the spouse's legal rights to each of the children based upon those representations to the foreign adoption authorities. One child was adopted by one parent before the marriage and one child was adopted by that same parent after the marriage. In spite of the fact that the adoptive parent misrepresented both her marital status and sexual orientation, she nevertheless pointed to those misrepresentations as proof of her intention to raise the children as a single parent. Although the Family Court failed to grant standing to the non-adoptive parent and the resolution in Supreme Court in the divorce action was no more certain, irrespective of the passage of the Marriage Equality Act, the matter was eventually settled.

Another recent case, from the Second Department, contrarily found that a mother may not challenge the presumption of legitimacy and parentage of her same-sex partner in a situation revolving around children born to the respective mothers (each woman had given birth) both before and after the couple's marriage, but the path to that conclusion was no less rocky. *Kelly S. v. Farah M.*, 2016 N.Y.App. Div. LEXIS 2556, 2016 Slip op. 02676, involved a couple who were first domestic partners and then married in California before relocating to New York. The couple had three children, all of whom were the biological progeny of a known male donor, Anthony S. The first child, born to Kelly, was adopted by Farah and thus not the subject of the litigation. The second and third children were born to Farah, one before the parties' marriage and one after. Neither of these children were adopted by Kelly. When the parties' relationship eventually ended, Kelly sought visitation in the Family Court with the second and third child. Farah opposed Kelly's petition on the basis that Kelly had no biological or legal relationship with the children. Farah sought, alternately, to establish paternity in Anthony S. With regard to the child born during the parties' marriage, Farah argued that there was no compliance with the technical requirements of New York's artificial insemination statute. The timing of the children's births and the inconsistent manner in which the rules of paternity, presumption of legitimacy, the artificial insemination statute and estoppel are applied created the potential for each child to be treated differently, and for there to be a different result for each child in the disposition of this case. Without directly applying equitable estoppel, the Second Department sensibly and cogently refused to allow Farah to establish the paternity of Anthony S. for the purpose of rebutting Kelly's presumed parenthood. Instead the court applied principles of comity to enforce California's rules regarding presumed parenthood for domestic partners (equivalent to married spouses) and held that the presumption of legitimacy for children of married spouses also presumes consent to the creation of parental rights via the parties' jointly undertaken informal artificial insemination.

The courts are "finding" standing by cobbling together presumptions and by affording comity to the rules of more enlightened jurisdictions. But they shouldn't have to go through such contortions. The best way forward to grant the "full promise of liberty" would be for the Court of Appeals to overturn *Alison D.* and firmly establish that same-sex parents in New York have an equal foothold on the rights and privileges of parentage in New York as that of their fellow citizens. More than 30 other jurisdiction in this country have adopted similar rules, and it is long past time for New York to do so. In rectifying this lingering wrong, New York should not adopt a standard that maintains an undue focus on the mechanics, timing, or presence of both parties at conception. Such a standard would overly circumscribe the ways in which same-sex couples form families and become parents and illogically forces them into a mechanism that mimics how children are conceived, deliberately or not, by heterosexual couples. Same-sex parents' standing rights should not be shoehorned into a standard that reinforces lingering, no longer applicable, heterosexual assumptions.

Hopefully, the horrific events in Orlando will not thwart or divert the march for equal rights under the law that is presently being undertaken in New York and across the country. Judges, legislators and the lawyers who are practicing in this area should not be chilled in extending and expanding equal civil rights to this community and, instead, be galvanized to work that much harder to overcome such ignorance and hatred. There is an undeniable pall cast over those efforts as we mourn the many lives lost in Orlando. We are forced again to realize that the LGBT community at large remains a target for violence and repression, that the effort to bring this part of the American population into the light of the "full promise of liberty" is far from over, and that New Yorkers, and their children in particular, whether the product of same-sex relationships or of a different orientation than their heterosexual parents, still have miles to go before they can rest easy, safe in the comfort of the protections and benefits of New York law.

Gray Divorce

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401(k) or defined pension plans, may be divided on a tax-free basis pursuant to a Qualified Domestic Relations Order (QDRO).[5] The QDRO sets forth how a retirement account is to be divided between the parties and may account for earnings and losses thereon until the distribution is made. Further, it can provide for the disposition of the benefits in the event of death.

With regard to other retirement assets, such as IRAs, a QDRO is not required to effectuate a tax free rollover, provided the transfer is made incident to divorce.[6] The divorce agreement can spell out the terms for the division of the IRA, and the recipient party can designate an account into which the funds should be transferred. If the funds from an IRA are not rolled into another IRA incident to the divorce, the recipient may face a tax liability.

Spousal Support

In 2015, in an effort to provide greater stability and consistency, statutory law was amended to include guidelines governing the duration of post-divorce spousal maintenance.[7] The new legislation includes an advisory schedule pertaining to the length of spousal support payments: (1) 0-15 years of marriage—15 percent to 30 percent of the length of the marriage; (2) 15 or more to 20 years of marriage—30 percent to 40 percent of the length of the marriage; and (3) over 20 years of marriage—35 percent to 50 percent of the length of the marriage.[8] It remains to be seen over time how the guideline durational amounts for spousal support will be interpreted by the courts.

On the one hand, one spouse may have been a stay-at-home parent for most or all of the marriage and have little or no employability at the time of a divorce. Also, there could be a great disparity between the earnings capacity of both spouses, and the less monied spouse may have been accustomed to a certain lifestyle over the course of a long-term marriage. In order to subsist, a spouse may require spousal support going forward for a long duration, especially if sufficient savings have not been amassed.

On the other hand, if, for example, a couple is divorcing at age 60 and have been married for 30 years, pursuant to the duration guidelines, a spouse may otherwise be required to pay support beyond his/her retirement age. In order to address this potential pitfall, the statute provides that the court shall take into account "anticipated retirement assets, benefits, and retirement eligibility age at the time of the decision."[9]

Social Security

If an individual was married for 10 or more years, he/she may receive Social Security benefits based upon a former spouse's employment record. In order to qualify, the individual must be at least 62 years old and unmarried, the former spouse must be entitled to receive Social Security benefits, and the benefit the individual is entitled to receive based on his/her own work is less than the benefit based on the former spouse's work.[10]

The benefit is equal to half of the former spouse's full social security benefit, which does not reduce the amount of social security benefits the higher earning spouse will receive.[11] Moreover, remarriage by the higher-earning spouse does not impact the lower-earning spouse's eligibility for social security benefits.

Health and Long-Term Care Insurance

During the marriage, one spouse may have relied upon the other spouse for health insurance benefits because he/she has been out of the workforce or has never worked outside of the home. A divorce agreement can specify how such a spouse will receive health coverage post-divorce.

An individual is eligible to receive COBRA benefits for three years following a divorce.[12] A divorce agreement may set forth who is to pay for the cost of COBRA. If divorcing parties are within three years of attaining age 65, they generally will be eligible for Medicare after the expiration of the COBRA period. However, issues arise if a non-working spouse divorces prior to age 62 and there is a gap between the expiration of the COBRA period and the commencement of Medicare coverage. In this situation, it becomes necessary to figure out how to obtain medical insurance during the "gap" period and who will pay for the coverage. Sometimes the parties may even delay the divorce to avoid a gap period.

The divorce agreement can also make provisions for payment of unreimbursed health expenses, which can be an enormous expense for older couples.

Divorce can radically transform preconceived notions of caregiving in the event of illness. It may be advantageous for older couples to maintain their long-term care insurance and to specify in the divorce agreement the allocation of those costs. If the long-term care insurance is not already procured, it can be mandated as part of the divorce process and the payment of its costs also set forth as part of the settlement agreement.

"Sunset" clauses are commonly used in prenuptial agreements and provide for the **automatic expiration of a prenuptial agreement** upon the occurrence of a certain event (such as childbearing) or after the passage of a certain period of time.

Estate Planning

Under New York state's intestacy law, the surviving spouse receives $50,000 plus one-half of the estate if the decedent has children and 100 percent of the estate if the decedent does not have any children. Pursuant to New York's Estate's Powers and Trusts Law (EPTL) §5-1.2, a surviving spouse is only disqualified for intestacy purposes if: (1) there is a final decree or judgment of divorce, annulment or nullity or dissolving the marriage on the ground of absence; (2) the marriage was void; (3) there is a final decree or judgment of separation; (4) there is abandonment of the deceased spouse by the surviving spouse that continued until the time of death; or (5) the surviving spouse who, having the duty to support the deceased spouse, failed or refused to provide such support despite having the means to do so.

Likewise, EPTL §5-1.4 pertains to the revocation of wills and revocable trust provisions, beneficiary designations, and fiduciary appointments. However, this revocation only takes effect upon divorce, judicial separation or annulment, rather than upon the commencement of a divorce case.

A long period of time may transpire between when a divorce is commenced and when it is finalized. Therefore, in each case, but especially when an older couple is divorcing, estate planning documents should be reviewed and reassessed.

Notably, there are automatic statutory restraints that go into effect at the commencement of a divorce case.[13] These automatic restraints include prohibitions regarding changes in beneficiary designations on life insurance policies, changes of title of joint accounts, as well as certain other actions unless both parties consent in writing or there is a court order.

Under New York law, if the deceased party has a will, a surviving spouse is entitled to an elective share of one-third of the deceased spouse's estate outright.[14] The surviving spouse retains the right to claim the elective share during the pendency of a divorce proceeding.

Federal law requires qualified plans to provide that a surviving spouse receive at least half, and in many cases all, of the deceased participant's benefits. A surviving spouse may waive these rights with acknowledged consent,[15] but typically this is not done until there is a divorce settlement.

Impact on Adult Children

In light of gray divorces, the number of adults with divorced parents has exponentially expanded. The divorce of parents can have a profound impact on children even when they are adults.[16] A parental divorce is considered a high stressor for adult children, and many of them may grieve about the loss of their long intact familial unit. They also may tend to reflect and question their lives, and whether their parents perpetuated the marriage for them until they were grown.

Child support in New York is mandated until age 21, unless an earlier emancipation event has occurred.[17] Custody is an issue in New York until a child is 18.[18] Accordingly, legal issues of child support, custody and access often do not loom large in gray divorces (although issues regarding the payment of college and graduate school tuition, as well as wedding expenses, often arise).

As a result of their age, adult children may be more likely to be drawn into the divorce and hear details from each parent. Further, the divorce may alter existing interfamily financial relationships.

For example, parents who divorce later in life may require financial assistance from their children. A parent may need a place to stay, even if temporarily, or may require financial contributions in order to help make ends meet. Alternatively, the parties may have been providing assistance to their children and may not be able to afford to continue to do so. In addition, the parties may hold differing views as to how much largesse they should bestow upon their adult children both during lifetime and upon death.

Effect on Prenuptial Agreements

"Sunset" clauses are commonly used in prenuptial agreements. These clauses provide for the automatic expiration of a prenuptial agreement upon the occurrence of a certain event (such as childbearing) or after the passage of a certain period of time. A common benchmark is 10 years. In light of the gray divorce phenomenon, it may be advisable to forgo a sunset clause altogether or provide for the prenuptial agreement to "sunset" after a longer period of time.

Love may be in the air once again after a gray divorce. A prenuptial agreement can provide numerous benefits in a second marriage. For example, the prenuptial agreement may contain provisions regarding what will transpire upon death in order to accommodate children from a first marriage as well as a new spouse. It can also contain provisions to protect separate property assets from being slashed further in the event of another divorce.

Conclusions

For a myriad of reasons, there is a proliferation of divorce among couples who have been married for many years. It is important to obtain sound financial and legal advice during and after a divorce in order to help maximize assets and prepare for the future. If remarrying, a prenuptial agreement can balance the need to protect children from a prior marriage, preserve assets for retirement, and provide for a new spouse. Life is not over. A new chapter lies ahead.

1. Susan L. Brown, I-Fen Lin, "The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults," National Center for Family & Marriage Research Working Paper Series (March 2013), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/Lin/The-Gray-Divorce.pdf.
2. Kristin Haugk, "Divorce While Retired: Three Ways to Avoid More Pain," The Oxford Club (May 16, 2016), http://wealthy-retirement.com/gray-divorce-retirement-three-financial-strategies-preserve-wealth/.
3. Id.
4. Id.
5. 26 U.S.C.A. §414(p) (West 2016).
6. 26 U.S.C.A. §408(d)(6) (West 2016).
7. N.Y. Dom. Rel. Law §236(B)(6) (McKinney 2016).
8. N.Y. Dom. Rel. Law §236(B)(6)f) (McKinney 2016).
9. N.Y. Dom. Rel. Law §236(B)(6)(f)(4) (McKinney 2016).
10. "Retirement Planner: If You Are Divorced," Social Security Administration, https://www.ssa.gov/planners/retire/divspouse.html.
11. Id.
12. U.S. Department of Labor, Employee Benefits Security Administration, Consolidated Omnibus Budget Reconciliation Act (COBRA), https://www.dol.gov/ebsa/newsroom/fscobra.html.
13. N.Y. Dom. Rel. Law §236(B)2(b) (McKinney 2016).
14. N.Y. Est. Powers & Trusts Law §5-1.1-A (McKinney 2016).
15. 26 U.S.C.A. §417(a) (West 2016).
16. Jane Gordon Julien, "Never Too Old to Hurt From Parents' Divorce," (April 21, 2016), http://www.nytimes.com/2016/04/24/fashion/weddings/never-too-old-to-hurt-from-parents-divorce.html?_r=0.
17. N.Y. Dom. Rel. Law §240(1-b)(b)(2) (McKinney 2016).
18. N.Y. Dom. Rel. Law §2 (McKinney 2016); N.Y. Fam. Ct. Act §119(c) (McKinney 2016); N.Y. Fam. Ct. Act. §651(a) (McKinney 2016).

Alienation

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Mark, NYLJ 8/24/01, p. 18, c. 4 (New York Co., Gische, J.), the Supreme Court required the defendant to provide "proof that he is actively involved in such therapy" in the form of a bill marked paid or other receipt for services. In *Singer v. Peters*, 284 A.D.2d 152 (1st Dept. 2001), the court held that, with the parties' consent, the Supreme Court was entitled to review the therapist's notes and to obtain the testimony of the therapist to determine the parties' "participation and progress in the therapeutic process." *Singer*, 284 A.D.2d at 152.

Trial judges, with the approval of appellate courts, have been involved in selecting the "nature" of the therapy or the "manner in which [it] will be accomplished." *Scheuering v. Scheuering*, 27 A.D.3d 446, 811 N.Y.S.2d 100 (2d Dept. 2006). In *LR v. AZ*, N.Y.L.J. 7/31/09, p. 26, c. 1 (New York Co., Drager, J.), the court ordered the appointment of an "intervention therapist" to assist the parties in finding a "cognitive-behavioral" therapist to provide short-term treatment for the child. Where the therapy selected by a parent "was neither consistent nor effective," the Second Department ordered the parent to enroll the child "in intensive and consistent therapy with a child psychiatrist, with the goal of repairing the relationship between the father and the child so that visitation could resume in the future." *Stebelsky v. Schleger*, 135 A.D.3d 774 (2d Dept. 2016).

The Appellate Divisions have made that trial courts responsible to use their remedial authority to ameliorate the damage caused by alienation of children. In *Schnee v. Schnee*, (New York Co., Tolub, J. 1999, n.o.r.), the children were "extremely alienated from the mother" and did not want to "re-establish a relationship with their mother." Nonetheless, the trial court refused to order the parties and the children into previously agreed-upon therapy "where to do so will serve no useful purpose" because both the father and the children refused to attend therapy. "There is no magical ruling that this court can render which will make these children want to re-establish a relationship with their mother … . The court is not unsympathetic to the plaintiff's plight, but can do little to award her the relief she really requests, her children's love and respect. Even a judge has no such power." The First Department disagreed. Noting that the experts unanimously recommended continued therapy at least for the children if not the entire family, the court held that the "record does not *presently* support" the denial of family therapy, and remanded on that issue among others. 268 A.D.2d 392, 700 N.Y.S.2d 839 (1st Dept. 2000) (italics added). In *Rodman*, the Supreme Court ordered the mother to bring the "alienated" child to therapy and visitation and imposed fines for her failure to do so. The First Department affirmed. In *Wolfson*, the court found that neither party was participating in therapy in good faith. The Second Department "insist[ed] that there be a meaningful effort by both parties to participate in the counseling process so that a reasonable relationship can be reestablished between father and children." In *Zafran v. Zafran*, 306 A.D.2d 468 (2d Dept. 2003) (*Zafran I*), the trial court ordered temporary visitation to be implemented by a court-appointed case manager. The alienating father refused to cooperate with the court-ordered therapeutic supervised visitation and "undermined the court's efforts to facilitate unsupervised visitation." The father next resisted an update of the court-ordered forensic evaluation. *Zafran v. Zafran*, 28 A.D.3d 753, 754 (2d Dept. 2006) (*Zafran II*). The trial court, growing frustrated, denied the mother's motion to hold the father in contempt, but "terminated" all visitation. On appeal, the Second Department reversed, directing the lower court to reconsider the issue of contempt and suspending the visitation, reasoning that termination of the father-daughter relationship was not in the daughter's best interests. Since the daughter's interests also were at stake, the court found that contempt, not termination of visitation, was an appropriate vehicle for addressing the father's recalcitrance. 28 A.D.3d at 757. By contrast, in *Rodman*, the trial court decided not to hold the mother in contempt but, rather, to direct her to comply with its prior orders, and the appellate court affirmed that exercise of discretion.

Collaboration between the court and mental health professionals is necessary to identify critical issues and to structure interventions and orders that integrate the perspectives of the psychological and legal professions.

The trial court decisions in *Schnee* and *Zafran* express the view that there are limits to what courts can do to repair fractured families. The appellate courts in each case and both courts in *Rodman* took a different tack, saying, in effect, that courts had to exhaust the remedies that the trial courts had at their disposal. Implicit in these appellate decisions is the hope that with the assistance, and if need be, the coercive power of the court, mental health professionals can help to repair severely damaged parent-child relationships. It is unclear what the appellate court in those cases would have done if the father in *Zafran* or the children in *Schnee* continued to refuse to participate in therapy in the face of enforcement of the court's contempt powers. Perhaps those appellate courts would reach the conclusion as, it seems, the trial courts did, that there is nothing more that the courts can do for these families. But the appellate courts are insisting that we have to try and mental health professionals, with the backing of the law, have provided us with a treatment plan that may help in some cases.

Recommendations for Triage

Attorneys with an alienation case should move early in the case for orders which insure that contact between the rejected parent and the child(ren) continues and that mental health services which specifically address alienation are immediately implemented. The motion is more likely to succeed if it is supported by an affidavit from a mental health professional, experienced in parental alienation, who identifies specifically the reasons for the initial assessment of alienation and a plan for addressing the problem. That affidavit should highlight the justification for prompt action.

Conclusion

The case law and the psychological literature underscore the urgent need for both judicial case management and rapid mental health intervention in alienation cases. If we are successful, in the long run the demands on the courts from alienation cases may be reduced. More importantly, however, this approach has the best chance of reducing the serious emotional damage that occurs in families when alienation continues unabated.

1. Fidler, BJ and Bala, N. (2010). Children Resisting Postseparation Contact with a Parent: Concepts, Controversies and Conundrums. Family Court Review, 48 (1), 10-47.
2. Baker, A.J. L. (2007). Adult Children of Parental Alienation Syndrome, Breaking the Ties that Bind. New York: W. W. Norton & Company.
3. The following is a partial list of cases. *Rodman v. Friedman*, 33 A.D.3d 400 (1st Dept. 2006) (parties ordered "to abide by the court's orders regarding … therapy"); *Thompson v. Thompson*, 41 A.D.3d 487 (2d Dept. 2007) (the trial court "may direct a party to submit to counseling as a component of visitation"); *Anne S. v. Peter S.*, 92 A.D.3d 483 (1st Dept. 2012) (father to "continue intensive treatment"); *SMZ v. SDZ*, NYLJ 3/28/97, p. 31, c. 4 (New York Co., Silbermann, J.) (counseling is the "one remedy that may salvage" the situation); *JF v. LF*, 181 Misc.2d 722 (FC, West. Co. 1999), aff 'd. 270 AD2d 489 (2d Dept. 2000) (finding that the mother alienated the children from the father, the Court changed custody to the father and ordered that the children be in therapy "with an appropriate therapist with experience in parental alienation and that the parents cooperate in such therapy" and "that both parties participate in their own individual therapy, if recommended"); *LS v. LF*, 10 Misc.3d 714 (SC, Kings Co., 2005, Sunshine, J.) (court appointed a parenting coordinator to assist the parties and child to reestablish meaningful parenting time and directs parties to pay equally so that both have vested interest in the outcome and responsibility for their past conduct).