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Civil LITIGATION

A look at the top misconceptions of matrimonial clients

As family law practitioners, we see it time and time again. Let's set the scene: You meet with a new client for a divorce consultation. The client is confident in her knowledge of divorce law based on comparing notes with her friend/brother/parent/cousin's co-worker who got divorced and told her all about their experience. The new client also has done extensive Google searching on the topic.

As we begin to discuss the New York state laws of child custody, child support, spousal maintenance and equitable distribution, the client becomes more and more surprised about the potential outcomes based on the facts of her case. The outcomes are not always as positive as the client expected.

By LEAH E. TARANTINO
Daily Record Columnist

As attorneys, it is not enough to inform clients of the positive aspects of their pending litigation. Two of the most important aspects of our job are managing client expectations and being honest about how the law applies to the facts before us. These are not always the easiest tasks, given the emotional state of a client about to embark on the journey of divorce.

I have compiled a list of the top misconceptions I hear from divorce clients for our review:

Misconception 1: The mother always has an advantage in child custody cases.

Gone are the days of the "doctrine of tender years," which favored the mother in child custody determinations. The courts have held that "an award of custody must be based upon the best interests of the child, and neither parent has a prima facie right to custody of the child," *Friederwitzer v. Friederwitzer*, 55 N.Y. 2d 89, 93, 447 N.Y.S.2d 893 (1982), *Goldfarb v. Szabo*, 130 A.D. 3d 728 (Second Dept. 2015), Domestic Relations Law §240, Domestic Relations Law §70.

In fact, many judges are using shared residency as a starting point in negotiations and asking why it wouldn't be appropriate. What is more important is the role that each parent has played in the child's day-to-day routine, medical treatment, activity participation and education, not whether they are mother or father.

Misconception 2: If the child refuses to visit with the other parent, it is the child's choice and I cannot make the child go.

The Court of Appeals has held that "It is important for the court to consider the desires of each child, but this is but one factor to be considered; as with the other factors, the child's desires should not be considered determinative," *Eschbach v. Eschbach*, 56 N.Y.2d 167,171 (1982). While courts have given great weight to the considerations of children ages 14 and older in custody disputes, it is important to note that the child's wishes alone are not what the court will rely on when deciding custody, see *Cannella v. Anthony*, 127 A.D.3d 745 (Second Dept. 2015); *Burke v. Cogan*, 122 A.D.3d 625, 997 N.Y.S.2d 141 (Second Dept. 2014); *Cheney v. Cheney*, 118 A.D.3d 1358 (Fourth Dept. 2014). Notably, one of the factors the court heavily weighs in custody determinations is which parent is more likely to foster a meaningful relationship between the child and the non-custodial parent, *DiMele v. Hosie*, 118 A.D.3d 1176 (Third Dept. 2014); *Alvarez v. Alvarez*, 114 A.D.3d 889 (Second Dept. 2014).

If a client is obstructing the child's visitation, bad mouthing the other parent in the presence of the child or failing to take steps to encourage the visitation, that parent is putting himself or herself at risk. Clients need to know that they must actively encourage the child to go on the visits in any way possible. If not, the wrongdoing parent may pay the price by losing custody.

Misconception 3: If the other parent and I share child residency on a 50/50 basis, then no one pays child support to the other.

The Court of Appeals makes it clear in *Bast v. Rossoff* that in a shared custody case, child support should be calculated using the three step statutory formula set forth in the Child Support

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Standards Act, with the greater-earning parent being considered the "noncustodial" parent and paying child support, *Bast v. Rossoff*, 91 N.Y.2d 723 (1998). The court holds that "if the trial court is satisfied that the amount of the basic child support obligation is 'unjust and inappropriate' because of the shared custody arrangement, the court may utilize the statute's paragraph (f) factors to fashion an appropriate award," *Bast v. Rossoff*, 91 N.Y.2d 723, 732 (1998)[emphasis added]. Clients need to know that child support will be calculated as in any other case, and that it is discretionary whether the court will deviate from the statutory amount of child support.

Misconception 4: We have kept separate bank accounts throughout our marriage. My spouse is not entitled to the accounts in my name.

The courts have held that "property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute was separate property," *Swett v. Swett*, 89 A.D.3d 1560 (Fourth Dept. 2011); *Teraska v. Teraska*, 124 A.D.3d 1242 (Fourth Dept. 2015). Property acquired by gift or inheritance or obtained prior to the marriage and not comingled with marital assets are examples of separate property, see *Teraska v. Teraska*, 124 A.D.3d 1242 (Fourth Dept. 2015), A*ntinora v. Antinora*, 125 A.D.3d 1336, 3 N.Y.S. 3d 500 (Fourth Dept. 2015).

Clients are shocked to hear that "their money" on deposit in a bank account in their name alone is not separate property if funds in the account were earned during the marriage as wages from employment.

These are just some examples of the misconceptions with which new clients walk into our office. Attorneys need to be prepared to disappoint clients who come in with incorrect notions of the law and unrealistic expectations regarding their case. What the general public doesn't know could hurt them.

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