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## **Perspectives on Controversies and Some Cautionary Tales From the Intersecting Worlds of Divorce, Family Law and the News**

By Alton L. Abramowitz and Leigh Baseheart Kahn | November 16, 2023

Recent news stories featuring celebrities, prominent businesspeople and the wealthy provide fodder for public consumption and their reported circumstances and controversies lend themselves as examples of situations (occasionally outlandish) that provide important lessons to matrimonial and family law practitioners and their clients.

One of the delights of practicing in the field of matrimonial and family law is that barely a day goes by when lawyers are not presented with stories, facts, controversies and news that can only be categorized as “you can’t make this stuff up!” It is what makes the life of a family lawyer interesting and consuming, as well as stressful.

Not only are an attorney’s legal skills and knowledge called into play on a daily basis, but those attorneys are called upon to use their best judgment in providing advice to their clients.

Oftentimes those judgments and advice are based on mere common sense acquired throughout the lawyer’s life based on their professional and personal experiences. Discussing cases with one’s colleagues occasionally provides differing perspectives on the approach that should be employed when advising and advocating for a client.

Other sources of perspective are reported decisions by judges in precedential cases, legislative initiatives and, from time to time, newsworthy stories reported by the media which provide cautionary tales of what is going on in the world at large, particularly the salacious details of the family law disputes of the rich and famous.

F. Scott Fitzgerald wrote “the rich are different than you and me,” and Ernest Hemingway is alleged to have responded with “yes, they have more money.” Recent news stories featuring celebrities, prominent businesspeople and the wealthy provide fodder for public consumption and their reported circumstances and controversies lend themselves as examples of situations (occasionally outlandish) that provide important lessons to matrimonial and family law practitioners and their clients.

## **Celebrity Custody and Child Support**

On Oct. 26, 2023, and Nov. 2, 2023, the New York Post ran stories regarding 83-year-old Oscar-winning actor Al Pacino’s settlement of his custody and child support cases with his 29-year-old girlfriend regarding their now five-month-old son. Strikingly, the stories indicate that the two parents remain “romantically involved” and that Pacino has agreed to pay \$30,000 per month, or \$360,000 per year, in support for this infant child. In addition, the articles go on to say that Pacino will also pay \$13,000 per month for a “night nurse” and that he agreed to cover any of the child’s medical bills that are not covered by insurance.

While sums of this magnitude for support of such a young child may not be uncommon by California standards for the offspring of celebrities, one may pause to consider whether a New York court would have encouraged this child support award in such a great amount under its Child Support Standards Act (CSSA) found in Article IV of the New York Family Court Act (FCA) and/or of the New York Domestic Relations Law (DRL) §240, 1-b.

While the provisions for uncovered medical expenses and for childcare are certainly contemplated by the statute, an application of the factors contained in the CSSA, as well as an assessment of the financial needs of a healthy five-month-old, would render an award of \$30,000 per month outlandish in the eyes of the average citizen and leads to the question of whether this amount is really, in part, “alimony” disguised as “child support” because the parents of the child were never married and, thus, no legal obligation exists that would require the more affluent parent to support the less monied parent.

## **Covenant Marriages**

Pivoting to the world of politics, Alyson Krueger of the New York Times wrote about “covenant marriages” in her Nov. 3, 2023, piece, focusing on the covenant marriage of the newly minted Speaker of the House of Representatives Mike Johnson and his wife of roughly 24 years, Kelly Johnson.

The article entitled “What is a Covenant Marriage?” indicates that only three states—Arizona, Arkansas and Louisiana—permit such marriages (thankfully, New York does not provide for covenant marriages). Thus far, it appears that covenant marriage is optional in these three states and couples who are about to marry or reconfirm their marital vows are not required to agree to a covenant marriage.

The theory behind covenant marriages is that they make it difficult for the spouses to divorce by requiring that the spouse seeking to end the marriage must prove fault, which generally falls into the categories of “adultery, physical or sexual abuse, abandonment for more than one year or imprisonment”, essentially doing away with “no fault divorce” based on the premise that when the couple vows during the wedding ceremony to remain married “until death do us part,” they are making a commitment and entering into an agreement to remain married for the rest of their joint lives. Thus, the party seeking the divorce could be left in matrimonial purgatory should a judge decide that they do not have sufficient proof of the fault grounds for a divorce.

By making divorce so difficult, covenant marriages smack of indentured servitude and provide opportunities for a spouse who is more powerful financially or psychologically to engage in abusive and controlling behaviors toward the other, less powerful spouse—e.g., economic control, threatening to take the children away, coercive threats, emotional abuse, blame assessment, isolation, intimidation, etc. Therefore, merely because a covenant marriage offers the panacea of a lasting marriage, it can be marred by seemingly never-ending years of unhappiness.

## **Seward & Kissel Sued for Malpractice and Fraud**

In interesting news from the financial world, according to Forbes (Nov. 1, 2023) and the New York Times (Nov. 6, 2023), Laura Overdeck has sued the law firm of Seward & Kissel (S&K) in New Jersey Superior Court for malpractice and fraud. Ms. Overdeck is the wife of John Overdeck, a co-founder of the hedge fund Two Sigma, who is purportedly worth more than \$7 billion.

According to Ms. Overdeck, S&K represented her and her husband in 2007 when they created New Jersey trusts as part of their estate planning designed to reduce their federal estate and gift taxes for their own benefit and that of the three children of their marriage. Subsequently, in 2018, S&K prepared documents creating Wyoming trusts that permitted her to be removed as a beneficiary of those Wyoming trusts if one of the spouses sued the other for a divorce. Documents were also signed at that time which decanted (i.e., transferred) the assets of the New Jersey trusts to the Wyoming trusts.

Ms. Overdeck claims that she was never advised of this potential consequence and that she was essentially told that the Wyoming trusts were being implemented solely in order to shield the trust assets from “certain taxes”. Further, Ms. Overdeck claims that the trust documents give her husband unfettered power to determine how much their three children would inherit and that they enabled him to also distribute the trust assets to any other children that he may have.

It should be noted that, when the spouses discussed a possible postnuptial agreement in 2013, S&K had sent the wife an e-mail saying that S&K could not represent either of them on that matter, which Ms. Overdeck assumed meant that the firm had a conflict of interest. However, Ms. Overdeck was not notified by S&K of any potential conflict when she was asked to sign the Wyoming trust documents in 2018, five years later. Ms. Overdeck claims that S&K had a fiduciary duty to her as a client to advise her of the detrimental effects of the new trusts with respect to her interests in the trust corpus involved, and further claims that S&K helped her husband to defraud her and that it committed malpractice.

S&K’s defense is that they had not provided any legal representation to her since 2010, notwithstanding the fact—raised by Ms. Overdeck—that S&K was paid from her and her husband’s joint bank accounts. No matter how this case ultimately shakes out in court, the

cautionary lesson for trusts and estates lawyers who provide representation to a family in the estate planning context is that there is a potential conflict of interest, at a minimum, when those same lawyers represent only one spouse in later date estate planning activities and otherwise.

### **Cautionary Tale: Attorney Conduct and Divorce Lawyer Obligations**

Of further note regarding attorney conduct is the Appellate Division, First Judicial Department, on Oct. 26, 2023, decision in *Suzuki v. Greenberg*, \_\_ AD3d \_\_, 2023 WL7028609. That decision provides a cautionary tale for divorce lawyers regarding their obligation to candidly provide the court with all of the facts, rather than intentionally omit those which may be damaging to their client's claims.

In this case, the Appellate Division affirmed an award of summary judgment on Ms. Suzuki's claim for treble damages pursuant to New York Judiciary Law §487 based on allegations that the defendant, who had represented her ex-husband, "knowingly failed to inform the [matrimonial] court" that she "had been awarded primary physical custody of the child of the marriage", and that the attorney had also prepared an affidavit for her ex-husband that falsely stated that the ex-husband had never been a party to a neglect proceeding and alleging that he was the custodial parent of the child.

The attorney also submitted a final judgment of divorce purporting to award his client primary physical custody of the child based on agreements signed three years before the neglect and custody proceedings in the Kings County Family Court that had resulted in the wife receiving primary physical custody of the child. Further compounding the attorney's malfeasance was his presentation of a motion seeking to hold the mother in contempt of the custody provisions of the proposed judgment.

The Appellate Division held that "Plaintiff established her entitlement to summary judgment by submitting evidence that defendant had intentionally failed to apprise the court of the Kings County custody order, thus affirmatively misrepresenting the existence of adverse information relevant to the proceedings." The Appellate Division went on to find that "a single egregious act" is sufficient to enable recovery under Judiciary Law §487 and that treble damages were

appropriate despite an earlier award of counsel fees in the underlying matrimonial action because Section 487 is intended to “punish a lawyer for his misconduct and to deter him from future misconduct, rather than compensate a plaintiff for her injury.”

The attorney’s claim that he was engaging in zealous advocacy was rejected because he “had an ethical duty as an officer of the court to uphold the integrity of the court and not subvert its truth-seeking process for the improper benefit of his client.”

For the most part, lawyers counsel their clients to be truthful and forthright with the court.

Suffice it to say that lawyers have the same duty as that of their clients.

## **‘United States v. Rahimi’**

Perhaps of greatest significance in recent activity on family law issues is the Nov. 7, 2023, argument before the U.S. Supreme Court in *United States v. Rahimi*, No. 22-915, where the court heard a challenge to the constitutionality of 18 U.S.C. §922(g)(8), a 1994 statute that prohibits people from possessing guns if they are the subject of a domestic violence restraining order—i.e., an order of protection. This is the first case on this issue to come before the Supreme Court since its decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. —, 142 S.Ct. 2111 (2022), which struck down a New York statute limiting the right to carry a handgun outside of one’s home.

Rahimi is alleged to have engaged in a “pattern of dangerous behavior,” including assaulting his girlfriend in a parking lot and threatening her with a gun in 2019, going on a “shooting spree” in December 2020 and January 2021 that lead to a police search of his apartment where a rifle and a pistol were found, and he was also alleged to be a drug dealer.

The U.S. Court of Appeals for the Fifth Circuit was quoted at argument for having said that Rahimi was “hardly a model citizen”, and U.S. Solicitor General Elizabeth Prelogar argued to the justices that, “the only difference between a battered woman and a dead woman is often the presence of a gun.” *See*, N.Y.L.J., Nov. 7, 2023, “Supreme Court Appears Likely to Uphold Gun Ban Following Restraining Orders”; The New York Times, Nov. 6, 2023, “Will the Supreme

Court Toss Out a Gun Law Meant to Protect Women”, Linda Greenhouse; and The New York Times, Nov. 7, 2023, “Here’s the latest on the case before the justices”, Adam Liptak.

Although advocates against domestic violence and abuse remain optimistic that the Supreme Court will uphold the statute, it will most likely be many months before the final decision is issued. Lawyers can dispute the pros and cons of varying interpretations of the Second Amendment, but few would be hard-pressed to say that this is a case where the defendant should be permitted to possess a firearm of any kind.

## **Global Developments**

Of other note for matrimonial and family law attorneys, particularly with the increasing focus on equal parenting time in custody cases (even in the absence of a statutory presumption to that effect) is Australia’s passage of the Family Law Amendment Bill of 2023, which did away with their presumption of equal parenting time and equal say in decision making with respect to children. In essence, Australia has abandoned these presumptions and returned to a child centric analysis in custody cases that requires an analysis of the best interests of the specific, individual child who is the subject of the case.

Finally, the New York Times article of Nov. 4, 2023, written by Sui-Lee Wee and entitled “‘Just Like Medicine’: A New Push for Divorce in a Nation Where It’s Illegal”, provides a provocative and interesting account of the movement in the Philippines that posits that divorce is “a basic human right” even in the face of religious and other blockages. Here too, the divorce and family law attorney can find further insights into the challenges that are presented by the evaporation of a marital relationship.

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