

LEGAL UPDATE WINTER 2012

From the Law Offices of

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Announcements

Russell Marnell recently represented a plaintiff mother in an extraordinarily lengthy and contentious custody trial in Nassau County Supreme Court, involving numerous experts and witnesses. One of the children suffers from a severe form of autism, which further complicated the trial. Mr. Marnell was successful in obtaining sole custody for the mother and having the father's

visitation substantially reduced.

Russell Marnell was a guest speaker at the Association of Divorce Financial Planners meeting held at the Suffolk County Bar Association regarding financial issues in same-sex marriages.

Scott R. Schwartz was successful in obtaining 100 percent of the marital property, including a \$500,000.00 house and a \$1,000,000.00 retirement plan for a Husband at trial where the husband's spouse had abandoned the husband and their six children in 1994 without ever returning. The Court issued this decision notwithstanding the fact that the parties had resided together as an economic unit from 1977 until 1994.

Scott R. Schwartz was successful in getting two separate petitions seeking Orders of Protection dismissed by the Court without a hearing on the grounds that the petitions failed to set forth a prima facie case to establish a Family





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Offense. (Failed to meet the minimum standards required in order to be awarded an Order of Protection.)

Court of Appeals Determines That Funds Acquired by Fraud are Considered To Be Marital Property

In a case recently decided by the New York Court of Appeals (the highest Court in the state), it was determined that assets fraudulently acquired by the Husband and ul-

Highlights of This Issue Include:

-  Announcements
-  Are funds acquired by fraud considered to be Marital Property?
-  Court rejects SUNY Cap when determining parents' financial obligation to pay for their children's college expenses
-  Downward Trend in The Courts' Distribution of Businesses

mately transferred to the Wife in the divorce settlement constituted marital property which did not have to be returned by the Wife.

In that case, the Husband had defrauded more than \$550,000,000.00 from funds that he managed on behalf of investors. The fraud was not discovered until after the parties' divorce settlement was signed and part of the funds had been transferred to the Wife.

In reaching the conclusion that the Wife could retain these funds, the Court focused on the fact that the Wife allegedly had no knowledge that the funds in question had been obtained illegally, and it would be wrong to punish an innocent and unknowing spouse. The Court also considered the fact that there was fair consideration paid by the Wife in exchange for the fraudulently obtained funds.

The ultimate conclusion of the Court was that where a spouse receives monies in a marital settlement and is unaware that some or all of the assets received were illegally acquired by the other spouse, she receives good title to the disputed property and may retain the monies received in the marital settlement.

The Court considered the public policy that spouses have a reasonable expectation of finality once they have entered into a valid agreement.

Court Rejects Bid to Impose SUNY Cap for College Expenses

Although the imposition of a SUNY cap is not mandatory and is not actually the law in this state, it is customary and is frequently applied by both Courts and attorneys in determining and settling divorce cases.

Thus, where one or both of the spouses is obligated to contribute towards the cost of their child's or children's college expenses, the Court typically imposes or in the event of a settlement, the respective attorneys typically agree that each spouse's obligation to pay for the children's college educations shall not exceed the cost of a SUNY college.

While the children are free to attend a non - SUNY school, the parents' obligations to pay for college expenses is often limited to or capped at the cost of a SUNY school.

However, in a recent case, the Court discarded the typical SUNY Cap in requiring a husband to pay 40 percent of his child's college education at Syracuse University. The

Court rejected an argument that imposition of a SUNY cap had become so ingrained that it is an actual established tenet of matrimonial law in New York State.

The Court's conclusion was that Courts view the SUNY cap as something less than an established doctrine firmly ensconced in the fabric of family law and that it was a concept that comes into play under certain limited circumstances.

Downward Trend in The Courts' Distribution of Businesses

New York is an Equitable Distribution State. This means that generally, title is irrelevant to the evaluation of each spouse's respective entitlement to marital property. Unlike a community property state in which all of the property is generally distributed equally, marital property in New York is distributed equitably. Thus, when distributing most types of marital assets, Courts typically distribute the marital property on a near equal basis, especially in long terms marriages of 15-20 years or longer. While there is no obligation or requirement for an equal split, this is generally what is done by the Courts in most instances after a consideration of the parties' contributions towards the acquisition of the property.

However, one exception to this relatively equal division of marital property in long term marriages concerns a spouse's business.

New York adopted equitable distribution in 1980. Early on, Courts would typically award non - titled spouses with between 40 - 50 percent of the value of a business owned by the other spouse when the business was started during the marriage and was strictly marital property.

Shortly thereafter, Courts started to take the non - titled spouse's efforts and contributions towards the business into consideration on a more significant basis.

Where the non - titled spouse's contributions were modest, the percentage awarded was decreased to less than 40 -50 percent.

From that point forward, awards of 40 -50 percent were reserved to the rare instance wherein the non - titled spouse had made significant and substantial direct contributions towards the acquisition and day to day operations of the business.

Thus, recently, the percentage of a business's value awarded by the Court to non -titled spouses have

decreased, and have ranged from a low of 0 -10 percent to a high of 40 - 50 percent, depending on the level of the non-titled spouse's contributions towards the business.

This information is important to consider if you are the owner of a business which was started during the marriage or if your spouse owns such a business.

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 two hundred 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 is a Nassau County Family Court Law Guardian. He is also the current Chair of the Attorneys/Accountants Committee. 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.)

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Scott R. Schwartz, the firm's Senior Associate, is a 1992 graduate of The Hofstra University School of Law. He is currently a member of The Matrimonial Committees of The Nassau and Suffolk County Bar Associations as well as The Nassau County Bar Association Child Custody

Sub-Committee. Mr. Schwartz is also a member of the prestigious New York Family Law American Inns of Court. He has drafted articles published in The New York Law Journal as well as other legal publications. Several cases on which Mr. Schwartz has worked have been published in New York State case reporters. Mr. Schwartz concentrates in complex divorce, family law and custody matters, has argued cases before New York State's Appellate Division, and is admitted to both the New York State and District of Columbia Bars.

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 secretary-treasurer 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.

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- Matrimonial, divorce, and all other family law matters
- Wills, estate planning, probate of wills and estate litigation

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 20 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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