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INSIDE
NOVEMBER 2018

SCBA's Judiciary Night a Big Success

By Laura Lane

This year more people came to Judiciary Night than in years past, which may be a testament to the popularity of the event. But also, it's more than likely indicative of the culture of the Suffolk County Bar Association, which encourages collegiality and is committed to a strong relationship with Suffolk County's judiciary. Held at the Watermill on Sept. 26, it was an elegant affair that included a cocktail hour that enabled attorneys and judges to mingle, before being served a delicious dinner.

SCBA President Justin Block's welcome confirmed what so many believe. "This is our chance to celebrate our relationship with the bar and bench," he said, "which gets better and better every year."

The special guests for the evening were Town Justices Hon. Andrea H. Schiavoni and Hon. Allen M. Smith, who received mementos for their dedication to the judiciary system in Suffolk County.

Kaitlyn Pickford, Outreach Coordinator, Town & Village Courts Liaison, at the District Administrative Judge's Office was awarded the Honorable Alan D. Oshrin Award of Excellence.

"Kaitlyn is the face of the court and does such a fantastic job," said the Hon. C. Randall Hinrichs, District Administrative Judge of the Suffolk County Courts. "She always receives high praise. I couldn't find a more deserving honoree."

Mr. Block added that Ms. Pickford made it easy to make the public service video "Another Night," which was inspired by the 1993 film made by the Suffolk County Bar Association and the Suffolk Academy of Law called "One Night." The Association plans to have the film, which addresses the growing opioid epidemic, distributed to the school districts and community groups throughout Suffolk County.

Mr. Block thanked Ms. Pickford for her efforts, adding that it was "such a pleasure working with her."

Ms. Pickford was visibly moved when she accepted her award. "It is a pleasure to come to work every day and work with all of you," she said. "I really enjoy it."

Photo by Barry Smolowitz

The Honorable Allen M. Smith, the Riverhead Town Justice, was an honoree at Judiciary Night. He received a memento for his continued dedication to the justice system.

Note: Laura Lane, the Editor-in-Chief of The Suffolk Lawyer, is an award-winning journalist who has written for the New York Law Journal, Newsday and is a Senior Editor at the Long Island Herald publications.

PRESIDENT'S MESSAGE

Looking Outward

By Justin Block

Justin Block

I have spent the last several columns talking about all the things the Bar Association does, and continues to do, for our members, as well as the things we intend to work on to make our lives easier. So, I thought it was time to give our membership just a glimpse of what your Bar Association, and some of our members, do for the community at large.

First, and with a nod to personal, presidential and podium privilege, is our public service video entitled "Another Night." This latest effort was inspired by the 1993 film made by the Suffolk County Bar Association and the Suffolk Academy of Law called "One Night," which followed the journey of an underage DWI, from party to a crash involving a fatality, arrest and legal proceedings, up through trial of the matter. Our members were the "actors," playing parts with which they were well-acquainted: Jeff Weeks played the prosecutor, Steve Kunken played the defense attorney, and my father, Ira Block, played the judge. "One Night" won a number of awards and everyone involved was rightly and immensely proud.

Last summer, I was given a copy of "One Night" by Harvey Besunder, who was president of the SCBA at the time it was made. Not coincidentally, Harvey was a very close friend of my father and a mentor, confidant and surrogate father to many of us. It was during that conversation with Harvey that I thought it might be time to update "One Night" to address the growing opioid epidemic. With that, "Another Night" was born, with the idea that it be distributed to all of the school districts and, hopefully, community groups throughout Suffolk County to be shown to middle and high school students.

In short, "Another Night" is the story of a 19-year-old brother and 14-year-old sister who are given legitimate prescrip-

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BAR EVENTS

SCBA Annual Holiday Party
Friday, Dec. 14, from 4 to 7 p.m.
Great Hall, Bar Center

Join your colleagues in ringing in the holidays at this festive party which includes refreshments and live entertainment. For further information call the bar.

Annual School Law Conference
Friday, Dec. 8, 8:30 a.m. to 2:50 p.m.
Sign-in and continental breakfast begins 8 a.m.
Great Hall, Bar Center

Presented by the Suffolk and Nassau Academies of Law and the Education Law Committees of the Suffolk and Nassau County Bar Associations. The conference is for attorneys, school administrators, school board members, teachers, representative of school bargaining groups, parents, and others with an interest in education law covers legal topics of importance to the school community. 5.5 credits in professional practice will be awarded to attorneys. For more information, or to register, nicolette@scba.org, (631)234-5588.

Swearing in & Robing Ceremony
Monday, Jan. 14 at 9 a.m.
Touro Law Center
225 Eastview Drive, Central Islip

Join us to honor our distinguished members of the Judiciary at their Swearing-in ceremony.

PERSONAL INJURY

Focus on FOIL: Non-Traditional Fact Finding

By Cory Morris

New York's Freedom of Information Law, codified in the Public Officer's Law, is becoming a pivotal tool in litigation. Whether it be records relating to police body cameras, government audits, public schools, wrongful convictions, traffic cameras or infrastructure and design, any member of the public has standing to request such agency records and the attorney(s) who represents a spurned FOIL petitioner in an article 78 proceeding is allowed to request reasonable attorney's fees.

Forty years later, the Court of Appeals repeated and confirmed the simple rationale behind FOIL, that "the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."[1] Recently, a mandatory award of attorney's fees provision was added to the statute.[2] The enormous expansion of local government agencies, especially throughout Long Island and the five boroughs, has allowed FOIL to become an integral discovery device where no alternative discovery device exists or prior to a more formal filing.

FOIL (Public Officers Law § 89 (3)(a)) mandates that within five business days of receiving a request for a record, an agency shall either make the record available to the requestor; deny the request in writing; or furnish a written acknowledgment of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied. "The New York State Legislature enacted FOIL to promote an open government and public accountability."[3] FOIL rests on the premise that the "public is vested with an inherent right to know and that official secrecy is anathematic to our form of government."[4] The statute "imposes a broad duty on government to make its records available to the public."[5] Once challenged, it is the agency that bears the burden of withholding records from the public.

Cory Morris

In accordance with the desire to encourage "open government"[6] and "public accountability,"[7] FOIL generally mandates all agencies to make records available unless the material being sought falls within a statutory exemption. As such, "[a]ll government records are presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2)." To ensure maximum access to government records, courts are to narrowly construe the exemptions, and the agency retains the burden to demonstrate the requested materials are actually exempt. The agency will typically be bound to the administrative record, the reasons outlined by the agency in response to an appeal as per Public Officers Law § 89 (4)(a). Disclosure may be withheld "[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions."[8] Anyone can make a request and this powerful tool operates at all levels of local government agencies as defined by Public Officers Law § 86(3).

Even the mayor of New York City is subject to FOIL. On May 1, 2018, the First Department not only affirmed the New York City Supreme Court Order releasing electronic mailings ("e-mail") between Mayor Bill de Blasio and a consulting firm, but it also affirmed the discretionary award of reasonable attorney's fees.[9]

The FOIL requests reviewed by the First Department sought "correspondence exchanged between the mayor and/or certain members of his administration and various private consultants." The reporter who sought these e-mail records was denied access based upon the intra/inter agency exemption. After the reporter exhausted her administrative remedies, she commenced an Article 78 litigation. Over a thousand pages of records were produced after litigation was commenced. The Mayor of New York City's office sought "to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency." The First Department rejected this position. In upholding the award of attorney's fees to the reporter, the First Department noted that "after the proceeding had commenced and more than a year after the FOIL requests were made, [the Mayor of New York City's Office] produced approximately 1,500 pages of previously withheld documents."

Personal injury attorneys know that ordinarily litigation may rely on government records, from police reports, video and permits to broken sidewalks.[10] A recent case example from the Second Department, *Trawinski*, shows how records produced from FOIL can change the outcome of a litigation. The plaintiff in *Trawinski* sought to recover personal injuries for falling on a sidewalk. After a complaint was filed and discovery conducted, a motion for summary judgment was filed by the New York City defendants. It was granted by the lower court. On a motion to renew, filed after *Trawinski's* receipt of new facts from a FOIL request, the lower court affirmed the award of summary judgment to the New York City Defendants. An appeal was taken.

The Second Department in *Trawinski* reversed because "she had not received these documents, which were responsive to her FOIL request

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LGBTQ

Divorce for Long Term Same-Sex Relationships that Became Short term Marriages Under the Marriage Equality Act

By Christopher J. Chimeri

This is part three of a three-part series.

This is the final of three articles discussing the legal ramifications and considerations of a divorce in which the spouses are long term same-sex partners, having previously functioned as a family before marriage equality. We continue with the hypothetical couple that have lived together for 20 years with a structured household reminiscent of a "traditional" marriage with children and one spouse functioning as a primary income earner and the other functioning as a spouse, homemaker and parent. Let us say the hypothetical couple, together since 1998 or so, married in 2013. They have now been married only five years but have lived together for four times that duration.

Equitable distribution first requires a court to identify all assets and liabilities that exist when a divorce is commenced. Once such an inventory is established, the next critical step is to classify each item as "marital" or "separate." With limited exception, such as application of other equitable doctrines like constructive trusts, a court may only distribute assets and liabilities that are "marital." Domestic Relations Law § 236(B)(5) provides that all property, regardless of title, acquired during the marriage by either or both spouses before commencement of an action for divorce is marital, unless it falls within the exceptions defined as separate property. Separate property is narrowly defined by statute to include only assets acquired before marriage or inherited/gifted from someone other than the other spouse; personal injury awards; property in exchange for other separate property; or passive appreciation on separate property.

Christopher Chimeri

Once the inventory and all classifications are made, the court must value the marital (and sometimes, separate) assets to aid in the last step, which is distribution of those assets and debts.

In distributing assets and liabilities, the relevant portions of DRL § 236(B)(5) require the court to determine the rights of parties regarding marital and separate property unless there is a valid agreement signed between them as to such rights, requiring that separate property remains as such, and that the court distribute marital property "equitably between the parties, considering the circumstances of the case and of the respective parties."

In "considering the circumstances," as relevant here, court considers, among other factors enumerated in the statute: (2) the duration of the marriage and the age and health of both parties; (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects; (4) the loss of inheritance and pension rights after divorce; (5) the loss of health insurance after divorce; (6) any award of maintenance; (7) equitable claims to, or direct or indirect contributions to the acquisition of marital property by the non-titled spouse, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. Even though the value of a spouse's enhanced earning capacity from a license, degree, celebrity goodwill, etc., is no longer an asset, "in arriving at an equitable division of

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HELTH AND HOSPITALS

CMS Cracks Down on Medicare Advantage Plan Denial Abuses

By James G. Fouassier

After years of complaints by health care providers, the US Department of Health and Human Services, through its Centers for Medicare and Medicaid Services, finally appears to be getting serious about unfair, improper and often illegal denials of physician and hospital claims for Medicare beneficiaries who have elected Medicare Advantage plans (Medicare Part C) in lieu of "traditional" Medicare Parts A (hospital) and B (physician) coverage.

When a Medicare beneficiary elects Medicare Advantage instead of "traditional" Medicare, the federal government pays a "capitated" monthly amount to the health plan that the beneficiary elected to join. The driving force behind the creation of Part C programs is that the federal government saves a substantial amount of money by paying a commercial health insurer or plan administrator what effectively is a "premium," and the health plan then assumes all the risk of financial loss if the member's care turns out to be more expensive than the capitated payments the plan receives from CMS. This obviously incentivizes a MA plan to scrutinize a provider's claim to ascertain whether the service can be authorized in advance or, if already performed, was covered by the MA plan benefit design, was medically necessary, and was correctly coded (formatted with the medical shorthand for claims) to accurately reflect the services and levels of intensity that the claim initially reflects. For most of these activities the criteria for payment eligibility and amount are established by the MA plan in its policies and procedures, incorporated by reference into the network agreement between the health plan and the clinical provider. Since only the most basic claims adjudication and payment criteria are specifically addressed in that contract the agreement will default to the hundreds of pages in the MA plan's provider manual or policies and procedures, all of which are established unilaterally by the MA plan and obviously are self-serving.

James G. Fouassier

The tension, then, is between the need and legal obligation of a health plan to pay only for claims properly eligible for payment in the amounts properly payable, and the need for the MA plan to operate with a profit margin. What has been evident to providers for years, and now is becoming evident to federal regulators, is that MA plans are abusing the lopsided power they have to authorize services and to adjudicate and pay claims based on overwhelmingly self-serving criteria simply to save money.

An extensive report issued by the Office of Inspector General of the US Department of Health and Human Services just this past September develops specific data that point to the clear conclusion that MA claim and service authorization denials across the board are excessive and unjustified. The report reveals "widespread and persistent problems related to denials of care and payment in Medicare Advantage." Gathering data from MA claims submissions and adjudications from 2014 to 2016, CMS examined the number of denials (which include refusals to authorize medical services that clearly are covered and medically necessary; nonpayment for ineligibility or noncoverage or "short" payments where the provider asserted that the claim was underpaid) and the result of subsequent appeals, if any. CMS concludes that the high number of initial health plan denials that were overturned on appeal either by the plans themselves or by second level appeals to independent third party reviewers raised concerns that MA plans were improperly denying those claims. What appears to be even more disturbing, however, is that the data demonstrate that *only about one percent of authorization and claims denials are ever appealed*! While there are a variety of reasons for this (see *infra*), the bare fact itself suggests that the problem is much more serious than the data establish.

These improper denials of claims for medical services to the neediest of our population, the elderly, may not only contribute to physical and financial harm to the patient and keep beneficiaries from obtaining needed medical services but also cheat the federal government out of the value of the capitated payments made to the plans ("…but they also misuse Medicare Program dollars that CMS pays for beneficiary healthcare.") The amount of the capitated payments is based upon CMS criteria that weigh the value of estimated services the plan will be covering (in

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CYBER

Blocking Malware

By Victor Yannacone

Malware infections are becoming more common and more costly than ever. In 2017, cyber attacks cost small and medium-sized an average of $2,235,000.

When it comes to blocking malware, you don't need an army of security experts, or software designed to be used by them, to block the vast majority of attacks. The vast majority of the cyber criminals are just greedy, lazy opportunists who use readily available and easy-to-use tools developed by others, basically the equivalent of hacking-paint-by-numbers kits. You can dramatically lower your risk of infection simply by placing a few select roadblocks on the path's cybercriminals are used to taking.

The real task for defenders isn't guessing the hackers' game plan. The challenge is blocking the execution of that game plan. Here are six simple actions you can take to block the most common attacks.

Use your firewall/email filtering to block the most commonly abused file types. According to Verizon's 2018 Data Breach Investigations Report, 92.4 percent of malware was delivered via email.

Limit the types of file attachments you allow through. Block the attachment types Google has deemed dangerous and blocks in Gmail. Next, consider the file extensions for the most common (77.5 percent) types of malicious attachments used in malware campaigns in 2017: .vbs, .js, .exe, and .jar as well as .zip, .rar, and .7z. Block them.

Victor Yannacone

Lock down Microsoft Office. Office files are almost universally accepted. All the capabilities of MS Office are the source of its vulnerability to becoming a carrier of malware.

A few of the most commonly-abused capabilities you should consider restricting, if not disabling altogether from incoming mail attachments are:

- Macros. Microsoft also offers the option to block them in high-risk scenarios only, such as when they're included in documents downloaded from the internet.
- Object Linking and Embedding (OLE). Microsoft developed OLE to give Office users the ability to link to and add data from other applications inside their docs and attackers have abused that capability, often using it to trick users into inadvertently launching malicious embedded scripts. If you do not actively utilize OLE packages, you can disable them by modifying the registry.
- Dynamic Data Exchange (DDE). OLE's predecessor, Dynamic Data Exchange is a similar feature that was removed from Word following a spike in attacks that abused it. Curiously, DDE functionality remains active in Excel and Outlook and to disable it, you must make registry changes in both Excel and Outlook.

Prevent VBScript and JavaScript abuse. Scripts have become a favorite tool for cybercriminals. Malicious scripts can be smuggled onto machines via Office documents or simply via email. Because Microsoft doesn't show file extensions by default it's possible to easily hide .vbs and .js attachments in plain sight. In addition, it's also possible to tuck them away in archive file formats like .zip, .rar, and .7z files.

In order to protect users from inadvertently executing malicious script files, Microsoft recommends making registry changes to ensure that a warning prompt is issued before any script file is allowed to run. When feasible, go one step further by disabling Windows Script Host, which will prevent users from running VBScript or JScript scripts at all.

An additional way to reduce your risk from malicious .js files in particular is to configure Windows so that it always opens .js files with Notepad.

Put restrictions on PowerShell. PowerShell comes installed by default on all Windows systems automating a wide range of local and remote tasks. Unfortunately, it can also create serious security issues from downloading and executing malware payloads to helping attackers achieve persistence, privilege escalation, and lateral movement, PowerShell offers hackers a veritable buffet of malicious capability. Attacks leveraging PowerShell

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Focus on FOIL: Non-Traditional Fact Finding (Continued from page 12)

and in the sole possession and control of the NYC defendants, until after the December 2014 order." Although it was unclear why such records were not obtained through the ordinary course of discovery, such records were readily available by FOIL request. Indeed, in *Trawinski*, "The plaintiff contended . . . she had filed a [FOIL] request for documents . . . pertaining to the subject sidewalk but had not yet received any documents." The Second Department, in granting the renewal noted that the receipt of records from a FOIL request were not previously in her possession at the time that the New York City defendants moved for summary judgment.

In reversing the lower court, the Second Department held that the plaintiff "demonstrated the existence of triable issues of fact concerning the involvement of the NYC defendants in the affirmative creation of a defective condition of the subject sidewalk, upon renewal, that branch of the motion of the NYC defendants which was for summary judgment dismissing the complaint insofar as asserted against them should have been denied." *Trawinski* is just one recent case example where a FOIL request(s) changed the outcome of an otherwise ordinary slip and fall case.

Attorneys who utilize contingency fee retainers would be wise to amend such retainers for the assignment of an award of reasonable attorney's fees associated with the enforcement of FOIL requests in light of the recent amendments to the Public Officer's Law. While a narrow majority of the New York Court of Appeals[xi] recently endorsed a new type of denial to FOIL requests, "the Glomar response, an ambiguous nonanswer that defense and intelligence officials have used for years to hide their deepest secrets,"[xii] FOIL remains a powerful tool for litigants. One should consider filing a FOIL request in tandem with a notice of claim. Along with some other non-traditional forms of fact finding, FOIL is low cost, sometimes free. As discussed in *Trawinski*, just a simple FOIL request can change the outcome of a litigation.

Note: Cory Morris is a civil rights attorney, holding a master's degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at http://www.coryhmorris.com.

[i] *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571 (1979)
[ii] See L. 2006, ch. 492, § 1, Assembly Mem. in Support, at 1, Bill Jacket, L. 1982, ch. 73; Public Officers Law § 89(4)(c).
[iii] *Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP v. New York City Police Dep't.*, 2018 N.Y. Slip Op 32334 (NYC Sup. Ct. 2018) (citation omitted).
[iv] *Matter of Madeiros v. New York State Educ. Dept.*, 30 NY3d 67 (2017) (quoting *Matter of Fink v. Lefkowitz*, 47 NY2d 567.
[v] *Miller v. New York State DOT*, 58 AD3d 981 (3d Dep't. 2009)
[vi] *Matter of Newsday, Inc. v. Empire State Dev. Corp.*, 98 NY2d 359, 362 (2002); Public Officers Law § 84.
[vii] *Matter of Gould v. New York City Police Dept.*, 89 NY2d 267, 274 (1996).
[viii] *Matter of Fink v. Lefkowitz*, 47 NY2d 567(1979)
[ix] *Matter of Rauh v. De Blasio*, 2018 N.Y. Slip Op 3115 (1st Dep't. 2018).
[x] *Sabino v. City of New York*, 2018 NY Slip Op 32359 (NYC Sup. Ct. 2018); *Matter of Dilworth v. Westchester County Dep't. Of Correction*, 93 A.D.3d 722, 940 N.Y.S.2d 146 (2nd Dep't. 2012); *Trawinski v. Jabir & Farag Props., LLC*, 154 A.D.3d 991, 63 N.Y.S.3d 431 (2d Dep't. 2017) ("Trawinski")
[xi] *Matter of Abdur-Rashid v. New York City Police Dep't.*, 2018 N.Y. Slip Op 2206 (2018).
[xii] Alan Feuer, *Activists Sue Police Dept. Over 'Can't Confirm or Deny' Tactic,* New York Times (June 14, 2017), https://www.nytimes.com/2017/06/14/nyregion/nypd-secrecy-glomar-response.html.

Divorce Under the Marriage Equality Act (Continued from page 12)

marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;" and the catchall (14) any other factor which the court shall expressly find to be just and proper.

Age and health can often play a contrasting role against the short duration of a marriage in our example family. The relevance of a custodial parent's need to occupy the home may be that durational occupancy of the marital residence, although separate property of the non-custodial parent can be awarded to the non-titled parent if based on child custody. Maintenance, loss of retirement, and health insurance were previously discussed but the simple "problem" is that if your client has spent the last 20 years contributing to the creation of his or her partner's "separate" wealth as defined under the Domestic Relations Law, the court is empowered to consider the level of need and make maintenance and monetary distributive awards accordingly. To that end, under DRL § 236(B)(5)(e) a distributive award calling for the payment of money from one spouse to the other may be an equitable result, and there is no precise calculus for such distributive award, which is explicitly authorized in lieu of dividing ownership of asset(s), "in order to achieve equity between the parties."

When litigating these cases, it is imperative to prepare trial documents, such as a Statement of Proposed Disposition, that relates your arguments to the statutory considerations because under DRL § 236(B)(5)(g), in any decision made . . . the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel."

As cautioned in both the first and second part of this series, this article explores a topic that is not yet "battle-tested," with few or less reported decisions as of the writing of this article that confront the application of the recently changed laws on maintenance and the unquantifiable issues that can arise out of these classes of relationships, which do not fit neatly in a box in one's closet (pun intended). Accordingly, the practitioner must carefully understand the many different family dynamics specifically applicable to same-sex relationships before a) agreeing to take on a case; and b) prior to assuming positions in a case on behalf of a client in need. Once the case is your responsibility as the lawyer, it is even more critical to examine the statute at great length with a deep understanding of the many intricate facts involved in the family to best advocate for your client.

Note: Christopher J. Chimeri is a partner with Quatela Chimeri PLLC, with offices in Hauppauge and Mineola, and he focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors and holds an executive position in the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBTQ Law Committee. From 2014-2018, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star."

The Business of Percentages (Continued from page 10)

In affirming an award of 33 percent in a just under a 10-year marriage, the Second Department relied upon the 2008 case of *Kaplan v. Kaplan, supra*, which, unlike in *Westbrook*, was "a marriage of long duration" where the trial court awarded the wife 30 percent of the husband's dental practice and license. *Kaplan* at 637. In doing so, the *Westbrook* Court in essence discounted the duration of the marriage and weighted more heavily the trial court's credibility determinations regarding the wife's early direct contributions towards the start-up of the business and being "primarily responsible for taking care of the parties' children and the household."

That being said, is *Westbrook* the start of an upward trend in the percentages to be awarded to the non-titled spouse or an aberration based upon a unique fact pattern? Will the trial courts begin to acknowledge the work of a caregiver and homemaker as commensurate to the work of the income-producing spouse even in marriages that are not considered "long-term?"

Given the Appellate Court affirmed the award as a provident exercise of the trial court's discretion and did not itself determine the 33.33 percent, going to great lengths to recite the other factors the courts must consider in making an equitable distribution of marital property and not disturbing the trial court's determination unless it was an improvident exercise of discretion, *Westbrook* appears to be specific to its unique fact pattern. This is especially apparent considering other recent decisions from the Second Department wherein the Appellate Court held that that the trial court did not improvidently exercise its discretion in awarding lower percentages of a business in significantly longer marriages. *See*, *Culen v. Cul*en, 157 A.D.3d 926 (2nd Dept 2018) (where the Second Department affirmed an award of 25 percent of the husband's business in a 26 year marriage where the wife was the primary caretaker); *Perdios v. Perdios*, 135 A.D.3d 840 (2nd Dept 2016) (where the Second Department affirmed an award of 20 percent of the husband's business in an 18 year marriage acknowledging that this award did not ignore her contributions as the primary caretaker of the children, which allowed the husband to focus on his businesses).

Thus, it appears that the task of advising our clients of what percentage of their spouse's marital business interests they will likely be awarded by the trial court will remain a challenge to practitioners with *Westbrook* being a friendly reminder that each case is determined on its own unique facts that must be adequately presented to the trial court.

Note: *Jeffrey L. Catterson is a partner at Barnes, Catterson, LoFrumento & Barnes, LLP, with offices in Garden City, Melville and Manhattan and practices primarily in matrimonial and family law. He can be reached at* JLC@BCLBLawGroup.com *and (516)222-6500.*

Trusts and Estates Update (Continued from page 15)

sequently paid by respondent to himself. After a series of motions and appeals, the public administrator moved for summary relief.

The court observed that one of the most sacred duties of a fiduciary is to avoid self-dealing. Once self-dealing is disclosed, the "no further inquiry rule" is triggered, which will result in the transaction being set aside regardless of its fairness. The court further noted that in cases where a fiduciary places himself in a position where his interest is in conflict with his duty of loyalty, the fiduciary may be surcharged.

Based on the foregoing, and the undisputed record reflecting the improper payments the respondent made to himself, without prior court authorization, at a time when he was serving as preliminary executor of the estate, and was in full control of Quailman Investors, the court held that his conduct was an act of self-dealing in violation of his fiduciary duty of undivided loyalty to the estate beneficiaries. As such, the court set aside the payments, and directed the respondent to restore the sum of $725,453 to the estate.

In addition, the record revealed that the respondent, also, without prior court approval, paid himself a personal claim he had against the estate. As in the case of self-dealing, when a fiduciary pays himself a claim without leave of court, he subjects himself to a surcharge, which can include, among other things, costs, attorney's fees, and interest. Noting that attorney's fees may generally not be collected by a prevailing litigant in the absence of statute or agreement, or where the losing party has not acted maliciously or in bad faith, the court, nevertheless, found based on respondent's conduct, that an award of attorney's fees, to be paid by respondent personally, was warranted. Accordingly, the court scheduled a hearing to determine the surcharge and fees in connection with the improper payment of the claim.

***In re Smith,* NYLJ, May 17, 2018, at 28 (Sur. Ct. Albany County).**

Suspension of Letters

Before the Surrogate's Court, Kings County (Torres, S.), in *In re Allen*, was a motion of a co-trustee and beneficiary of the subject trust to suspend her co-trustee for failure to account. The petitioner had previously commenced two proceedings against her co-fiduciary; one, seeking his removal, which remained pending, and the second, to compel him to account. In response to the latter petition, the court issued a 45-day order directing that an accounting be filed. Although the order was served on the respondent/co-trustee, he failed to account in accordance with the court's directive, provoking the motion seeking his suspension. The assets of the trust estate were comprised of the decedent's residence, and an interest in a limited liability company, which owned a multiple-unit dwelling and income producing property.

In support of her application, the petitioner maintained that the respondent had, *inter alia,* failed to open a separate trust account, and to file federal or state income tax returns for the trust. Further, the petitioner alleged that the respondent's neglect of the real property held by the LLC caused it to sell for a price far less than two previous offers to purchase the parcel, which her co-fiduciary had rejected.

In opposition to the motion, the respondent filed a separate motion requesting an extension of time to file his account, claiming that he just received the bank statements in order to do so. Although the petitioner did not oppose the requested extension, she nevertheless requested that her co-trustee be suspended on the grounds that his failure to abide by the court's order was indicative of his on-going breach of fiduciary duties and responsibilities.

The court opined that, pursuant to the provisions of SCPA 719(1), a trustee may be removed, without a hearing, when after having been ordered to account, he fails to do so within the time and manner directed by the court. On this basis, the court found that the respondent's noncompliance with its directive to account constituted grounds for his removal. Indeed, the court concluded that throughout the proceedings the respondent had impeded the efficient administration of the trust estate necessitating the court's intervention most particularly, with respect to the sale of the subject real property.

Accordingly, based on his failure to account as ordered, the court directed that the respondent be suspended as co-trustee, pursuant to SCPA 719(1), pending the hearing and determination of the removal proceeding. Respondent's motion for an extension of time to file his account was granted.

***In re Allen,* N.Y.L.J., Mar. 8, 2018 at 28 (Sur. Ct. Kings County).**

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past-Chair of the New York State Bar Association Trusts and Estates Law Section, and a past-President of the Suffolk County Bar Association.

Blocking Malware (Continued from page 14)

increased 432 percent in 2017.

Because there are well-documented workarounds to many of PowerShell's built-in restriction options, consider whitelisting via Microsoft's AppLocker to limit PowerShell to a select group of power users only.

Use endpoint protection that improves on antivirus. The majority of successful attacks on small and mid-size businesses happen despite AV being installed. As attacks become more sophisticated and criminals take advantage of a growing number of workarounds, investment in antivirus solutions is generating diminishing returns.

Consider purchasing and implementing new endpoint options which can block not only malware, but the underlying activities and exploit techniques criminals rely on to launch their attacks regardless of where or how they start and stop them in real-time before any damage is done.

Secure RDP. Remote Desktop Protocol connections are commonly used where outside the office IT support needs to gain access and control over a machine in order to investigate problems and resolve issues.

When setup and secured properly, RDP can be a very effective tool. But when exposed to the wider internet, it can also be a beacon for cybercriminals with access to scanning tools which identify systems with open ports exposing RDP.

Cybercriminals can bypass this step and purchase access to previously compromised RDP servers, directly via thriving underground dark web marketplaces. SamSam, the ransomware that crippled the city of Atlanta, was distributed via RDP.

- Restrict access to RDP behind firewalls and by using an RDP Gateway and/or VPNs.
- Secure RDP accounts with unique and complex passwords. Better yet, use two-factor authentication, too.
- Limit the number of users with access to RDP to only those who really need it.
- Apply a lockout policy as an additional layer of protection against brute-force attacks.

These suggestions won't protect you and your firm from every attack, but they will help you thwart the majority of malware campaigns you're most likely to face. Covering these basics will significantly reduce your risk.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. He has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

The Attorney Emeritus Program (Continued from page 17)

Fordham University's School of Law's Feerick Center for Social Justice provides programmatic and administrative support for AEP. Feerick Center staff organize information sessions and assist attorneys in finding pro bono opportunities that best suit their interests, background, and schedule. Emeritus Attorneys have proven to be an integral force in New York State's fight for access to justice, with volunteers (there are approximately 1,000 Emeritus attorneys enrolled in the program) contributing an average of 150 hours of pro bono service annually. This service is critical, assisting low-income New Yorkers in essential matters including but not limited to housing, family, and education.

If you wish to enroll as an Emeritus attorney, you can do so by either going to NYcourts.gov/attorneys/volunteer/emeritus/index, checking the appropriate box on your biennial registration form or contacting the Feerick Center for Social Justice. If you wish to navigate through the various pro bono providers without the assistance of AEP, you are free to do so, but AEP will make things a whole lot easier for you.

Note: Michael Siris is of counsel to Solomon and Siris, PC, a member of the Board of Directors of New York County Lawyers Association and chair of its Senior Lawyers Committee.

Note: Cora Vasserman is an AmeriCorps VISTA Member at Fordham Law School's Feerick Center for Social Justice (FCSJ). As indicated above, FCSJ administers the AEP.