



the *Sidebar*

STRATEGIES FOR KEEPING THE LAW ON YOUR SIDE

SPRING 2006

VOLUME 11

ISSUE 1

THIS ISSUE > **“ESTATE PLANNING REPORT:
THE EMERGENCE OF NEW YORK’S ESTATE TAX SYSTEM”**

Page 1

Estate Planning

Report

Page 2/3

License to Kill

Page 4

Side Briefs

By Constantine Intzeyiannis, Esq.

THE FEDERAL ESTATE TAX

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) was intended to alleviate the burden of paying Federal estate taxes for a majority of decedents' estates. For the most part, EGTRRA has accomplished this purpose. However, EGTRRA has had no effect on an independent estate tax system that affects a large number of estates, namely, New York's estate tax system. For those of you who think your estates will be shielded from all estate taxes, your families will be in for a big surprise.

Under EGTRRA, for individuals dying in 2005, the first \$1,500,000 of assets are exempt from Federal estate tax with a top tax rate of 47%. The exemption will gradually increase until it reaches \$3,500,000 in 2009, and the top tax rate will decrease until it reaches 45% in the year 2007. There will be no Federal estate tax for individuals dying in 2010. However, these changes will be temporary as the Federal exemption will revert back to \$1,000,000 (the same amount prior to the enactment of EGTRRA) in 2011, assuming there is no further legislation passed by Congress prior to that time.

NEW YORK'S ESTATE TAX

Even though the Federal estate tax exemption is gradually increasing as indicated above, New York's estate tax exemption remains at \$1,000,000. New York's current estate tax system is based on laws which became effective on January 1, 1998 with a top tax rate of 16%. From January 1, 1998 until the passage of EGTRRA on June 7, 2001, New York's estate tax system basically mirrored the Federal estate tax system, which created a system where an estate that was subject to estate taxes would have to pay both Federal and New York estate taxes and estates that did not meet certain threshold requirements would pay neither Federal nor New York estate taxes. The passage of EGTRRA therefore required New York to enact new legislation to conform to the new system. Unfortunately for residents (and non-residents in certain cases), New York has not enacted legislation to conform its estate tax system with the provisions of EGTRRA. Thus, an estate can now be non-taxable for Federal estate tax purposes while being taxable for New York State estate tax purposes if it exceeds \$1,000,000.

ESTATE PLANNING AND NEW YORK'S ESTATE TAX LAWS

The good news is that the estate taxes that would be due to New York State can either be avoided or diminished significantly with proper estate planning. While it is uncertain at this time whether New York will eventually conform its estate tax system with the provisions of EGTRRA, what is certain is that you should review your estate plans with your estate planning professionals and make the necessary adjustments and revisions in light of New York's estate tax system. If you have any questions concerning this important subject, please feel free to contact the attorneys in our estate planning department. ■



> LICENSE TO KILL - TO A DEGREE: THE INEQUITY OF EQUITABLE DISTRIBUTION

By Joseph Trotti, Esq.

Alright, perhaps the title is a bit dramatic considering the fact that the topic is one area of the New York State Equitable Distribution Law. However, if your name is Dr. Holterman, you might agree. Dr. Holterman is a licensed medical doctor. Although he had an annual gross income of \$182,000, he wound up taking home approximately \$16,389 a year based on a marital award issued by the Court of Appeals. The decision in this problematic case is the natural (or perhaps supernatural) progression of a theory that was based in fairness and originally designed to remedy a specific inequity. What has taken place in the courts since then appears to be anything but fair.

THE O'BRIEN DECISION

Some background concerning the theory is required. Approximately twenty years ago, the New York State Court of Appeals created the notion of an "enhanced earning capacity." In 1985, the Court of Appeals in the O'Brien decision held that a person's professional license, if acquired during the marriage, is marital property. The significance of that decision is that since the license was now classified as marital property, it fell within the meaning of the Domestic Relations Law and more importantly, became subject to valuation and distribution between the parties. Although that case has not been followed nationally, New York's highest court addressed and remedied a situation it perceived to be unfair. O'Brien involved what was then called "The Classic Student Spouse, Working Spouse Syndrome." In that case, the wife sacrificed to put her husband through medical school only to have the husband walk out of the marriage soon after graduation. The O'Brien decision appeared to be a responsible assessment and equitable response to the situation.

O'BRIEN'S IMPACT

As always, however, theories in a vacuum and without room for exception generally lead to problems. Perhaps more problems than the original theory sought to remedy. The significance of the decision is that based on the concept of enhanced earning capacity, the court was going to project future income based on the economic capacity resulting from acquiring a professional license. (Incidentally, the O'Brien decision and the enhanced earning capacity was thereafter expanded by the courts to include not only licenses but post-marital education, certain certifications, and degrees earned during the marriage.) Essentially, the court was now going to deal, at least in some respect, with dividing up potential future income. An income, that in some cases, may never be fully realized and in other cases, completely fiction. For example, what would happen to an individual who possessed the so-called "enhanced earning capacity," and then loses that capacity and license at some point before the marital award is extinguished? What happens to the value of a license if, at some time in the future, it no longer is worth what the experts valued it at the time of trial or if an individual decides to pursue some other avenue of employment other than that which correlates to a degree that was earned?

ENTER DR. HOLTERMAN

The legacy of O'Brien becomes more complicated when other variables are added to the mix. For example, the crux of the problem in Holterman involved not only the enhanced earning capacity theory, but also the application of the Child Support Standards Act. If the court was to calculate child support and maintenance based on a payor spouse's income, should the payor spouse's available income be reduced by the amount that the court attributed to the professional license? In several decisions issued between 1995 and 2000 (e.g., McSparron and Grunfield), the Court of Appeals essentially warned against double counting the income of a payor spouse when making an award of maintenance. More specifically, it cautioned against calculating different payments from the same income stream.

The Court warned that this would be an impermissible double dipping. Therefore, the Court, in effect, stated that once it considered the license holder's future income and distributed that income in the form of a distributive award or other asset, then that stream of income was not to be considered again in the calculation of a maintenance award.

THE COMPLICATIONS OF HOLTERMAN

The parties in the Holterman case had been married for nineteen years and had two children. The case involved the valuation and distribution of the husband's medical license and therefore the amount of enhanced earning capacity attributable to his license. More importantly, however, the court in Holterman now had to also address the issue of child support and whether the double dipping analysis previously used in maintenance cases would apply.

The wife was awarded approximately 35% of the husband's enhanced earning capacity. That award was calculated at approximately \$21,000 per year for a 15-year period. The wife was also granted maintenance at \$35,000 per year for the first five years after divorce, and a smaller amount thereafter. The remaining issue involved the calculation of child support.

Dr. Holterman argued that in order to avoid the double dipping problem that the same Court had warned against in its earlier decisions, then the distributive award base payment of \$21,000 should be deducted from his gross income for purposes of calculating child support. The Court of Appeals then revisited the theory of the O'Brien case and analyzed the double dipping problem as it pertained to child support. The majority of the Court of Appeals rejected Dr. Holterman's argument by holding that the statutory language of the Child Support Standards Act does not allow for such a deduction. Further, the Court stated that a distributive award is purposely not deemed deductible to the payor, nor income to the recipient under the Internal Revenue Code. Therefore, the majority held it should not be

treated as a deduction from income under the provisions of the Child Support Standards Act. The result was that Dr. Holterman would now have to pay child support based on monies never realized and already distributed to his wife in the form of equitable distribution.

THE INEQUITY OF HOLTERMAN

The dissent argued that the "unjust or inappropriate" language in the Child Support Standards Act should have been considered by the majority in order to avoid the financial burden to Dr. Holterman and to further avoid the perils and injustice of double dipping. The dissent also argued that the majority of the Court of Appeals did not exam or evaluate the totality of the circumstances. Further, in analyzing the O'Brien decision, the dissent argued that O'Brien was devised almost exclusively for the "Classic Student Spouse, Working Spouse Syndrome." The dissent's arguments have merit. Since the Child Support Standards Act allows the courts to deviate from the mandate of that Act where a result would be unjust or inappropriate, then it would appear that Dr. Holterman would fit in that category as a result of being left with less than \$17,000 per year. In addition, in Holterman, the parties were married for nineteen years. Clearly not the same fact pattern as O'Brien. Here the parties were married for nineteen years before the divorce action was brought and therefore the dissent stated that the party's achievements and benefits had already been enjoyed by both of them for some time and were therefore already reflected in the husband's current income.

It appears that the Court of Appeals missed an opportunity to add a dose of reality to the O'Brien legacy. Perhaps doing away with the entire theory of an enhanced earning capacity is drastic or premature. However, there is little doubt that the result in Holterman was clearly not intended by the O'Brien court. In any event, recent lower court decisions and discussions among various matrimonial attorneys suggest that changes to the O'Brien theory of enhanced earning capacity are indeed on the horizon. ■

> **SIDEBRIEFS**

We are proud to announce that on April 2, 2006, **Joseph Trotti** and **Theresa DeStasio** celebrated their 5th anniversary with Capell Vishnick.

Andrew A. Kimler spoke at the Flushing Lawyer's Association on February 15, 2006. The topic of the lecture was "How to Avoid Discrimination Lawsuits".

It's a Girl! **Robert Bommarito** and his wife, Ann Marie have an addition to their family. Their second daughter, Gianna, was born on March 25, 2006. All the best!

Oh Boy! **Bernard Vishnick** and his wife, Sheri, welcomed their second grandson into the world! Justin Ryan was born on April 7, 2006. Congratulations!

Bernard McGovern has been elected Treasurer of the Blackstone Lawyers Club of Ridgewood, one of New York's oldest fraternal legal societies.

Erica Bekoff is involved in Casino Royale 2006, the main fundraising event for the American Foundation for Suicide Prevention (AFSP). The event will take place on Thursday, May 18, 2006 at the Chateau Briand.

Capell Vishnick was a proud sponsor of the American Heart Association's' 5th Annual "Go Red For Women Luncheon" which was held on February 8, 2006 at the Crest Hollow Country Club. Our managing partner, **Christopher J.L.Deziel** participated on the Sponsorship Committee.

Erik Ortmann spoke on Wednesday, March 29, 2006 on behalf of NARI at a public hearing before the Environmental Protection Agency concerning NARI's official position with respect to the EPA's new proposed regulations governing lead safe work practices.

Bernard McGovern's daughter, Kristen, was named Managing Editor of the St. John's Journal of Legal Commentary. Kristen is in her second year of law school at St. John's and we wish her continued success.



3000 Marcus Avenue, Suite 1E9
Lake Success, NY 11042

t 516.437.4385 f 516.437.4395

www.CapellVishnick.com