



By Alton L. Abramowitz, left, and Leigh Baseheart Kahn, right, of Schwartz Sladkus Reich Greenberg Atlas. (Courtesy photos.)

[ANALYSIS](#) [Family Law](#)

## The 'Bad Actor Syndrome' in Matrimonial and Family Law: The Misbehaving Spouse or Parent

"There is nothing worse than aggressive stupidity," (Johann Wolfgang von Goethe).

Throughout the history of family law litigation, parties have engaged in tactics that can be most kindly and favorably described as "bad behavior." Notably, there appears to have been an uptick in decisional law which not only describes the work of "bad actors," but which metes out justice in a manner that denotes an ever evolving and growing lack of tolerance by judges for the antics of those who would manipulate, coerce, threaten and harm (physically, emotionally or financially) the opposing spouse or opposing parent, the

parties' children, family members, business interests, etc. All too often such behavior on the part of the bad actor is intentionally designed to place the other party at a psychological or informational disadvantage while simultaneously attempting to dominate the results of the dispute by force, subterfuge, intimidation, and the like. Examples of this type of bad behavior can be found in both the negotiation and the litigation contexts. This column will focus on recent case law reports describing examples of such behavior and the manner in which the courts have addressed it.

Perhaps the most high profile of recent "bad actor" decisions is that of the U.S. Supreme Court rendered on June 21, 2024 in *United States v. Rahimi*, 602 U.S. \_\_\_, 144 S. Ct. 1889 (2024). In *Rahimi*, the court, in an eight to one decision written by Chief Justice John Roberts (with Associate Justice Clarence Thomas being the lone dissenter), upheld the federal statute making it a crime to possess a firearm when the accused is the subject of a domestic violence restraining order. See, 18 U.S.C. Section 922(g)(8). *Rahimi*, the defendant, was the subject of a protective order barring him from possessing a gun that resulted from his having "dragged his then girlfriend [the mother of his child] back to his car when she tried to leave after an argument. He pushed her into the car, causing her to hit her head on the dashboard. [He] also fired a gun at a bystander who witnessed the incident." The tale continued at a later date "when Rahimi was a suspect in a series of shootings [that led] the police to obtain a warrant to search his home. [Where] they found a rifle and a pistol, which prompted prosecutors to charge him with violating the [federal statute]." See, "[Supreme Court upholds bar on guns under domestic-violence restraining orders](#)," by Amy Howe.

The District Court entered an order on consent of both *Rahimi* and the woman, finding that he had committed an act of "family violence," that he posed a credible threat to the woman and their child, and that the violence was likely to occur again. The order prohibited *Rahimi* from threatening the woman or her family for two years, enjoined him from contacting the woman or her family in that period except to discuss their child, and

suspended his gun license for two years. The federal indictment cited events that had occurred on later occasions that were subsequent in time to when the state court protective order had been granted and which included Rahimi approaching the woman's home during the night, threatening another woman with a gun, dealing drugs, shooting into the home of one of his so-called customers, shooting at another car after a collision, firing his gun into the air while driving through a residential neighborhood, chasing a truck off of a highway and firing his gun towards the truck, shooting into the air at a roadside restaurant when his friend's credit card was declined, etc.

Roberts noted in his decision that a violation of 18 U.S.C. Section 922(g)(8) based on the possession of a firearm while the accused is the subject of a "domestic violence restraining order," which was punishable by up to 10 years' imprisonment (now amended to 15 years), could only "proceed if three criteria are met. First, the defendant must have received actual notice and an opportunity to be heard before the order was entered. Section 922(g)(8)(A). Second, the order must prohibit the defendant for either 'harassing, stalking, or threatening' his 'intimate partner' or his or his partner's child, or 'engaging in other conduct that would place [the] partner in reasonable fear of bodily injury' to the partner or child. Section 922(g)(8)(B). A defendant's 'intimate partner[s]' include his spouse or any former spouse, the parent of his child, and anyone with whom he cohabits or has cohabited. Section 921(a)(32). Third, under Section 922(g)(8)(C), the order must contain a finding that the defendant 'represents a credible threat to the physical safety' of his intimate partner or his or his intimate partner's child, Section 922(g)(8)(C)(i), or 'by its terms explicitly prohibit[] the use, 'attempted use, or threatened use of 'physical force' against those individuals, Section 922(g)(8)(C)(ii)."

The District Court refused to dismiss the indictment on Second Amendment grounds, finding that Rahimi's conduct met all three of the bad actor criteria. As a result, Rahimi pleaded "guilty" and then appealed to the Fifth Circuit Court of Appeals, again raising the Second Amendment challenge to the statute. That appeal was denied by the

panel hearing it and Rahimi sought an en banc rehearing of his appeal before the Fifth Circuit. While his rehearing motion was pending, the Supreme Court came down with its decision in *New York State Rifle & Pistol Assn. v. Bruen*, 142 S. Ct. 2111 (2022). A new panel reheard the arguments and considered additional briefing, which resulted in a reversal whereby that court held that the statute was not "consistent with the nation's historical tradition of firearm regulation." The Supreme Court "granted certiorari. 148 S. Ct. 2688 (2023)" and upheld the statute as well as Rahimi's conviction. In doing so, Roberts ruled that "the government offer[ed] ample evidence that the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others." Roberts limited the Supreme Court's conclusion as follows: "... we conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." Suffice it to say that the conduct as described portrays Rahimi for all intents and purposes as a "bad actor," who clearly and unequivocally "posed a credible threat to the physical safety of others"—i.e., his violation of the restraining and protective orders, along with his guilty plea acknowledging his misconduct, warranted the imposition of the penalties permitted by this statute which serve a greater public need than his "right to bear arms."

In addition to this decision by the U.S. Supreme Court, there have been a series of recent New York State cases that have taken on—and taken to task—matrimonial litigants who have demonstrated a flagrant disregard for court orders, fairness, civility and, in many cases, simple human decency.

On Aug. 7, 2024, Justice Kathleen Waterman-Marshall, sitting in Supreme Court, New York County, issued her decision in *J.N. v. T.N.*, 83 Misc.3d 1262(A), 2024 WL 3710792 (Sup. Ct. N.Y. County 2024) in which she held the ex-husband guilty of criminal contempt under Judiciary Law Section 750(3). According to that decision, the parties to those contempt proceedings had been divorced pursuant to a judgment entered in January of 2023 in the aftermath of a 2020 custody trial and a 2022 financial trial.

The underlying facts of this matter are set forth in *J.N. v. T.N.*, 77 Misc.3d 894 (Sup. Ct. N.Y. County 2022), an earlier published decision in this case, where Waterman-Marshall awarded the wife 85% of the marital assets based on acts of domestic violence committed during the "entire marriage" by the husband. In doing so, the court cited DRL Section 236B(5)(d)(14), noting that his harassment of the wife had continued unabated throughout the trial and that it had "impacted [the wife] emotionally, financially, and reputationally." (DRL Section 236B(5)(d)(14) is the equitable distribution factor added by the Legislature in 2020 whereby courts making an equitable award of marital property are directed to consider domestic violence and provides: "whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts.")

Thus, coming into the contempt hearing, the court had already determined the husband to be a bad actor based on his threats to take custody of the parties' children, degrading comments rendered in unseemly language and without provocation or legitimate purpose—for example, name calling, telling the wife in the presence of her family that she was diseased and unfit to be around their children, blaming her for his own "despicable" speech, telling her that she was "different flavors of you're an idiot. You're stupid. You don't know what you're doing." Waterman-Marshall goes on to find that the husband had "continued his campaign of abuse for the past four years: having lost the power to curse and degrade [the wife] to her face at will, [he] has engaged in extreme and harassing litigation tactics for the stated purpose of wearing the wife down financially and emotionally. Indeed, he has said it himself—he is on a kamikaze mission. He has engaged in 'clear, intentional, and relentless conduct in attempting to harm wife in her professional life' by discussing her employment and the details of this litigation with third parties, including reporters, in direct violation of the Confidentiality Order. He asserted manufactured and wholly meritless claims of domestic violence against the wife. He has actively sought to disparage and defame her to the Board of Directors of [a not-for-profit

organization on which she sits] and undermine her employment. He caused articles to be written about her, her relationship to [the investment bank], and this divorce, despite knowing that she could lose assets and her job for any reason including reputational and financial harm to her employer."

Much of the foregoing had already spilled over into the determinations made by the court at the conclusion of the financial trial (77 Misc.3d 894, supra), where Waterman-Marshall cited, among other things, the husband's marital waste due to his loss of \$1.2 million in trading the wife's earnings. Further, the Husband's counsel fee application was entirely denied and the court applied \$200,000 in counsel fees that the wife had advanced pursuant to a pendente lite order by reducing the Wife's equitable distribution obligation to the husband in that amount. As further evidence of the correctness of this decision, Waterman-Marshall described in detail the husband's conduct throughout the course of the litigation, which she summarized as: "From the outset, husband engaged in harassing, obstructionist conduct, asserted meritless claims, and took positions resulting in delay and unnecessary litigation. The litigation will continue even after issuance of this decision, as husband has at least five pending appeals and will likely appeal this decision, all of which will cost hundreds of thousands of dollars for wife." As "icing on the cake," the court awarded the wife \$50,000 in counsel fees against the husband as a further credit against her equitable distribution obligations to him (77 Misc.3d 894, supra).

Returning to the contempt decision and order in the subsequent proceedings (83 Misc.3d 1262[A]), near the beginning of that decision, Waterman-Marshall noted that the husband failed to appear for the criminal contempt hearing despite his having been given notice of the date and time, an opportunity to appear with an attorney he had chosen, and to present a defense; that an 18B attorney was present in court in the event that the husband had appeared and was able to prove that he was indigent; and that the husband had been provided with "*Parker* warnings" if he failed to appear. (See, *People v. Parker* 57 N.Y.2d 136 [1982] where the Court of Appeals held that "in order to effect a knowing,

voluntary and intelligent waiver [of the right to be present at trial, inclusive of an implied waiver] the defendant must be informed of the nature of the right to be present at trial and the consequences of failing to appear for trial, including the fact that the trial will proceed even though the defendant fails to appear.) Waterman-Marshall summarized her findings and rulings as follows: "Wife established beyond a reasonable doubt, that husband is guilty of criminal contempt, pursuant to Judiciary Law Section 750(3), for: (1) his willful disobedience on three separate occasions [of three orders] which prohibited him from disclosing wife's confidential documents to the public; (2) his willful disobedience of the order ..., which require[d] him to speak to wife via Our Family Wizard (OFW) or a neutral intermediary; and (3) his willful disobedience of [three orders], which directed him to pay third-party professionals for work related to custody issues in this matter. For each one of the five separate violations, Husband is sentenced, pursuant to Judiciary Law Section 751(1), to 30 days in jail, for a total sentence of 150 days in jail." Of great significance is Waterman-Marshall's statement that: "If a court failed to find criminal contempt on this record, it would effectively undermine its own integrity and dignity and permit husband to continue to disrespect judicial orders with impunity." One glaring aspect of this and many of the other "bad actor syndrome" cases is the extent to which the offending party engages in a series of acts that are beyond being "merely offensive."

Another decision involving criminal contempt was recently issued by the Appellate Division, Second Judicial Department, on July 10, 2024, in *Agulnick v. Agulnick*, 229 A.D.3d 492 (Second Dept. 2024), where the court affirmed the decision and order of Justice Joseph R. Conway (Sup. Ct. Nassau County) holding the defendant-wife in that case guilty of criminal contempt following a hearing. Conway had sentenced her to 30 days of incarceration and a fine for willfully disobeying his order directing that the parties' 15-year-old child attend a therapeutic boarding school and directing the wife "to encourage the child to go with a transport team that was to take him to the school." During the contempt hearing, "members of the transport team" had "testified that the [wife] discouraged the child from cooperating with them." The Appellate Division found that "the

evidence before the Supreme Court was sufficient to support a finding, beyond a reasonable doubt, that the [wife] willfully disobeyed [its] order, a clear and unequivocal mandate of the court, by discouraging the child from cooperating with the transport team."

In another Nassau County Supreme Court "bad actor" case, Justice Edmund M. Dane faulted both parties' conduct in his extensive decision and order that directed, among other things, the sale of commercial real estate in Wantagh, New York, and the equal (50/50) division of those sale proceeds where both parties sought sole title to that property at the conclusion of the case. *M.I. v. C.I.*, 2024 WL 3862749 (Sup. Ct. Nassau County 8/6/2024). In language strikingly reminiscent of the line in Sir Walter Scott's "Marmion: A Tale of Flodden Field," where he wrote: "Oh what a tangled web we weave/When first we practice to deceive," Dane specifically held: "The testimony of both parties ... was strikingly incredible with a marked unreliability to it. It was abundantly evident to the court that both parties exhibited a pattern of deliberately and deceitfully scheming to advance his or her own self-interest(s), leaving the court without an ability to rely upon the creditability of the parties themselves ... Stated more directly, both parties lacked any semblance of credibility. The testimony of the parties themselves was, in large part, 'finger pointing' at the other. Neither party displayed any remorse, nor assumed any degree of culpability, for ... their blatant deceit to the relevant taxing authorities. The husband exhibited no remorse or degree of culpability for providing misleading statements to financial institutions regarding his income. The wife ... sought to blame her own attorney for literally lying under oath at her deposition. Both parties knowingly provided incomplete and ostensibly false information to their accountant at times, and yet, at the same time, sought to shift blame to that very accountant for their tax issues. All of that is unbelievable. Collectively, during the marriage, these parties lived their lives on substantial unreported cash income." Significantly, Dane did not attempt to distinguish one party's bad behavior from the bad acts of the other party, demonstrating that "no [bad] deed goes unpunished." Dane provided these parties with the equivalent of what Shakespeare thrice wrote in his "Romeo and Juliet,": "A plague on both your houses."



The trend of "bad actor" decisions continued on Aug. 5, 2024, when Justice Douglas E. Hoffman, sitting in Supreme Court, New York County, issued his decision in *Josephine D. v. William A.D.*, 83 Misc.3d 1260(A), 2024 WL 3659594 (Sup. Ct. N.Y. County 2024) where the wife was permitted to amend her pleadings so as to join a third-party recipient (Ms. H) of 49% of marital property business interests transferred to Ms. H by the husband. The husband argued that joinder of Ms. H was unnecessary because any award to the wife with respect to that transfer could be paid out of his other assets. In response, Hoffman held: "This is not necessarily true, however, as husband purportedly transferred 49% of the business interests to Ms. H. and another 49% to the parties' (adult) son ..., allegedly retaining only 2% for himself. husband then purportedly purchased back [the son's] interest, which buy-back [the son] is contesting in a separate action ... To the extent that there is at least some possibility that husband and Ms. H are able to keep that 49% 'shielded' in Ms. H's control, but husband does not receive or retain 49% 'back' from [the son], any equitable distribution award in this action might (in that case) be enforceable only against husband's then-remaining 2% (in such case), which would then make husband virtually judgment proof in this action without joinder of Ms. H." Significantly, in what appears to be a very clear signal to the husband that the court would not tolerate his conduct, the wife's application for \$350,000 in temporary counsel fees was granted to the exact penny, even though the wife only owed her attorneys \$95,975.03 at the time of the making of her motion for pendente lite counsel fees.

In *Lombardi v. Lombardi*, 229 A.D.3d 537 (Second Dept. 2024) the Appellate Division, Second Department, on July 10, 2024, affirmed an order of Suffolk County Supreme Court Justice Valerie M. Cartright, which had held the husband in that case guilty of civil contempt. On appeal, it was held that: "Here, the plaintiff demonstrated that the defendant failed to comply with the clear and unequivocal mandates set forth in the 2011 [pendente lite] order by failing to pay child support and maintain medical insurance for the plaintiff. The defendant failed to refute this showing or establish an inability to comply with these mandates. While finding that the husband's conduct constituted civil contempt,

the court affirmed the denial of his cross-motion to impose sanctions against the wife because her conduct was not "frivolous" within the meaning 22 NYCRR Section 130-1.1(c)(2) so as to warrant the imposition of monetary sanctions. Further, the Appellate Division did confirm the award against the husband of \$10,000 in interim counsel fees incurred by the wife with respect to her enforcement motion.

And finally, as if Waterman-Marshall did not have enough "bad actor" litigation to deal with in *J.N. v. T.N.*, *supra.*, she was presented with yet another campaign of horrific behavior in *G.K. v. S.T.*, 83 Misc.3d 1238(A), 2024 WL 3382373 (Sup. Ct. N.Y. County 2024). Here, the court found that the defendant-husband-father, an anesthesiologist, had "mentally and physically abused the plaintiff-wife-mother and [their three] daughters. Defendant grabbed and pushed Plaintiff, leaving bruises on her arms, and threw and broke things, often in front of the children. He rampaged against her. He denigrated her in front of the children, calling her names. In one incident, while the parties were staying at an Airbnb, Defendant chased Plaintiff around the home, yelling at her and denigrating her for not having proper food in the home, as she begged for him to leave her alone. Defendant also hit and hurt the children. ACS indicated a report against Defendant as it related to [one of the children]. Defendant also called the children names; he would ask them if they wanted to be 'fat,' 'a f—king retard,' or 'ignorant like your mother.' Defendant's abuse during the marriage resulted in a dysfunctional and traumatic family dynamic and harm to the children."

Near the beginning of Waterman-Marshall's decision in *G.K. v. S.T.*, *supra.*, she takes "judicial notice" of and summarizes a "laundry list" of certain facts and prior court orders in that case, as outlined in the following string: 1) the order to show cause on the wife's pendente lite motion directed the husband to "immediately pay for the outstanding balance on the children's therapy expenses ... and to immediately pay any and all arrears and penalties on the late rent for [the marital apartment] pending the hearing of [that] motion"; 2) the court granted the pendente lite motion to the extent of directing the

husband to pay \$3,600 per month in basic child support, plus 100% of the statutory add-on expenses of unreimbursed medical (including therapy), child care, education and extra-curricular activities, plus \$8,030 per month for spousal support to be paid directly to the landlord for rent and to the utility companies, as well as the expenses of the parties' truck, along with \$130,000 for interim counsel fees subject to reallocation; 3) the husband did not make his court-ordered support payments and did not produce any discovery; 4) the wife moved for contempt, including emergency interim relief that the court granted to the extent of directing the husband to produce all of the financial documents relating to his medical practice by a date certain and to timely pay the children's private school deposits for the upcoming school year; 5) the husband produced virtually no documents; 6) at the hearing, the court adjudicated the husband in contempt, finding that his "testimony was 'inconsistent' at best and 'at worst he flat out lied to this court'" by misrepresenting his income, intentionally obfuscated the payments that he made over the preceding six months, lied about his ability to make "any" of those payments for the children over the preceding months, claimed that the children's primary residence was upstate when they actually resided with the wife in New York City, that he withdrew \$183,500 from an account in addition to his regular income, but paid none of the mandated expenses, etc.; 7) although given the opportunity to purge his contempt, the husband failed to do so and the court issued a warrant for his arrest, which was stayed when he filed for bankruptcy before the warrant could be served; 8) the husband moved for an order disqualifying the wife's attorneys and to disgorge the fees that he had paid them, but the court denied that motion and granted the wife's cross-motion for sanctions; 9) because the husband failed to pay the children's private school tuition as ordered, they lost their enrollment; 10) the wife made a second contempt motion based on the husband's failure to produce documents and for discovery sanctions, which the court granted; 11) because the husband "refused to participate in discovery," he was precluded from producing certain evidence at trial and certain claims were resolved in the wife's favor; 12) while trying the custody case pro se based on his claim that he could not afford to hire an attorney, the husband nevertheless

found the money to hire attorneys for the bankruptcy proceedings and to work on his appeals and related appellate motions; 13) the pendente lite support order, the contempt order and the disqualification order were all unanimously affirmed on appeal; 14) in the bankruptcy proceedings, the husband entered into a stipulation with the mortgage lender on the upstate house, which conditionally vacated the automatic stay, but then defaulted by not making all of the required mortgage payments; 15) as a result, the bankruptcy judge dismissed the husband's bankruptcy case and enjoined him from filing a new one for roughly six months, and, the automatic stay of the divorce proceedings was lifted; 16) the husband was arrested under the newly reactivated warrant and given the opportunity to purge his contempt, "but expressly declined to do so"; 17) the court sentenced him to 100 days unless he purged his contempt by paying \$174,500, which he did do about two weeks later; 18) the husband liquidated the children's 529 educational savings accounts without the wife's consent and used those funds for the payment purging himself of the contempt order; etc., etc. The record appears to have been riddled with a mountain of malicious and nefarious behavior on the Husband's part, which was truly serial bad behavior.

Without going into the details, it suffices to say that Waterman-Marshall awarded the Wife 50% of the marital assets in what the court described as a "short-term" marriage, and awarded her \$906,776.45 for counsel fees and \$5,000 in experts fees through trial and directed the husband to pay her that amount. He was also ordered to make restitution to the children's 529 accounts in the amount of \$130,000. (This column will not detail the awards for spousal maintenance, child support, add-on expenses, etc., as they are not relevant to a further description husband's bad actor behavior.)

Representing the bad actor (offending party) in cases akin to those discussed above oftentimes creates a difficult conundrum for the matrimonial and family law attorney. For example: Can the lawyer control the client and convince them to behave? Can the lawyer ethically mount a credible defense of the client's bad acts and/or omissions, particularly those which are clearly intentional? Is the lawyer able to distance themselves from the bad

actor client in the eyes of the judge in order to maintain their own creditability with the court? Is the lawyer compromising their credibility and reputation with the judge in such a way as it impacts their ability to effectively represent other clients before that very same judge? Is the lawyer subjecting themselves to potential penalties and sanctions by asking the court to forgive or condone their client's bad behavior, particularly where the client and/or opposing counsel makes it appear as if the attorney for the bad actor encouraged, participated in and/or conspired with their client's bad behavior? What should the lawyer do if their client continues to misbehave (e.g., seek to withdraw from representing the bad actor client)?

"The difference between the true lawyer and those ... who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards." (Piero Calamandrei, "Eulogy of Judges," 1942.)

**Alton L. Abramowitz** is a partner in the matrimonial & family law group at Schwartz Sladkus Reich Greenberg Atlas (SSRGA), a past national president of the American Academy of Matrimonial Lawyers, and a past chair of the Family Law Section of the New York State Bar Association.

**Leigh Baseheart Kahn** is a partner and the chair of the matrimonial & family law group of SSRGA and currently serves as a national second vice president of the American Academy of Matrimonial Lawyers.

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