

# LEGAL UPDATE FALL 2012

From the Law Offices of

*Russell I. Marnell, P.C.*

Divorce and Family Law Attorneys

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## Announcements

We are pleased to welcome Gina Dorcelus as our new junior associate. Gina graduated summa cum laude with a Bachelor of Arts degree from St. John's University and received her J.D. from the Ohio State University Michael E. Moritz college of Law.

Bruce W. Albert, Esq. was awarded a plaque in honor of his six year tenure as an executive officer and President of the prestigious New York Family Law American Inn of Court reading..."In recognition of your efforts to improve the skills, professionalism, civility and ethics of the matrimonial bench and bar."



Mr. Albert also presently serves on a select committee appointed by the Chief Administrative Judge of Nassau County to make recommendations on behalf of the matrimonial bar to streamline the operations of the matrimonial courts.

In November, Russell Marnell will be a guest speaker at the National Business Institute's seminar on Financial Settlements and Support Issues in Divorce. His topic will be Tax Consequences and Reporting.

### *Court of Appeals Determines that Visitation is Foreclosed Where Parents Rights are Terminated After Contest*

In a case recently decided by the New York Court of Appeals (the highest Court in the State), the Court found that visitation rights are foreclosed between a biological parent and their child when the biological parents' rights have been terminated after a contested proceeding. This case resolved a split between the four departments of the Appellate Division.

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Under New York Law, an authorized agency that brings a proceeding to terminate parental rights must establish that it has made diligent efforts to encourage and strengthen the parent child relationship. Once the agency has met that burden, it must prove that the parent permanently neglected the child, which is defined as follows :

- failing for more than one year after the child is in the care of the authorized agency to
- substantially and continuously maintain contact with the child
- plan for child's future.

In this case, the child, Hailey was born in 2007. She was three months old when her biological father was sentenced to five to fifteen years in prison. The child was removed by Social Services from her mother's home in November of 2008. In and around March 2010, the biological mother voluntarily surrendered her parental rights. The biological father did not agree to surrender his parental rights.

The Court also determined that the agency met its burden of diligent efforts by communicating with the biological father regarding the child's progress, and the agency also investigated biological father's relatives to no avail. Because the biological father contested the action and was stripped of his parental rights, the Court found that there is no legal basis to order visitation between the biological father and the child.

### Highlights of this issue:

-  Announcements
-  Court of Appeals Determines that Visitation is Foreclosed Where Parents Rights are Terminated After Contest
-  Earning Capacity and Licenses
-  Changes to Child Support Income Withholding Order
-  Order of Protection Denied

## ***Enhanced Earning Capacity and Licenses***

In a case recently decided by the Appellate Division Third Department, the Court agreed with the trial court that Husband was entitled to 10% of the value of Wife's law degree.

The parties were married in 1991. They had two children during the marriage. The Husband completed his studies in psychology and obtained a Ph.D degree. The Wife attended law school and earned a law degree during the marriage. The divorce action commenced in 2006. The Wife passed the bar exam and obtained her license to practice law after the filing of the divorce complaint.

The Husband filed an appeal because he believed that he was entitled to more than 10% of the value of the Wife's law degree. He argued that while the Wife was attending law school, he was the family's primary wage earner. He asserted that he re-arranged his work schedule so he could care for the children while the Wife completed her studies.

The Appellate Court found that Husband's contributions represents "overall contributions to the marriage rather than an additional effort to support the Wife in obtaining her license." Therefore, the Court found that Husband was entitled to only 10 % percent of the overall value in Wife's law degree. The Court arrived at a similar conclusion regarding Wife's claim that she was entitled to a larger portion of Husband's Ph.D degree.

## ***Significant Changes on Child Support Income Withholding Order***

Under New York Law, there are three ways in which child support can be paid:

- Directly from payor to payee
- Payable by way of the New York State Child Support Enforcement Program, i.e. the local Support Collection Unit (S.C.U.) - 90% of Family Court cases are payable through S.C.U.
- By private Income Deduction Order or Income Withholding Order

Under the third method, an employer is instructed by Counsel or the Court to withhold from the payor's paycheck a certain amount to satisfy their support obligation. They are also instructed to send the support directly to the payee. Please note that an order of spousal support or maintenance cannot

be enforced through the S.C.U.

### **Effective as of May 31, 2011:**

- Income Withholding Order must instruct that the employer send the payment to the processing center in Albany and not directly to the payee; and

### **Effective as of May 31, 2012:**

- There is a new federal Income Withholding Order form that must be used. (The form can be found at [www.acf.hhs.gov/programs/cse/courts.html](http://www.acf.hhs.gov/programs/cse/courts.html)).

Once the employer sends the payment to Albany, the processing center records the payment and sends the check to the payee. If your attorney does not comply with the directions listed above, then there may be a delay in payment to the payee (person receiving support). With respect to the old Income

Withholding Orders that are already processed by the employer, the employer must contact the person who issued the Income Withholding Order and request a revised Income Withholding Order, which directs payment. Please note that if your support obligation is payable through the S.C.U., S.C.U. will use the correct form.

## ***Order of Protection Denied Where Relationship Lacked Intimacy***

In a case recently decided by a Brooklyn Family Court, the Court denied a party's request for an Order of Protection where the relationship between the parties lacked intimacy. Under the Family Court Act, the Court has the power to issue an Order of Protection for family offenses, which concern acts which constitute the following crimes: harassment, stalking, assault, sexual abuse, and forcible touching when such crimes are committed between the following persons:

- spouses or former spouses;
- parent and child;
- members of the same family or household

The Family Court Act defines members of the same family or household as the following:

- persons related by blood
- persons legally married to one another
- persons who have a child in common
- persons who are not related by blood and who are/have been in an intimate relationship

The New York Legislature has provided the Courts with factors to consider when determining whether persons are in an intimate relationship:

- nature or type of relationship regardless of whether the relationship is sexual
- frequency of interactions between persons
- duration of the relationship

In this case, the parties, Shannon and Michael, met through an online dating site. Over the course of several weeks, the parties exchanged a number of emails and chatted online and Michael did some repair work in Shannon's home. Some of the exchanges contained "flirtatious messages." However, the Court found that casual acquaintances between individuals in business/social contexts did not give rise to an intimate relationship. The Court also reasoned that the Family Court is a forum for resolving disputes between person who are intimately connected through familial ties or by emotional bonds arising from domesticity or companionship. As a result, the Court denied Shannon's request for an Order of Protection.

### *Profile of The Firm*

**Russell I. Marnell** is admitted to the bars of New York, California, Nevada, Florida, the United States Tax Court and Federal District Court. He has litigated over 500 trials including those involving complex custody, equitable distribution, child support, maintenance, and all issues involving family law. Mr. Marnell is the past chairman of the Nassau County Bar Association Matrimonial Committee's Child Custody Sub-Committee. He is currently a member of The Matrimonial Committees of The Nassau and Suffolk County Bar Associations. Mr. Marnell is a member of the prestigious New York Family Law American Inns of Court, is a fellow of The American Academy of Matrimonial Lawyers, and was a Nassau County Family Court Law Guardian. He was previously Chairman of the Attorneys/Accountants Committee of the Nassau County Bar Association. Mr. Marnell has published numerous articles on various matrimonial and family law topics, is a frequent lecturer on these subjects, and has appeared on several television and radio programs. Mr. Marnell has obtained an MBA in accounting and has passed the CPA examination. Finally, he is "AV" rated by Martindale-Hubbell\*\* (An AV rating shows that a lawyer has reached the height of professional excellence. He or she has usually practiced law for many years, and is recognized for the highest levels of skill and integrity.)

\*\*"CV, BV, and AV are registered certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies. Martindale-Hubbell is the facilitator of a peer review process that rates lawyers. Ratings reflect the confidential opinion of members of the Bar and the Judiciary. Martindale-Hubbell Ratings fall into two categories – legal ability and general ethical standards."

**Gina Dorcelus** is an associate attorney with the Law Offices of Russell I. Marnell, P.C. She concentrates in divorce and family law. Ms. Dorcelus received a Bachelor of Arts summa cum laude in Government and Politics from St. John's University in Jamaica, New York. She holds a J.D. from the Ohio State University Michael E. Moritz College of Law and is a member of the New York and New Jersey Bars. She formerly served as a judicial law clerk to the Honorable Julio L. Mendez, Presiding Judge of the Family Part of the New Jersey Superior Court in Cumberland County, NJ. As a

clerk, Ms. Dorcelus observed a significant number of divorce trials, drafted divorce opinions, and mediated contested cases resolving parenting time and child custody disputes. While matriculating at Moritz, she served as a law clerk in the Justice for Children Clinic. As a clerk in the Justice for Children Clinic, she represented juveniles in delinquent and immigration matters. Ms. Dorcelus understands the needs of clients on the brink of divorce. She is a first generation Haitian American who is fluent in French Creole. She is a member of the New York Family Law Section of the New York State Bar Association as well as the Matrimonial Committees of the Nassau and Suffolk County Bar Associations and the Immigration Lawyers Association.

**Susan P. Marnell**, who is of counsel to the firm, concentrates on estate planning, drafting of wills, trusts and related documents, estate administration and guardianship matters. Her practice also includes counseling elderly clients and their families on Medicaid, Medicare, tax and legal issues, including the use of durable powers of attorney, living trusts, health care proxies and living wills and real estate matters. Mrs. Marnell holds a J.D. from Hofstra University and is a member of the Estate Planning and Elder Law sections of the New York State, Nassau County and Suffolk County Bar Associations. Mrs. Marnell has been appointed as a court evaluator and guardian ad litem in numerous guardianship and probate matters.

**Bruce W. Albert**, of counsel, has been engaged in the practice of family law in New York City, Long Island and Westchester as a sole practitioner and counsel to other firms for more than 35 years. He is an adjunct professor at Hofstra University Law School and regularly lectures at local professional organizations and schools, authors articles and has appeared on national television to speak on family matters. Mr. Albert is admitted to the United States District Court for the Eastern District of New York and is a Master, Executive Committee member, and was secretary-treasurer and counselor of the prestigious national New York Family Law American Inns of Court as well as its immediate past president. He is also a member of the Nassau County Bar Association and the Matrimonial and Ethics Committees, as well as the Speakers Bureau. Bruce W. Albert is a New York State Court appointed Arbitrator and has been appointed as a Referee and Neutral Evaluator in matrimonial cases. Mr. Albert also presently serves on a select committee appointed by the Chief Administrative Judge of Nassau County to make recommendations on behalf of the matrimonial bar to streamline the operations of the matrimonial courts.

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The Law Offices of Russell I. Marnell, P.C. is a fully staffed, computerized law firm which has capably met the legal needs of the Long Island community and New York City for more than 25 years. We welcome the opportunity to handle all of your legal problems. In the event we do not handle the type of law in question, we would be more than happy to refer your case to a qualified law firm to assure that your problems are handled properly and professionally.

The information in this newsletter is presented as general information and is not to be construed as legal advice to apply to any person or particular situation. Please keep in mind that the law is constantly changing and therefore you should always consult an attorney for legal advice based on the individual circumstances of your situation.

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