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Trial Advocacy: How to Persuade Judge and Jury

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Family Law Update - 2008

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During the past year, as usual, there were a number of appellate decisions in the field of Family Law, that merit being called to the attention of our membership, together with some commentary. Following the discussion on case law developments, some new legislation will also be listed.


Where there was a Connecticut divorce judgment and the husband remained in Connecticut, child support ended at age 18. When the mother sought to have a de novo determination made in New York, where she and the children had lived for years, the Court of Appeals ruled against her, holding that it was tantamount to a request for a modification of the Connecticut decree, over which the New York court had no subject matter jurisdiction. The Court specifically rejected the argument that since the order had expired, there was nothing to modify.

MESHOLAM v. MESHOLAM 11 N.Y. 3d 24, 862 N.Y.S. 2d 453 (Ct. of App., June 26, 2008)

For a substantial number of years, there has been a difference of opinion among the Appellate Division Departments, as to the issue of what date is to be used, for the termination of acquisition of marital property or for valuation, when a first matrimonial action is discontinued or dismissed and a second action is commenced. Our Second Department’s rule was consistent, namely, that the answer depends upon why the first action was terminated. If it was in order to reconcile, no matter whether or not successful, the so-called marital partnership was resumed, and all property acquired up until the commencement of the second action would be “marital” and valued any time between the commencement of action number two and the trial. But, if there was no reconciliation component, the commencement date of the first action would be the termination and earliest valuation date, on the theory that the marital partnership had never been resumed. THOMAS v. THOMAS, 221 A.D. 2d 621, 634 N.Y.S. 2d 496, (App. Div. 2nd Dept.), and numerous other decisions. The First Department position was that when DRL § 236 B (4) (b) said valuation must be between the “date of commencement of the action and the date of trial” it meant the current, second action, regardless of why the first ended.

If there was no reconciliation, and the parties did nothing for each other or in connection with the acquisition or appreciation of marital property, between actions, the reasoning was that the court could account for and consider that in the distribution or fixing of percentages in the property distribution. GREENWALD v. GREENWALD 164 A.D. 2d 706, 565 N.Y.S. 2d 494 (App. Div., 1st Dept.). However, this difference among the departments has now been finally resolved by the Court of Appeals in the MESHOLAM case, cited above. The First Department view won out. The bottom line was that the Court concluded: “the value of marital property generally should not be determined by the commencement of an action for divorce that does not ultimately culminate in divorce.” For whatever reason, utilizing the date of a prior, unsuccessful action would be “inconsistent with the statutory scheme”.

GRAEV v. GRAEV _ N.Y. 3d _ _ N.Y.S. 2d _ (Ct. of App., Oct., 2008)

All of us, practicing in the field of Family Law, have from time to time taken instruction from a “wake up call” in a reported decision, article or seminar presentation, and changed something we had customarily done. In particular, the “standard language” we use in various clauses of our Separation Agreements and stipulations, has always been a work in progress, modified when needed. The advent of the CSSA required changes, as did decisions which mandated that the actual calculation of the “presumptive amount” be in the agreement, if it was to be enforceable. Many of us have standard language for what we refer to as a “cohabitation clause”. That is the provision, calculated to circumvent the extremely difficult burden imposed by DRL § 248, to terminate maintenance when the recipient established a new, living together relationship for an agreed upon time. The recent Court of Appeals case, cited above, should remind us to be ever vigilant, careful and clear when drafting agreements. “The cohabitation clause” I have used for drafting agreements. The “cohabitation clause” I have used for

Continued On Page 14

Holiday Party

Pamela Jordan, President of QWCBA, Alexander Rosado, President, LLACQ, Steven Oralv, President, QCBA and Howard Lazarus, Representative of Brandeis Assn. at QCBA’s annual Holiday Party held December 4, 2008 at Terrace on the Park. For more photos, see the centerfold on pages 8-9.

INSIDE THIS ISSUE

Family Law Update .......................... 1 Estates Update .......................... 6
Estate's Update .......................... 1 'Spread Of Hours' Regulations .......................... 7
President's Message .......................... 3 Photo Corner .......................... 8 - 9
Nominating Committee Notice .......................... 3 Persuading Judge & Jury .......................... 10
Consider Bankruptcy .......................... 4 Culture Corner .......................... 11
Setting Aside A Jury Verdict .......................... 5 Service Directory .......................... 15

PROOF OF OWNERSHIP

As noted in this column last year, DNA testing has been confirmed as an element of proof of paternity by which non-marital children may inherit. The statute EPTL 4-1.2 (C) (D), and subsequent case law have confirmed the validity of both pre-death testing and post death testing as one component of proof of paternity. This genetic component, when combined with open and notorious
Trial lawyers’ main goal is to persuade the jury or, in a bench trial, the judge to rule in their favor. In addition, since the rules of evidence vary from state to state, the judges have to know more than just legal arguments. Persuasion is more than convincing. It is about creating an emotional and psychological connection with the judge or jury. Jurors must be convinced of the lawyer’s sincerity and trustworthiness. Otherwise, their decision will be influenced by other factors, such as personal biases or preconceived notions. Therefore, trial lawyers must appeal to their audience. They must know whom they are trying to convince. In a jury trial, lawyers have to establish the profiles, they should collect information on the prospective jurors to see whether they match the right profile. Good trial lawyers modify their strategy according to the jurors. They can change their arguments, language, and occupation to know what will appeal to them and what will offend them. Trial lawyers must know the jurors. They need to put themselves into the jurors’ shoes to consider what the jurors want to hear. Jurors are likely to listen to arguments they are interested in and then look for evidence to support that emotional decision. Effective trial lawyers re-learn to present their case. They should anticipate questions that will be important to jurors. They gain their attention, hold their interest, and make it easy for them to agree with their case. For trials in front of a judge, lawyers should anticipate what the judge will know the judge. They should ask their colleagues for advice on what that judge likes or dislikes so they can structure their presentation appropriately and give the judge what they want to hear. Emotional presentations move judges less than jurors. Before a judge, lawyers should stick to a dispassionate approach where they detail the facts of the case. Trial lawyers should also become familiar with and respect the court’s rules. They do not want to lose on a technicality.

(2) Give a strong opening statement. The opening statement is the most important persuasional moment. It is the first impression that the lawyer has on the opening so strong that their adversary can never recover. The opening statement is important: It is the first opportunity, after the voir dire begins, to explain their case. Jurors and judges are the most attentive then. Trial lawyers should seize the opportunity to summarize the case in a compelling way. They should start their opening statement with a bold adversarial statement. Making bold adversarial statements at this early stage, lawyers can ensure that the jury will side with the arguments that affect the jury. Lawyers cannot persuade if they do not make arguments during opening statements. Arguments do not persuade at this stage of the trial. The judge will not agree that the case will agree with their point; they must make sure their argument is stated clearly. The best trial lawyers act like teachers, not advocates. They give their colleagues for advice on what that judge likes or dislikes so they can structure their presentation appropriately and give the judge what they want to hear. Emotional presentations move judges less than jurors. Before a judge, lawyers should stick to a dispassionate approach where they detail the facts of the case. Trial lawyers should also become familiar with and respect the court’s rules. They do not want to lose on a technicality.

(3) Have a theme. Themes are an essential part of trial persuasion. Themes summarize what the case is about. Themes are crucial in jury trials; jurors can get lost sorting through complicated information without a theme. To project a memorable image about the case, effective trial lawyers use plain language and familiar words and phrases for their themes. Lawyers should emphasize and de-emphasize their arguments and facts to fit their themes. Themes should be announced in the opening statement, repeated throughout the trial. The best themes appeal to jurors’ common sense, experience, and fairness. They are short, easy to understand, hard to forget, and encompass all phases of the case. They serve as the moral foundation of the case. Here are some examples of good themes: life, liberty, no fury like a woman scorned, and the integrity of the legal system. Trial lawyers should also know the other side’s theme so that they can contra- dict it. Therefore, the lawyer should address them later on, while examining witnesses or during summation. Being focused is also essential to assuring that the lawyer will understand the case. Lawyers, who present their arguments illogically, jumping from issue to issue, will lose their audience. The audience will be confused about their theory of the case and will not care, not only the adversary, but also the jurors and the judge. Having focus also means thinking about the trial before it begins — thought-out conclusions are key. Lawyers should memorize key points and make their presentation interesting by being clear and effective. They use different communication techniques to persuade. Effective lawyers are also to correspond both to the forthcoming line of evidence and to the adversarial position. They should focus on what the jurors want to hear. Jurors often make decisions based on what they think they want to hear. Jurors think like real people to anticipate questions that will be important to jurors. They gain their attention, hold their interest, and make it easy for them to agree with their case. For trials in front of a judge, lawyers should anticipate what the judge will know the judge. They should ask their colleagues for advice on what that judge likes or dislikes so they can structure their presentation appropriately and give the judge what they want to hear. Emotional presentations move judges less than jurors. Before a judge, lawyers should stick to a dispassionate approach where they detail the facts of the case. Trial lawyers should also become familiar with and respect the court’s rules. They do not want to lose on a technicality.

(4) Know the case. Good trial lawyers are focused. They do not make arguments during opening statements. Argument should start with the opening statement list between 3 and 30 minutes. If shorter, important facts and themes will be missing. If longer, trial lawyers risk losing the jurors’ attention and overwhelming them with details. The opening statement is the opportunity for trial lawyers to tell their story. They should enjoy it. It is the time to steal their adversary’s thunder. They find witnesses and exhibits to support their theme. Lawyers should also always keep their notes or, if they must look at their notes, they should read them. Doing so separates them from the jurors and the judge. How can lawyers be persuasive if they are riveted to their notes? They should note what the jurors focus on. They should make their presentation interesting by being clear and effective. They use different communication techniques to persuade. Effective lawyers are also to correspond both to the forthcoming line of evidence and to the adversarial position. They should focus on what the jurors want to hear. Jurors often make decisions based on what they think they want to hear. Jurors think like real people to anticipate questions that will be important to jurors. They gain their attention, hold their interest, and make it easy for them to agree with their case. For trials in front of a judge, lawyers should anticipate what the judge will know the judge. They should ask their colleagues for advice on what that judge likes or dislikes so they can structure their presentation appropriately and give the judge what they want to hear. Emotional presentations move judges less than jurors. Before a judge, lawyers should stick to a dispassionate approach where they detail the facts of the case. Trial lawyers should also become familiar with and respect the court’s rules. They do not want to lose on a technicality.

(5) Be eloquent. Eloquent lawyers use plain language when presenting their argument. If chosen words are too difficult to understand, hard to forget, and encompass all phases of the case. They serve as the moral foundation of the case. Here are some examples of good themes: life, liberty, no fury like a woman scorned, and the integrity of the legal system. Trial lawyers should also know the other side’s theme so that they can contra- dict it. Therefore, the lawyer should address them later on, while examining witnesses or during summation. Being focused is also essential to assuring that the lawyer will understand the case. Lawyers, who present their arguments illogically, jumping from issue to issue, will lose their audience. The audience will be confused about their theory of the case and will not care, not only the adversary, but also the jurors and the judge. Having focus also means thinking about the trial before it begins — thought-out conclusions are key. Lawyers should memorize key points and make their presentation interesting by being clear and effective. They use different communication techniques to persuade. Effective lawyers are also to correspond both to the forthcoming line of evidence and to the adversarial position. They should focus on what the jurors want to hear. Jurors often make decisions based on what they think they want to hear. Jurors think like real people to anticipate questions that will be important to jurors. They gain their attention, hold their interest, and make it easy for them to agree with their case. For trials in front of a judge, lawyers should anticipate what the judge will know the judge. They should ask their colleagues for advice on what that judge likes or dislikes so they can structure their presentation appropriately and give the judge what they want to hear. Emotional presentations move judges less than jurors. Before a judge, lawyers should stick to a dispassionate approach where they detail the facts of the case. Trial lawyers should also become familiar with and respect the court’s rules. They do not want to lose on a technicality.
adjectives. They should avoid legalese and foreign languages. They should speak in everyday, six-pack English. They should use short sentences. It is pointless for lawyers to use complex language and complicated arguments in front of jurors unlikely to understand—your point. Lawyers should aim to reducing their idea to their clearest form: What may seem clear to lawyers who have been working on a case for years might be unclear to a jury. For trials in front of a judge, the same principles apply. Judges are busy professionals who multi-task and hear different cases. Lawyers should make it easy for them to understand their arguments and difficult to rule against them. Being clear is crucial to persuasion. Otherwise, jurors and judges might not understand where lawyers stand on facts and issues.

(10) Be concise. The best trial lawyers know that their presentation of the case need be not only clear but also short and sweet. They work on every part of the trial: motions in limine, jury selection, opening statements, witness examinations, evidence introduction and exclusion, jury-charge requests, summations, and exceptions to the jury charge. They know the time they have before a jury or judge is limited. They learn to boil down arguments to the crucial facts only. They rehearse their oral presentation to ensure that every issue is stated with maximum concision and clarity to avoid losing the jurors’ attention. They do not try to fit every argument into their presentation; they select the best ones. They do not rush; they take their time to make every word count. Concision helps audiences better understand lawyers’ arguments and demonstrates the lawyer’s dedication to the case. An excessively long or boring factual statement encourages audience skepticism.

(11) Be presentable. Because persuasion is partly based on impressions and perceptions, trial lawyers should never neglect how they present themselves. They must dress appropriately: neatly and professionally. A messy appearance will distract the audience from the lawyers’ message. They should also be aware of their body language. Body language is not something lawyers can fake. Audiences will perceive dishonest body language and disbelieve what they hear. Lawyers should avoid closed posture, such as crossed arms, and favor open posture and gestures that communicate sincerity and openness. They should also make eye contact with their audience to establish a connection and to demonstrate honesty. Trial lawyers should also try to sit with the fewest people at the counsel table, or preferably alone. Lawyers need to put themselves in the place of jurors, who will see David versus Goliath if one side has several lawyers at their table and the other side has only one. Jurs are more sympathetic toward the poor lawyer alone against a larger group of greedy lawyers. Trial lawyers should also avoid drinking water at the counsel table in front of the jury. Jurs do not have water during the trial. To demonstrate that they are on the same level, lawyers should not drink either.

(12) Be trustworthy. To project sincerity and be credible in the jury’s eyes, trial lawyers must be honorable. They cannot hide anything. They should request side bars only when necessary; jurers feel excluded by this procedure. Lawyers should also make understandable objections so that jurors or the judge do not conclude they are trying to conceal information. Jurs or judges will not rule in the favor of lawyers perceived as deceitful and dishonest. Trial lawyers should never exaggerate, overstate, or generalize. By understating, lawyers emphasize content, not style, to make their arguments powerful. Lawyers should never use sneaky techniques to hide important facts: honesty is the only policy. They win by stating the facts accurately and then by providing strong explanations and evidence to prove their conclusions. Trial lawyers should also stick to the record and provide accurate and precise references. Doing so gives credibility to lawyers and shows they worked on the case. They should never over promise and risk not fulfilling their promises. Lawyers should be careful in their opening statement when they tell jurors what to expect.

(13) Be reasonable. The best trial lawyers know that the way to win in the long run is to be reasonable. They use good judgment and common sense. They portray the situation accurately and always present valid arguments. They object only for a good reason. Reasonable lawyers are logical and fair when arguing their position and asking for relief. They know whether and when to concede and when to stand their ground. Conceding when appropriate allows lawyers to concentrate their efforts on important arguments while appearing reasonable. Being reasonable also means that lawyers should not prolong trials. Reasonable lawyers are pleasant to work with: jurs and judges appreciate them and will be more likely to cooperate with them. Opposing counsel might even be more likely to concede or settle on favorable terms.

(14) Be yourself. Trial persuasion requires lawyers to be engaging to get their audience interested in what they are saying. Trial lawyers should be original when presenting their case to get the audience’s attention. No one style is suitable to all trial lawyers. Being original does not mean that lawyers should try to use trial skills or strategies with which they are uncomfortable. Lawyers should be themselves, without pretense. Jurs can tell when lawyers are uncomfortable or nervous. Trial lawyers should also be able to manage their nerves. Some nervousness can be useful, however; it proves that lawyers are aware of the seriousness of the matter to their client and their resulting responsibilities and that any case can be won or lost. Lawyers should not take themselves too seriously: Most jurs already have a preconceived idea of egotistical lawyers. Trial lawyers can use humor, but they should be careful not to offend. Jokes should never be memorized and rehearsed; if humor is used, it should be spontaneous. Trial lawyers should also practice caution with theatrics. They can use it sparingly to make a point or to get attention, but overuse will turn the trial into a comedy routine.

(15) Be professional. Trial lawyers should always act professionally. Professionalism persuades in two ways. First, lawyers will be more likely to win points with judges and jurs if they are charming, civil, and likeable. Second, acting professionally helps lawyers maintain the credibility necessary to persuade audiences. Being professional as a trial lawyer means consistently respecting the judge, the jury, and the court personnel. Professionals are never rude. They are able to defend their client’s interests efficiently without forgetting their good manners. They never lie or mislead. Jurs and judges see everything that happens in the courtroom. They see how lawyers act with one another and with court personnel. If the audience sees lawyers being respected and acting professionally, they are more likely to listen and trust them. Determination and perseverance for a cause are also important qualities of trial lawyers. Winning a case is worth it only if the lawyer behaves ethically and maintains integrity. Professionals know when to let something go.

Conclusion
Trial advocacy is complex. Cases are lost and won on atmosphere. Lawyers can only try their best to control it in their favor. They should be themselves and think of a trial as a conversation and not a speech. The key to persuasion is to believe in what one is doing — and then to make it easy for the audience to rule for you and to make the audience want to rule for you. If lawyers are sincere in their presentation, the judges and jurors will want to rule in their favor.

Editor’s Note: Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor of law at St. John’s University School of Law, in Queens, New York, where he teaches trial and appellate advocacy. For her research help, Judge Lebovits thanks Amelie Plouffe Deschamps, a law student from the University of Ottawa, Civil Law Section, his alma mater.