

Bisel's PA FAMILY LAW UPDATE

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The trial court entered a PFA order against defendant for a period of 18 months. Defendant appealed, arguing that the trial court erred in not admitting e-mails purportedly written by plaintiff's mother that referred to plaintiff's drinking problem, and in granting the PFA order where there had been no documented instances of abuse by way of medical reports or police records.

The Superior Court affirmed, rejecting defendant's argument, finding that the e-mails were not properly authenticated and were excluded as hearsay. "Although testimony revealed that the e-mail address ... did in fact belong to [plaintiff's] mother ... it was denied by [mother] that she was the author of the e-mails. We find that the e-mails were properly excluded." Opinion, P. 4.

The court further rejected defendant's contention that the lack of police reports or medical records rendered the trial court's determination erroneous. "Nowhere in the Protection from Abuse Act itself, or in the body of case law interpreting it, is there a requirement that a police report be filed or that there be medical evidence of an injury in order to sustain the burden of proof. A petitioner simply must show by a preponderance of evidence that she suffered abuse as defined by the statute." Opinion, P. 6.

Citing *Miller v. Walker*, 665 A.2d 1252 (Pa.Super. 1995), the court determined that the PFA Act requires flexibility in the admission of evidence and that prior instances of abuse are relevant and admissible, even if they occurred as many as eight years ago.

Finally, the court noted, the Protection from Abuse Act specifically states that "the right of [appellee] to relief ... shall not be affected by [appellee] leaving the residence or household to avoid further abuse." Opinion, P. 7.

Hood-O'Hara v. Wills, ___A.2d___, 2005 PA Super 145 (Pa.Super. April 22, 2005). Olszewski, J. 8 pp.



ABUSE

CASE SUMMARY

Police

In *Hood-O'Hara v. Wills*, the Superior Court ruled that the trial court did not err in granting a Protection from Abuse order, despite the lack of police reports or medical records to document the allegations of abuse and even though the instances of alleged abuse occurred eight years ago.

Plaintiff and defendant began an eight-year relationship in 1995, while plaintiff was married to her previous husband. The parties lived together for most of that eight-year period. In 2004, plaintiff moved out of the residence and filed a Petition under the Protection from Abuse Act, 23 Pa.C.S. §6101 et seq., alleging physical abuse.

At the hearing, plaintiff testified that defendant engaged in violent and abusive behavior through much of the relationship, including physical assaults and threats against plaintiff and her family. Plaintiff moved out of the shared residence in April 2004 and testified that she was continually harassed and threatened by defendant through phone calls made to her workplace.

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CASE SUMMARY

Reasonable Fear

In *Commonwealth v. Haigh*, the Superior Court held that the trial court erred in finding defendant guilty of criminal contempt for violating a PFA order prohibiting him from having any contact with his wife, where defendant did not act with wrongful intent when he asked his wife about her health while both were present in the courtroom. Defendant's inquiry of wife as to her health while shackled in the courtroom before a judge prior to a hearing, was not sufficient to support a finding of indirect criminal contempt.

On August 21, 2003, defendant and his wife of 31 years entered into a final Protection from Abuse order. The order prohibited defendant from having any contact with wife until February 21, 2005. Less than six months later, defendant was brought before the trial court for a hearing on charges that he had violated the PFA order by attempting to contact wife from prison by letter and by telephone. Defendant tried to contact wife after receiving a letter from their son regarding wife's recent surgery to remove a mass from her breast. Defendant was not advised whether the mass was malignant or benign.

At the hearing on the PFA violation charges, defendant appeared in court in shackles and guarded by deputy sheriffs. At one point, defendant shuffled over to wife, leaned slightly towards her and asked her, "Are you okay on top?" Deputy Sheriff Franke pulled defendant back and charged him with indirect criminal contempt arising from this contact with his wife.

At the hearing on this indirect criminal contempt charge, wife and Sheriff Franke testified that defendant neither said nor did anything threatening to wife. Wife stated that she did not feel threatened by defendant's conduct. Nevertheless, the trial court found defendant guilty of indirect criminal contempt for violating the PFA order.

Defendant appealed, arguing that the evidence was insufficient to establish that he acted with wrongful intent.

A majority of the Superior Court panel reversed defendant's conviction and vacated the judgment of sentence. The court found that defendant lacked the wrongful intent required to support a finding of criminal contempt. Here, the majority said, enforcement of the PFA order may be "relaxed" because security measures in place in the courthouse reduced the danger to the protected party. "A reasonable person could have believed, and [defendant] did believe, that the PFA order was relaxed to some extent in the courtroom context, especially where [defendant] was shackled and the victim was protected by an armed deputy sheriff." Opinion, P. 5.

Moreover, neither wife nor anyone else in the courtroom heard defendant threaten wife. Defendant's questions arose from

his concern for his wife's health. Given the circumstances, the majority concluded that defendant did not act with wrongful intent by engaging in this courtroom conversation with wife.

The majority found that the courthouse setting reduced the level of threat that could credibly be brought to bear against wife. "It is imperative that trial judges use common sense and consider the context and surrounding factors in making their determinations of whether a violation of a court order is truly *intentional* before imposing sanctions of criminal contempt." Opinion, P. 6. Thus, under the facts presented, the Commonwealth failed to provide sufficient evidence to satisfy the element of "wrongful intent."

Judge Orié Melvin dissented, finding that the facts supported the trial court's decision. Wife could have reasonably perceived defendant's move toward her as a threat. "What someone who has never been placed in danger by an abusive spouse or paramour would perceive as a threat is different from what the victim of such abuse perceives. It is the contact alone that can be intimidating for it places in the mind of the victim the notion that the abuser will continue to intrude into her life, even after she has sought the protection of the legal system." Dissenting Opinion, P. 8. Furthermore, Judge Orié Melvin said, "no contact means no contact for any reason."

Commonwealth v. Haigh, ___ A.2d ___, 2005 PA Super 139 (Pa.Super. April 18, 2005). McCaffery, J. Dissenting Opinion by Orié Melvin, J. 9 pp.



ADOPTION

CASE SUMMARY

Procedure

In *In re: L.P.*, the Superior Court ruled that the trial court properly changed the goal of the family service plan for two girls with cystic fibrosis from reunification to adoption, given the evidence that established the parents' failure to meet the serious medical needs of the older girl. A court may assume from evidence that parents ignored the medical needs of a child with cystic fibrosis that they would similarly ignore the medical needs of another child with the same disease.

Mother and father were the parents of six children. Two of their daughters, C.R., born in 1993, and L.P., born in 1996, had cystic fibrosis. Following a hearing on March 24, 2003, both girls were adjudicated dependent and were placed in foster

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homes. In February 2004, the Monroe County Children & Youth Services (CYS) filed a petition to change the goal of the family service plan (FSP) from reunification to termination of parental rights and adoption. The trial court granted the petition.

Parents appealed, arguing that no declaration of dependency was warranted because they were ready, willing and able to care for the children.

The Superior Court, in a Memorandum Decision, affirmed, concluding that the parents were incapable of properly caring for the girls in light of their medical needs. The court noted that in the argument section of their brief, parents contended that the trial court failed to consider that they had other children, including a boy with cystic fibrosis, for whom they allegedly provided adequate care. In *In re: Adoption of M.A.R.*, 591 A.2d 1133 (Pa. Super. 1991), the Superior Court rejected an identical claim. "As in *M.A.R.*, the fact that Parents are able to adequately care for another child in the family is irrelevant to this matter. Furthermore, Parents, like the mother in *M.A.R.*, have done very little to prove that they are now able to take responsibility for [their children's] needs, irrespective of their abilities toward any other child." Opinion, P. 4.

Parents also argued that the goal change was not in the girls' best interest, noting that they met the girls' medical needs. According to the evidence, the court said, when C.R. lived with her parents, she was forced to perform "clapping" treatments herself, although she was only 10 years old. Parents also missed C.R.'s first follow-up appointment following the child's surgery to flush a shunt implanted in her liver. A caseworker testified to verbal abuse parents directed at C.R. C.R. also confided to a school guidance counselor that mother had hit her with a metal stick.

Furthermore, the evidence established that parents did not comply with the terms of the FSP. Quoting the court's recent decision in *In re: G.T.*, 845 A.2d 870 (Pa. Super. 2004), the panel said that "when the evidence establishes that the parents ignore medical concerns in one child, both the Juvenile Act and *In re: M.W.*, 842 A.2d 425 (Pa. Super. 2004) allow us to assume that any medical problem [another child in the family] might have developed would have been similarly ignored." Opinion, P. 7.

In re: L.P., Memorandum Decision, No. 1073 EDA 2004 (Pa. Super. March 7, 2005). Del Sole, J. 8 pp.

**CUSTODY & VISITATION****CASE IN BRIEF****Best Interest of the Child**

In *Cichocki v. Mazurek-Smith*, the trial court held that continuing in the same school system can be a factor in a custody decision.

The Court of Common Pleas of Berks County held: "Bradley is comfortable with his school and his teachers are addressing his problems. If Bradley were to live with Father primarily during the school year, he would have to make new friends and adjust to new routines. That would not be in the child's best interest." Citing *Fisher v. Fisher*, 535 A.2d 1163 (Pa. Super. 1988), the court held that continuing in the same school system can be a factor in a custody decision.

Cichocki v. Mazurek-Smith, 97 Berks Co. L. J. 137 (C.C.P. November 15, 2004). Grim, J. 13 pp.

**ARTICLE****Best Interests of the Child**

"The Divorce Is Over—What About the Kids?" By Mitchell K. Karpf and Irene M. Shatz.

An attorney and a psychologist provide a roadmap for divorce-related issues that arise involving children, with suggested solutions. Among the topics covered are the binuclear family, collaborative co-parenting, time sharing considerations, and renegotiating rules and boundaries.

The authors write: "Extensive time and effort has gone in to crafting a detailed and elaborate shared parenting agreement. It has all the "magic" language addressing visitation, emergencies and joint parenting. Yet, as these ideas are being memorialized, in most instances, the divorcing parents cannot stand being in the same room with one another; nonetheless, we expect them to communicate with one another for the sake of their children, for many years to come. Is this realistic? Is this even possible? What can the family law practitioner do to help insure successful co-parenting? These and related issues are discussed in this article."

Karpf and Shatz. **"The Divorce Is Over—What About the Kids?"** 19 American Journal of Family Law 7 (Spring 2005). 5 pp.



ARTICLE

Child's Preference

In "*Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*," Janet R. Johnston critiques the Parental Alienation Syndrome (PAS) and then discusses whether children necessarily need a relationship with both parents; whether children who reject a parent are significantly emotionally troubled or at-risk for emotional problems or psychological disorders in the future; and hence whether they need court-ordered treatment (despite the child's and aligned parent's resistance or objections); what is the nature, purpose, and prognosis for mandated treatment; when should we give children their own voice and respect their self-determination; and under what conditions should a change of primary residence to the rejected parent be considered?

Johnston. "*Children of Divorce Who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*." 38 Family Law Quarterly 757 (Winter 2005). 10 pp.



ARTICLE

Interference With Custody & Visitation

"*False Allegations of Parental Alienation*," by Ira Daniel Turkat, PhD.

Parental alienation claims in custody and access suits is increasingly common. The validity of such claims is also usually hotly contested. An expert provides background on this difficult area and offers advice to matrimonial attorneys handling cases involving this issue.

"When a parent charges that the other parent is engaging in alienating behaviors, that allegation is either true or false. While there are numerous professional articles regarding the clinical specification, diagnosis, and treatment of parental alienation, there is a glaring void in the literature regarding false allegations of parental alienation. The purpose of this article is to begin to address this neglected area."

Turkat. "*False Allegations of Parental Alienation*." 19 American Journal of Family Law 15 (Spring 2005). 5 pp.



CASE IN BRIEF

Relocation

In *Matthews v. Smolka*, the trial court found that mother's request to relocate to Colorado with the parties' child must be denied where the child's father maintained an important relationship with the child, including frequent routine custodial visits, which were in the child's best interest to continue. Mother's request to relocate must be denied where the best interest of the child will not be furthered by relocation, and no custodial visitation arrangements could be made which would adequately foster a continuing relationship between the child and his father if the mother were permitted to relocate.

The Court of Common Pleas of Westmoreland County held: "It is quite clear that there is no custodial visitation arrangements which would adequately foster a continuing relationship between Jacob and his Father. The expense of transporting the child for a few visits per year would be a burden on the parties. The Father currently sees Jacob on alternating weekends and once during the week and for a vacation. ... The activity level which the Father maintains, obviously, could not be sustained. ... Despite an empathy and feeling for the Mother's desire to live in Colorado, this Court cannot conclude that the best interests of Jacob will be furthered by relocation. Jacob's relationship with the Father is important and must be viewed as one which should be preserved, even though he is non-custodial. Obviously, if this relationship fails to flourish and mature as it should, the child's interest would not be served by a continuing denial of the mother's right to relocate. But at this time one cannot conclude that Jacob's life would improve or that it is in his best interest to move away."

Matthews v. Smolka, 87 Westmoreland L. J. 11 (C.C.P. October 15, 2004). Driscoll, J. 6 pp.



CASE IN BRIEF

Relocation

In *McLoughlin v. McLoughlin*, the trial court held that while the Internet undoubtedly has fostered a myriad of ways for people to maintain communication, and while computer video cameras allow people to "feel" closer, even when separated by hundreds of miles, such technology cannot realistically be equated with face-to-face contact between parents and young children. Staying connected via the Internet can never be a substitute for face-to-face contact between a parent and a child.

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The Court of Common Pleas of Chester County denied mother's petition to relocate with the parties' child to Wales, United Kingdom, as it would not be in the child's best interests. The court found that while visitation post-relocation is not required to be as frequent as occurred prior to relocation, it must nonetheless realistically foster an ongoing relationship.

"The ability to see his son on school breaks does not replicate the total involvement Father asserts is in Conor's best interest. Further, even if it were a reasonable substitute, the cost renders it economically infeasible. The very times when Father could have custodial time are high seasons for airfare, running as much as \$900-\$1000 per ticket. If Conor were to come to the United States, he would have to be accompanied on the plane by an adult capable of managing his medical care, which doubles the cost. If Father were to visit Conor in Wales, he would have to take time off from work and secure a place to stay. While Father has had steady employment, he has very modest means. ... It is apparent to me that the parties cannot afford any reasonable arrangement to transport Conor and/or themselves that would even begin to reinforce the relationship of father and son, even if augmented with electronic modes of communication. While visitation is not required to be as frequent as prior to relocation in order to meet the third *Gruber* factor ... it must nonetheless realistically foster an ongoing relationship. Under the circumstances of this father's place in his son's life and these parents financial means, that proposal is neither realistic nor fosters any meaningful ongoing relationship."

McLoughlin v. McLoughlin, 153 Chester Co. Rep. 34 (C.C.P. October 21, 2004). Platt, J. 6 pp.



CASE SUMMARY

Third Parties

In *Chambers v. Chambers*, the trial court ruled that where the child's adult brother had *in loco parentis* status and where it was in the child's best interests for him to live with his adult brother rather than with his father, the adult brother was entitled to sole legal and primary physical custody of the child. Brother's stable home and regular contact with the child supported an award of custody to him, where father's contact with the child had been irregular for the past seven years, and he was not able to provide as much stability.

Mother and father had three children, Jonathan, now 26 years old, Stefanie and Nolan. Nolan was born in March 1990. Father physically abused mother, and he was incarcerated for violation of a protection from abuse order. This abuse was witnessed by Nolan. Father had left the marital home when Nolan was eight due to the entry of the PFA order at the

request of mother.

After the parties' divorce, the children lived with mother, who had sole legal and primary physical custody. Nolan saw his father on a sporadic basis after the divorce. Mother died of leukemia in July 2004. At the time of mother's death, father's support payments were in arrears.

Prior to her death, mother executed a will in which she named Jonathan as the guardian of his brother Nolan. By that time, Jonathan had married and had his own home. During the final stages of mother's illness, Nolan went to live with Jonathan. Nolan continues to live with Jonathan and his family. Now 15 years old, Nolan takes medication to deal with depression and neurological conditions, such as attention deficit disorder (ADD).

After mother's death, Jonathan and father disputed custody of Nolan. Jonathan lives in the Saucon Valley School District. Father has remarried and now has a wife and a stepson in Reading, Pennsylvania. Father maintained a sporadic relationship with Nolan thereafter.

The trial court heard testimony from the parties and their families, and from Nolan. The trial court determined that Jonathan had standing in this custody matter by virtue of his *in loco parentis* status.

The Court of Common Pleas of Berks County held that it was in Nolan's best interests to continue living with Jonathan. Accordingly, the court awarded sole legal and primary physical custody to Jonathan and partial physical custody to father. The court also ordered that father and Nolan begin family counseling and that a physician re-evaluate Nolan's medications.

The court observed that Jonathan and his brother Nolan had a very good relationship, and Jonathan had been a constant in Nolan's life for many years. Nolan was thriving in school, and his continuation in the same school district was a factor the court found to be critical in this case. "Continuing in the same school system can be a factor in a custody decision. ... It is a critical factor in the instant case." Opinion, P. 229. In addition, the court noted, Nolan expressed a desire to continue living with Jonathan.

The court also noted that father and Nolan argue whenever Nolan visits father. Given father's past conduct, Nolan's reluctance to be with father for extended periods of time was not without reason, the court concluded. It noted that Nolan had witnessed father's physical abuse of mother. "Although Father is now a religious, caring man, he cannot realistically expect Nolan to forget the past. Father's views of his past are not grounded in reality. Father's past behavior was deplorable; Mother did not have to poison the children's minds because they lived it. Father had little to do in the success of the two older children's lives. It is to Father's credit that he

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has turned his life around; however, he cannot force his children to change their opinions of him overnight. Father has a long history of hurt and abuse to overcome.” Opinion, P. 228. Thus, the court found that third parties can be awarded custody over a parent if they can provide the more stable home that meets the child’s best interests.

Chambers v. Chambers, 97 Berks Co. L. J. 225 (C.C.P. March 29, 2005). Grim, J. 6 pp.



DIVORCE

CASE IN BRIEF

Bankruptcy

In *Tomazzolli v. Tomazzolli*, the trial court held that the automatic stay provision that occurs after a bankruptcy petition is filed does not preclude the court from rendering a disposition of the divorce petition. However, the court is precluded from making any determination or disposition regarding property as it may be deemed property of the bankruptcy estate. Protection of the automatic stay will not be afforded when a debtor attempts to use the stay unfairly as a shield to avoid an unfavorable result.

The Court of Common Pleas of Monroe County declared that husband’s failure to apprise his counsel, opposing counsel, or the tribunal of the pending bankruptcy and accompanying stay does, in fact, operate as a waiver of his opportunity to later present evidence to the contrary. “Husband did not provide this Court with any notice of the filing of his bankruptcy petition or otherwise place this fact on the record. Husband was given sufficient notice of the Master’s Hearing before it was held. He thus had both the opportunity and the obligation to serve this court with notice of his bankruptcy and the accompanying automatic stay. Because he failed to do so, we will not allow him to demand relief based on a fact not of record. It would be inherently inequitable for Husband to expect to receive the benefit of the automatic stay that resulted from his bankruptcy filing when he failed to disclose to his former attorney, Wife’s attorney, and the Divorce Master that he had filed for bankruptcy. ... We find that Husband’s failure to apprise his counsel, opposing counsel, or the tribunal of the pending bankruptcy and accompanying stay does, in fact, operate as a waiver of his opportunity to later present evidence to the contrary and is in conformance with the sanction provision of our local rule.”

Tomazzolli v. Tomazzolli, 50 Monroe Leg. Rep. 12 (C.C.P. September 8, 2004). Worthington, J. 4 pp.



CASE SUMMARY

Bifurcation

In *Brian v. Brian*, the Superior Court ruled that the trial court erred when it failed to explain its rationale for granting bifurcation on the record or at the time of entry of an order for bifurcation. The divorce decree could not stand where the trial court failed to provide on the record its reasons for granting bifurcation of the decree.

Husband had filed for divorce in 2001 and wife filed an Answer and Counterclaim. Both parties later filed Affidavits of Consent. Husband filed a Petition for Bifurcation in 2003. After hearing, the trial court granted the Petition, and husband filed a Praecipe to Transmit and a Divorce Decree was entered.

Wife appealed, arguing that the trial court erred in failing to specify its reasoning for granting bifurcation, as it is required to do.

The Superior Court agreed and vacated the Divorce Decree and Order and remanded for a new hearing. The court found that the trial court failed to explain on the record its reasons for granting bifurcation. The trial court record disclosed that the trial judge failed to discuss the basis for his decision on the record, and, due to the retirement of the judge, a trial court opinion was not provided. Even if the judge had issued an opinion, the court held, it would not be sufficient, since case law required a judicial explanation be provided before or at the time of entry of the bifurcation order.

The court noted that the Superior Court has long held that it will defer to a trial court’s discretion on the decision to bifurcate only if the trial court has provided a thoughtful explanation for the decision. The trial court must provide its reasoning before the order is issued, the court explained.

Here, the trial court conducted a brief hearing on the bifurcation issue but failed to provide any explanation on the record for its bifurcation decision. “We conclude the relevant case law dictates that the trial court must explain its reasoning for a bifurcation order, on the record, either prior to the entry of a bifurcation order or within the order itself.” Opinion, P. 1.

Brian v. Brian, ___A.2d___, 2005 PA Super 127 (Pa.Super. April 8, 2005). McCaffery, J. 5 pp.



CASE IN BRIEF**Bifurcation**

In *Hillwig v. Hillwig*, the trial court held that in a bifurcated divorce proceeding, where the divorce is granted while economic claims are pending, any spousal support order—whether entered as part of the divorce or at a separate Domestic Relations proceeding—automatically converts to alimony *pendente lite*.

The Court of Common Pleas of Crawford County declared: “Based on the *dicta* in *Calibeo v. Calibeo*, 663 A.2d 184 (Pa.Super. 1995) . . . as well as our own reading of the current versions of Rule 1920.31(d) and 1920.76, we find that this court had jurisdiction in the divorce case to automatically convert the spousal support award entered in the Domestic Relations case when the divorce decree, providing the undecided equitable distribution claim, was entered.”

Hillwig v. Hillwig, 27 Crawford Leg. J. 173 (C.C.P. April 13, 2005). Vardaro, J. 5 pp.

**CASE IN BRIEF****Counsel Fees**

In *B.J.C.C. v. H.B.C.*, the trial court held that the Divorce Code requires an award of counsel fees and costs to promote fair administration of justice and serve the purposes of the Code where a party's conduct prolongs the litigation and causes a party to incur unnecessary counsel fees.

The Court of Common Pleas of Delaware County declared that 42 Pa.C.S. §2503(7) entitles a party to an award of counsel fees as a sanction where a party's dissipation of marital property is dilatory, obdurate, and vexatious within the meaning of the statute. 42 Pa.C.S. §2503(9) entitles a party to an award of counsel fees as a sanction where a party's dissipation of marital property is arbitrary, vexatious, and in bad faith within the meaning of the statute.

The court held that defendant was required to pay counsel fees to plaintiff in the amount of \$1,463,790.00.

B.J.C.C. v. H.B.C., 92 Delaware Co. Rep. 51 (C.C.P. October 27, 2004). Kenney, J. 9 pp.

**DOMESTIC TORTS****ARTICLE****Marital Tort Claims**

“*The Divorce Case and RICO*,” by H. Joseph Gitlin, deals with building a RICO claim.

Although the RICO Act was originally intended to provide a civil cause of action for damages against organized enterprises acting in a criminal or racketeering manner, it also has been applied to financial aspects of divorce cases. The author acknowledges that pursuing such a claim is an uphill battle as he explains how important case law and the required elements of proof must be mastered in moving such a claim forward.

The article comments on *Perlberger v. Perlberger*, 1999 WL 79503 (ED. Pa. 1999), which involved a case where a prominent family law attorney and his wife were divorced. After the divorce, the wife brought a claim under RICO, alleging the attorney and other defendants conspired to conceal assets during the divorce proceeding. The attorney argued that he and his law firm could not constitute a RICO enterprise.

The trial court held that the attorney and his firm were distinct and could constitute an association-in-fact, despite a complete overlap of the individual attorney and the owner of the firm. Therefore, the trial court denied the attorney's motion for summary judgment and allowed the case to proceed.

The article includes a checklist of important questions to ask in pursuing a RICO claim.

Gitlin. “*The Divorce Case and RICO*.” 27 Family Advocate 46 (Spring 2005). 7 pp.

**EQUITABLE DISTRIBUTION****CASE IN BRIEF****Interest on Property**

In *Feaga v. Feaga*, the trial court ruled that when a court is fashioning an equitable distribution scheme it is appropriate for a spouse to receive half of the fair market rental value of the home so long as the other spouse was in exclusive possession of the marital residence during the parties' separation. The award of half of the fair market rental value of the home is discretionary with the court.

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The Court of Common Pleas of Adams County declared: "The Court agrees with the Master's determination that a credit is not appropriate in this case. Defendant was not in exclusive possession of the marital residence throughout the entire period of separation. The record reveals that Plaintiff had access to the marital home before the petition for exclusive possession was filed. Only in April 2002 after the Court granted Defendant's Petition for Exclusive Use and Possession of the Marital Residence was the Plaintiff denied the use of the marital home. Additionally, Plaintiff has had exclusive possession of the parties' boat, a marital asset. The record reflects that Plaintiff has lived on the boat since the date of separation. The record is not clear as to a rental value that could be assigned to the boat. ..."

Feaga v. Feaga, 46 Adams Co. Leg. J. 239 (C.C.P. March 8, 2004). Bigham, J. 8 pp.



CASE IN BRIEF

Marital Property

In *Johnson v. Johnson*, it was held that where monies were used for improvements, materials, and household expenses prior to separation, the trial court properly concluded that they were used for marital purposes and were not available to be treated as part of the marital estate and divided between the parties.

The Court of Common Pleas of Delaware County held that where amounts used for separate household expenses are found to be *de minimis*, the court may decide not to require their identification and division as part of an equitable division of the marital estate.

Johnson v. Johnson, 92 Delaware Co. Rep. 170 (C.C.P. March 4, 2005). Kenney, J. 4 pp.



CASE SUMMARY

Pensions

In *Johnston v. Johnston*, the Superior Court ruled that the trial court properly included employer benefits husband received after age 55 in its equitable distribution calculation as disability payments, even though the benefits had previously been categorized as disability payments, because the benefits converted to normal pension benefits at age 55.

During the parties' marriage, husband worked as a City of Philadelphia juvenile probation officer. He participated and

was vested in a pension, to which he made contributions through payroll deductions. In 1998, husband received monthly disability payments, resulting from an emotional disorder. Pursuant to the disability benefit, husband received a monthly payment of \$1838.02. Husband contended that the payments were lifetime disability payments and therefore not marital assets subject to equitable distribution. Wife conceded the payments were disability payments until husband reached 55 years of age on December 22, 2003; however, she argued that at that point, the payments converted to a retirement pension.

The trial court agreed with wife and determined the payments to be a marital asset subject to equitable distribution on the basis of its finding that the payments converted to normal pension benefits on December 23, 2003, when husband turned 55. After determining the present value of husband's pension, the court awarded 60% of the marital portion thereof to husband and 40% to wife.

Husband appealed, arguing that the trial court erred in characterizing his disability payments as a pension subject to equitable distribution, and that the trial court erred in treating his disability income as an asset for purposes of equitable distribution where wife previously used the income to calculate his obligation for child support.

The Superior Court, in a Memorandum Decision, upheld the trial court's determination that husband's benefits converted to normal pension benefits when he turned 55 and were therefore marital property subject to equitable distribution. From its review of the benefits plan, the court determined that "at age 55, Husband was entitled to his normal pension regardless of whether he returned to work." Opinion, P. 4.

The court referred to *Ciliberti v. Ciliberti*, 542 A.2d 580 (Pa.Super. 1988), in which the Superior Court held that while pension benefits are marital property subject to equitable distribution, true disability payments are not. However, a payment may entail both disability and pension payments. Thus, if a portion of the spouse's disability pension is representative of retirement benefits, the amount received in lieu of retirement benefits remains subject to equitable distribution. Here, husband offered no other documentation or evidence to support his contention that his was a lifetime disability benefit.

Husband also claimed that the trial court erred by including his "pension" income in the calculation of equitable distribution when that income had already been utilized in calculating husband's obligation for child support. The court disagreed, and determined that the trial court did not improperly include the pension income in its equitable distribution calculation after it had already used that income to calculate husband's child support obligation. As a general rule, the court does not condone the use of the same revenue for calculating support and equitable distribution. However, the

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trial court did not violate that rule because it counted husband's disability benefits, those he received before age 55, in the support order only. The benefit received after age 55 was a retirement pension. The trial court did not characterize the disability income as a marital asset; it characterized the retirement pension as a marital asset, which was properly subject to equitable distribution.

However, the court allowed husband the option of petitioning the trial court for a modification of the support order on the basis that the disability benefit converted to a retirement pension benefit, which could no longer be used to calculate support.

Johnston v. Johnston, Memorandum Decision, No. 503 EDA 2004 (Pa.Super. February 28, 2005). Del Sole, J. 6 pp.

**ARTICLE****Valuation**

In "**Business Valuation Standards — What Do They Mean to You?**" Robert E. Schlegel and Chris Hines note:

"Why should a matrimonial attorney pay attention to business valuation standards? Quite simply, because your knowledge can yield big judgment dividends by supporting your valuation expert or by impeaching the credibility of the opposing expert."

In 2005, business valuation experts in the United States are likely to be members of—or received education from—one of four professional organizations: The American Society of Appraisers (ASA), the Institute of Business Appraisers (IBA), the National Association of Certified Valuation Analysts (NACVA), or the American Institute of Certified Public Accountants (AICPA). All of these organizations either have professional standards or are in the process of adopting standards that address ethics, competency, objectivity, accepted procedures to develop the business valuation opinion, and how to report the opinion. These standards are dynamic; periodic updates, revisions and exposure drafts of new language are being regularly promulgated.

Schlegel & Hines. "**Business Valuation Standards—What Do They Mean to You?**" 23 *The Matrimonial Strategist* 3 (May 2005). 2 pp.

**PATERNITY****ARTICLE****Procedure**

"**Paternity Fraud, the Poor Person's Adoption and Interests of the Child**," by Thomas L. Leeds.

A child support hearing examiner compares formal and poor person's adoption; discusses relevant statutes, cases and uniform laws; then recommends a policy to harmonize the competing interests of the child, the adults and the government.

"If formal adoption and the procedures used to protect the interests of the child have any meaning then the "poor person's adoption" should be treated differently from the normal paternity/child support case and differently from the not so normal paternity disestablishment case. A "poor person's adoption" is not paternity fraud, nor is it an acceptable substitution for formal adoption. It is a unique circumstance which should concentrate on the interests of the child."

Leeds. "**Paternity Fraud, the Poor Person's Adoption and Interests of the Child**." 19 *American Journal of Family Law* 20 (Spring 2005). 5 pp.

**PRACTICE & PROCEDURE****ARTICLE****Attorneys**

"**Representing "High Profile" Clients in Family Law Cases**," by Randall M. Kessler and Sarah McCormack.

High profile clients may present atypical challenges. These include problems in attorney-client communications, public scrutiny and fact development. This article provides suggestions for handling these and other issues which arise when representing such clients.

The authors note: "All clients come into a case with certain expectations, and it is part of an attorney's job to contour those expectations in accordance with legal and practical realities. Unlike a typical client, however, high profile clients may have a level of expectation that is unusually elevated due to the "instant gratification" factor that their careers and lifestyles have come to contain. High profile clients, perhaps more than other clients, require meetings during unusual

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hours, quicker turn-around on phone calls, and more detailed reassurances about the progress of their case. Establishing a reasonable level of expectation from the beginning is therefore essential to keeping and cultivating a high profile client's (as well as any other client's) satisfaction."

Kessler & McCormack. *"Representing "High Profile" Clients in Family Law Cases."* 19 American Journal of Family Law 12 (Spring 2005). 3 pp.



ARTICLE

Discovery

"Collecting and Preserving Electronic Media," by Joan E. Feldman.

With growing use of computers and communication tools, electronic data is a vital source of discovery in matrimonial litigation. The author offers tips for gathering such evidence in a manner that will best assure its admissibility.

The author concludes: "With the ever-growing use of computers as business and communication tools, data stored electronically is a vital source of discovery in divorce cases. The days of relying upon printed material exclusively are gone forever. But as with tangible evidence, it is imperative that you gather electronic media in a manner that ensures the admissibility of the evidence. This requires attorneys to develop standard protocols for acquiring, preserving, and presenting electronic media. While the technology will continue to change, the basic techniques for collecting evidence should remain consistent."

Feldman, J. *"Collecting and Preserving Electronic Media."* 19 American Journal of Family Law 3 (Spring 2005). 4 pp.



CASE SUMMARY

Evidence

In *Fidler v. Cunningham-Small*, the Superior Court held that a trial court's admission of videotaped interviews of two sisters, ages six and seven, conducted by a county child welfare agency as to the validity of their report of being sexually abused by their stepfather, was properly admitted in lieu of courtroom testimony in their father's action for custody. Admission of videotape interviews of children regarding sexual abuse was properly admitted under the Tender Years Hearsay Act, since the tape was deemed reliable and testi-

mony in court would be found to harm the children.

Mother had primary physical custody of the parties' two daughters, when the Schuylkill County Children & Youth Agency received a report that the children had been sexually abused by mother's new husband. The girls recanted the allegations the next day and indicated that they had been prompted to make the claims at the urging of father's girlfriend.

Father subsequently filed a petition for special relief seeking primary physical custody of his daughters. He relied on the same allegations of abuse that were the subject of the Agency's earlier investigation and sought a hearing on the matter. At the hearing, father presented videotaped interviews conducted by the Agency on July 9, 2004. Apparently, father brought the girls to the Agency after they repeated their allegations to him. Agency personnel interviewed the girls and then referred them to the Children's Resource Center in Harrisburg, where they were interviewed on videotape by a caseworker there. Father offered the tapes to the court in lieu of the girls' direct testimony and in support of his claim that the girls were not safe with mother and her new husband.

Mother objected to the omission of the videotapes, which the trial court ultimately concluded were admissible as substantive evidence after an *in camera* review. The trial court then entered an order transferring primary physical custody to father and limiting mother's visitation to daylight hours without any contact with mother's new husband.

Mother appealed, arguing that the trial court's admission of the videotaped statements was improper hearsay as it did not meet the requirements of the Tender Years Hearsay Act, 42 Pa.C.S. §5985.1.

The Superior Court disagreed, and affirmed the order of the trial court awarding primary physical custody to father. The court said that under the Act, if the child will not be present as a witness, the trial court must determine whether the child is "unavailable"—whether testifying would cause serious emotional distress that would substantially impair the child's ability to communicate reasonably before the court. In this case, the mother contended that neither prong of the analysis was met.

Noting that in concluding that the statements were reliable the trial court focused not on the time they were made but rather on the manner in which they were elicited, the court added that the trial court considered the skill of the caseworker who took the statements and the methods by which she conducted the interviews. Finding no error, the court observed that the trial court's viewing of the videotape was informed by its prior knowledge of the children, who had already testified before it for months before the tape was made.

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The court stated that the trial court had a basis on which to determine that additional live testimony would so upset the girls that they would experience serious emotional distress, and their ability to communicate would be impaired.

The court added that the Act does not require the testimony of experts in establishing such distress, but does require that some concrete evidence of serious emotional distress be presented. The court said that in the absence of expert witnesses, a trial court's *in camera* examination of the subject child is the better practice to ensure that the determination of unavailability is well-founded. "Upon review of the entire record, including the videotapes, we find no error in the trial court's finding that the statements made in the taped interviews provided sufficient indicia of reliability." Opinion, P.10.

Fidler v. Cunningham-Small, ___A.2d ___, 2005 PA Super 98 (Pa. Super. March 16, 2005). Beck, J. 14 pp.

**SUPPORT****ARTICLE****Agreements**

In "*Waivers Of Spousal Support In Antenuptial Agreements*," Laura W. Morgan briefly reviews the status of the law on whether parties to an antenuptial agreement can waive various forms of spousal supports. At common law, such waivers were against public policy. In recent years, the strong trend is to permit enforcement of such waivers, as long as the agreement is otherwise valid. But a minority of states continue to follow the common-law rule.

Morgan. "*Waivers Of Spousal Support In Antenuptial Agreements*." 17 Divorce Litigation 62 (April 2005). 3 pp.

**CASE IN BRIEF****Gifts**

In *Loney-Heck v. Heck*, the trial court held that gifts are not income to the recipient under Pennsylvania support law.

The Court of Common Pleas of Dauphin County relied on *Collins v. Collins*, 121 Dauphin Co. Rep. 386 (2002), aff'd, 849 A.2d 600 (Pa. Super. 2004), which found that periodic payments from family to obligee were not income under the support law. "Although the gift payments to obligee are not income to her, they can be considered a basis for deviation under the Support Guidelines. Pa.R.Civ.P. 1910.16-5(a)."

Loney-Heck v. Heck, 122 Dauphin Co. Rep. 276 (C.C.P. March 4, 2005). Turgeon, J. 7 pp.

**CASE IN BRIEF****Personal Injury Awards & Settlements**

In *Coburn v. González*, the trial court held that when overtime is earned, it is averaged for the purposes of determining income available to pay support.

The Court of Common Pleas of Cumberland County declared: "We do not believe that an obligor working full-time must work overtime and be subject to a calculation of income based on earning capacity if such overtime is rejected. However, when an obligor chooses to work overtime, as in this case, it benefits both himself and the children he is obligated to support." The court noted that the situation may be different if an obligor works two separate full-time jobs.

Coburn v. González, 53 Cumberland 163 (C.C.P. September 16, 2004). Bayley, J. 3 pp.

**CASE IN BRIEF****Income**

In *Ryckman v. Ryckman*, the trial court held that if a spouse in possession of a rental property has failed to rent it, the court will impute the reasonable rental income to her. The court found that it was not reasonable for wife to keep a one-bedroom apartment vacant or to use it for her business when it could be generating further income to her.

The Court of Common Pleas of Crawford County also found that while alimony *pendente lite* may be terminated if the recipient delays the divorce proceedings, it is up to the spouse paying alimony to request termination; the court will not arbitrarily set a termination date. "There is also some older case law in the appellate courts supporting the proposition that alimony *pendente lite* can be terminated prior to the resolution of a divorce and related matters if the party receiving the alimony *pendente lite* does not move the proceedings forward.... Thus, it appears clear that alimony *pendente lite* that has been awarded can be terminated prior to the resolution of the divorce proceedings and related claims due to the receiver of alimony *pendente lite* not exercising due diligence in moving a divorce forward if that person is the plaintiff or for holding up the divorce proceedings if that person is the defendant in the divorce action."

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Ryckman v. Ryckman, 27 Crawford Leg. J. 145 (C.C.P. February 27, 2005). Vardaro, J. 7 pp.

**CASE SUMMARY****Modification of Support**

In *McClain v. McClain*, the Superior Court ruled that the trial court properly relied on the parties' divorce agreement in conjunction with the divorce decree from an outside jurisdiction in its decision to deny a modification of father's child support obligations, because the language of the two documents clearly stated the parties' intention that they merge. Moreover, the full property settlement agreement, not just the registered support provisions, could be considered by the trial court on the petition to modify, where the full agreement had been incorporated into the divorce decree and it would have been illogical to modify the order without reviewing the basis for its entry. Father failed to demonstrate a change of circumstances warranting modification of the support order.

The parties had been divorced in Texas and negotiated two agreements there in connection with property and divorce issues. Father registered the Texas child support order and four months later filed the instant petition to decrease. The support master determined that father's income had nearly doubled since the execution of the support agreement.

Father had contended that he expected to be called to military service in the near future, although he provided no evidence. The master reasoned that if father was called to duty, his income would return to the same amount as existed at the time of the execution of the agreement.

The trial court granted father's request to register the child-support order entered by the Texas court while the parties were Texas residents. However, the court denied father's petition to modify the order.

Father appealed, arguing that the trial court improperly relied on the parties' divorce agreement executed in conjunction with the parties' Texas divorce decree in rendering its decision to deny his requested downward modification, rather than just its interpretation of the support provisions of the Texas divorce decree, which father had registered. Father argued that the two documents were separate and distinct and that his request for modification solely referenced the decree and not the agreement.

The Superior Court affirmed the trial court's ruling, finding that both the decree and the agreement were essential to the trial court's consideration, because the court could not consider a petition requesting a modification of support without

examining the bases for the existing support order. "It is apparent that the language in the Decree allows for modification of the amount of child support, while the language in the Agreement is silent as to that issue. However, both documents include language expressing the parties' intentions that the two documents be considered as one, i.e., the Agreement is incorporated into the Decree. Conversely, neither document employs any merger language." Opinion, P. 8.

As the court recognized in *Jones v. Jones*, 651 A.2d 157 (Pa. Super. 1994), if the language of such documents makes clear that the parties intended that the documents merge, then the documents speak for themselves. *Jones* further provides that an agreement that does not merge with a decree cannot be modified by a court. Rather, it is an enforceable contract and is governed by contract law.

Here, in both the decree and the agreement the parties acknowledged that the documents would merge and that they contain the entire settlement of the rights and obligations incident to the divorce. The court concluded that it would be illogical to consider a petition to modify without the ability to examine the basis for the existing order. Therefore, the trial court properly considered both documents in determining whether father's modification petition should be granted.

Father also argued that mother should have been assigned an earning capacity. Father referred to mother's testimony wherein she acknowledged that she has a bachelor's degree in communications and earned approximately \$30,000 per year prior to the birth of the parties' son. "However, Father fails to mention Mother's testimony wherein she stated that the parties had agreed that Mother would become a stay-at-home-mom following the birth of their son. Father also makes no mention of the fact that Mother is working part-time from her home so that she can care for the child. Although we recognize that 'the determination of a parent's ability to provide child support is based upon the parent's earning capacity rather than the parent's actual earnings,' ... a court may make an exception to the rule whenever a parent chooses to stay at home with a minor child." Opinion, P. 13.

McClain v. McClain, ___ A.2d ___, 2005 PA Super 130 (Pa. Super. April 11, 2005). Bender, J. 13 pp.

**CASE IN BRIEF****Personal Injury Awards & Settlements**

In *Rakowsky v. Rakowsky*, the trial court held that since the entire amount of a tort award is money which a parent can spend at his discretion and use to pay his debts, it should be considered as a financial source in determining support.

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Father asserted that because the personal injury settlement was applied to the purchase of a vehicle to replace a vehicle that was lost in an accident giving rise to the personal injury action, those funds should not be considered income.

The Court of Common Pleas of Bucks County disagreed, and declared: "Our Courts have consistently held that because the entire amount of a tort award is money that Father can spend at his discretion and is available for all of his debts, it should be considered a financial resource in determining support. *See, Darby v. Darby*, 686 A.2d 1346 (Pa.Super. 1996)."

Rakowsky v. Rakowsky, 78 Bucks Co. L. Rep. 288 (C.C.P. November 3, 2004). Goldberg, J. 12 pp.

**CASE IN BRIEF****Income**

In *Cason v. Wilson*, the trial court held that proceeds from appellant's civil suit were properly subject to garnishment for the purpose of providing child support.

The Court of Common Pleas of Bucks County held that child support obligations are to be given priority over other expenses. Accordingly, father's civil suit proceeds were properly subject to garnishment for the purpose of providing child support. "It is proper that Father's civil suit proceeds should go to his children, rather than to himself, to satisfy the Order and provide the children with some means of aid and support."

Cason v. Wilson, 78 Bucks Co. L. Rep. 104 (C.C.P. August 25, 2004). Fritsch, J. 3 pp.

**CASE SUMMARY****Procedure**

In *Phillips v. Wheeler*, the Superior Court ruled that the trial court did not err by failing to use health insurance information provided by mother's employer in determining father's obligation to contribute toward the cost of their children's health insurance.

The trial court awarded mother primary custody of the parties' two children after the parties' separation. Mother initially agreed to provide the children's health insurance coverage through her employer's plan. However, after a significant increase in the cost of that insurance, the trial court ordered father to contribute.

The trial court, following the recommendation of the hearing officer, calculated the amount of father's contribution using the pro rata formula found in Pa. R.Civ.P. 1910.16-6(b)(2). The trial court refused to rely on a Health-Insurance-Coverage Report prepared by mother's employer that included a statement of insurance expenses, finding that the handwritten information was ambiguous.

Father appealed, arguing that the trial court erred in failing to use the health insurance information supplied by mother's employer to the domestic relations office to determine his health-insurance obligation.

The Superior Court, in a Memorandum Decision, affirmed, concluding that the trial court did not abuse its discretion in finding the employer-prepared document to be ambiguous and without controlling weight. As the trial court correctly ruled, an ambiguous out-of-court declaration by an unknown declarant has no weight.

"Since there is ample evidentiary basis to support the ruling of the trial judge, we find that the trial court acted properly within its discretion in using the formula set forth in Rule 1910.16-6(b)(2), rather than the information contained in the PACSES health insurance coverage report to determine father's health insurance coverage obligation." Opinion, P. 6.

Phillips v. Wheeler, No. 2491 EDA 2004 (Pa.Super. March 1, 2005). Joyce, J. 7 pp.

**ARTICLE****Social Security**

In "*Social Security: A 2005 Update*," Brett R. Turner considers social security in setting spousal support.

The author notes: "State courts generally hold that Social Security benefits may be considered as one relevant factor in setting spousal support ... in the great majority of cases, Social Security benefits are most appropriately considered as a factor in setting support. Such consideration is more consistent with federal law, and it permits modification in the event of material changes in the Social Security system itself."

Turner. "*Social Security: A 2005 Update*." 17 Divorce Litigation 53 (April 2005). 9 pp.



Spousal Conduct

In *Rose v. Rose*, the trial court ruled that when the defendant support obligor voluntarily leaves the marital residence, and the evidence does not show a "lock out" or constructive desertion, it is not the plaintiff support obligee's burden to provide reasons for the separation, but the defendant's to prove conduct on the part of the plaintiff constituting grounds for a fault divorce.

The Court of Common Pleas of Somerset County declared: "Although defense counsel argued that the defendant was prevented from returning to the home, we find insufficient evidence of a 'lock out' or constructive desertion to warrant reversal of the Master's findings and recommendations. The defendant did not present evidence sufficient to merit a finding that the plaintiff had engaged in conduct constituting grounds for a fault divorce.... It is the general rule that a dependent spouse is entitled to support until it is proven that the conduct of the defendant spouse constitutes grounds for a fault divorce."

Rose v. Rose, 61 Somerset Leg. J. 370 (C.C.P. May 25, 2004). Fike, J. 2 pp.

**CASE IN BRIEF****Spousal Support**

In *Turnau v. Ciganik*, the trial court ruled that the time to be considered when determining the duration of a spousal support award is the time during which the parties lived together from the date of marriage to the date of final separation.

The Court of Common Pleas of Westmoreland County determined that where the parties resided together for, at most, seven or eight months from the date of marriage to the date of separation, and were married approximately one full year before they resided together, an award of 11 months of support is long enough.

Turnau v. Ciganik, 86 Westmoreland L. J. 75 (C.C.P. January 23, 2004). Marsili, J. 5 pp.

**ARTICLE****Federal Income Taxes**

In "*How Should I File My Taxes? Helping Your Client Decide for Next Year*," Joanne Ross Wilder writes:

"The timing of a divorce decree can make a big difference in the parties' federal income tax liability because their filing options are determined by their marital status at the end of the tax year. Under federal tax law, taxpayers who were married for 364.5 days but had their divorce decree entered on the afternoon of Dec. 31 are deemed to be single for that tax year. Parties whose divorce decree is entered on the first business day of the new year are married for purposes of filing the previous year's tax returns. Similarly, parties who are divorced or otherwise single during the year who remarry on Dec. 31 are married for purposes of filing their tax returns for that year. Parties who are still married and not judicially separated are married for purposes of filing their tax returns no matter how long they have been separated. IRC Secs. 6012-6013. It is important to give consideration to the client's filing options because filing status can produce considerable variation in the tax bill on the same income."

Wilder. "*How Should I File My Taxes? Helping Your Client Decide for Next Year*." 23 *The Matrimonial Strategist* 1 (May 2005). 3 pp.