

## APRIL 2012 NEWSLETTER

### MATRIMONIAL CASE OF INTEREST

**Scher v. Scher (Appellate Division, Second Department)** – The wife’s motion for a reexamination of her entitled share of the appreciated value of Home Companion Services of New York, Inc. was accepted and the court determined that the Supreme Court erred in its finding that the wife made no direct or indirect contributions to the business. Despite being incorporated three years before the marriage, Home Companion Services’ appreciation of value during the marriage was due in part to the actions of the wife, including her contribution as bookkeeper of the business for approximately seven years and her indirect contributions as homemaker and caretaker of one of the children from the husband’s prior marriage. The appellate court awarded 20% of the appreciated value of the business to the wife in the amount of \$229,200.

[\(Link to Decision\)](#)

### ENHANCED EARNINGS CASE OF INTEREST

**Huffman v. Huffman (Appellate Division, Second Department)** – The defendant (husband) appealed the trial court’s decision that subject his MBA degree to equitable division. The appellate court reaffirmed the decision of the trial court, stating, despite the defendant’s claim that the MBA was not a prerequisite for his employment in various finance positions, there was ample evidence that this degree made him a more valuable candidate. Furthermore, it was also affirmed this 30% award of the enhanced earning to the plaintiff was proper as the plaintiff made substantial indirect contributions to the husband’s attainment of the degree: supporting the husband’s educational endeavors, working and contributing her earnings to the family, being primary caretaker of the children, family and housekeeping responsibilities.

[\(Link to Decision\)](#)

### ESTATE & GIFT TAX CASE OF INTEREST

**Estate of Magnin v. Commissioner (U.S. Tax Court)** – The decedent had owned 75,044 out of 255,174 shares outstanding of JM Co. common stock and 47.5 out of 1,000 shares outstanding

of Specialty Shops Inc. common stock. The Court concurred with the valuator in his use of a lack of marketability discount and a minority interest discount on valuing the decedent's positions in both JM Co. and Specialty, but determined that the valuator, in adding together the two discounts to get a combined discount percent of 60.00% was in error. The lack of marketability discount and the minority interest discounts are separate and distinct and in order to ensure accuracy, the minority interest discount is to be applied first, and then the lack of marketability discount then applied to that figure. This correction would have yielded an effective, albeit lower, rate of 51.25%.

[\(Link to Decision\)](#)

## **NEWS ARTICLE**

**Increased Divorced Filings Under No-Fault Law** – Since New York adopted the No-Fault Law on October 12, 2010, divorce filings grew nearly 6% in Nassau County and 9% in Suffolk County as compared to filings in 2009, the last full year under the old law. The No-Fault package also effected change in how temporary maintenance was calculated. As such, this new law has helped more couples who have 'simple' divorces to resolve matrimonial issues more easily, but many complications still remain for couples with significant assets to divide.

[\(Link to Article\)](#)

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**False Friends: the Ethical Limits of Discovery via Social Media** – “While publicly accessible information is likely "fair game" for evidentiary use, and private posts (whose distribution may be limited to "friends," "followers", or other designated individuals) can -- and often should -- be included in discovery requests to opposing counsel, there may be times when attorneys would prefer to do their own investigations of any non-public social media posts rather than disclose their strategies by making open-ended discovery queries. In such circumstances, attorneys may be tempted to try to "become friends" with an opposing party or witness on a service like Facebook and thus gain access to posts and files not available to the general public. This could be done by the attorney directly, or by an investigator or non-lawyer at the attorney's direction, and might not even require making false statements to the user receiving the friend request; many users will accept friend requests from anyone, or from someone

whom they believe may be familiar to them from some context, without needing specific (and potentially dishonest) details about any past association.

Such "false friending," though, has been rejected as unethical practice by multiple state and local bars. Whether the contact is with a party or a witness, is done by or at the direction of the attorney, and involves false information or merely not disclosing the real reason for (and source of) the friend request, these investigations are generally viewed as impermissible."

[\(Link to Article\)](#)

### **Facebook Content as Digital Evidence: Implications of Facebook's Updated Messages Feature**

The increasing use of social media as evidence in matrimonial matters has been widely publicized. In particular, Facebook can often be a treasure trove of information for one spouse to utilize against the other. That is why it is especially important to understand the changes that were made to Facebook's messaging system over the past few years. While initially implemented as an instant messaging tool, Facebook's messaging system has now become an instant message and email hybrid. This has had a significant impact on what data is potentially stored by Facebook and the default options for what is saved. This article also highlights some issues with obtaining information through an ordinary Facebook account, which may provide you with only a portion of the information actually retained by Facebook.

[\(Link to Article\)](#)

**N.Y. Appellate Court Ruling Brings Clarity to Cost-Shifting in E-Discovery** – "The court held that 'it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information,' subject to reallocation upon a proper showing. . . To reduce such expense, the 1<sup>st</sup> Department has advised that the first step is to seek a protective order. If the results of such motion fails to satisfactorily reduce e-discovery costs by sufficiently narrowing the ESI required to be produced, the next step would be for the motion court to consider the equitable factors set out in *Zubulake v UBS Warburg, LLC* to determine whether to 'shift,' in whole or in part, the cost of searching for, retrieving, and/or producing ESI to the requesting party. The 1<sup>st</sup> Department, in its ruling, took into account that plaintiff, often the requesting party seeking discovery, would not be able to afford ESI discovery if it had to bear the burden of paying for such expense."

[\(Link to Article\)](#)