

MAY 2012 NEWSLETTER

UPCOMING SPEAKING ENGAGEMENTS

Steven Cusumano will be presenting on the topic of "Valuation of Assets and Division of Property".

This seminar is hosted by the National Business Institute and is eligible for CLE credit.

Date: Thursday, May 03, 2012
Time: 9:00 am - 4:30 pm
Location: Hyatt Place Garden City
5 North Avenue
Garden City, NY

To register for this program, please [CLICK HERE](#).

Jacqueline W. Silbermann, Esq. and David Gresen, CPA/ABV/CFF, CFE will be presenting on the topic of "Separate Property - Legal and Financial Considerations".

Date: Tuesday, May 08, 2012
Location: NYCLA Matrimonial Law Committee

MATRIMONIAL CASE IN THE NEWS

While the fervor relating to Bernie Madoff's \$50 Billion Ponzi scheme has subsided significantly since his sentencing in June 2009, the fallout caused by this scandal can still be witnessed nearly 3 years later in the realm of matrimonial law and business/asset valuation. Such can be evidenced in the matter of **Simkin v. Blank (NY Court of Appeals – April 3, 2012)**.

In June 2006, as part of their divorce proceedings, Steve Simkin and Laura Blank agreed to equally split the \$5.4 million they had jointly invested in Madoff Securities in which Mr. Simkin gave Ms. Blank a \$2.7 million check. Subsequently, in December 2008, Bernie Madoff was

arrested on charges of running a Ponzi scheme. Mr. Simkin, along with myriad other investors, soon came to learn that the totality of their investments were essentially worthless.

In the appeal, Mr. Simkin argued for a reformation of the settlement relating to the division of the Madoff account and claimed that the division of said account was not equitable because of a mutual mistake in the belief that the account existed when in fact, it never had.

The Court of Appeals denied the husband's appeal of the Appellate Court's decision on the basis that, after the June 2006 settlement agreement, the husband was still able to redeem the funds in his Madoff account. It was not until the scheme was publicized more than two years later that the account was deemed 'nonexistent'. This is not so much, the Court of Appeal states, evidence of mutual mistake as it is a marital asset that unexpectedly loses value AFTER dissolution of the marriage. The asset, undoubtedly, had value at time of settlement for over two years and had the account increased in significant value during that time, the wife would not have been entitled to claim a portion of the enhanced value either.

Furthermore, the Court's decision to deny appeal reaffirmed the precedents set by Appellate Divisions denying a spouse's attempts to reopen settlement agreements based on post-divorce changes in asset valuation.

[\(Link to Article - 2009\)](#)

[\(Appellate Court Decision - 2011\)](#)

[\(Court of Appeals Decision - 2012\)](#)

ENHANCED EARNINGS CASE OF INTEREST

Sadaghiani v. Ghayoori (Appellate Division, Third Department) - Husband appealed the Supreme Court's decision relating to the valuation and distribution of his enhanced earnings. The Appellate Court determined that one third of the enhanced earnings as marital property was appropriate. However, the court adjusted the distribution of that marital portion from 30% to 10% due to the facts that a) the husband obtained medical degree prior to marriage, b) cohabitated with plaintiff for less than six months during which time he took additional tests for his medical licensing, c) husband's expenses were primarily covered by his mother, d) wife did not adjust or interrupt her lifestyle/career to support the husband's efforts for licensure, and e) wife's level of contribution was 'modest'.

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

ESTATE & GIFT TAX CASE OF INTEREST

Estate of Paul H. Liljestrand v. Commissioner (US Tax Court) - Prior to death in 2004, Paul Liljestrand (decedent) transferred real estate holdings from his personal revocable trust into PLP LP, an entity he formed on May 30, 1997 with the intention of leaving his property his

children. The Court determined that despite transferring legal title of the real estate into PLP LP, partnership funds and income were still being deposited into the bank account of the trust for several years (1997-1999) thereafter, resulting in comingling. Furthermore, since decedent had contributed all income producing assets into PLP LP his remaining income could not cover his living expenses. Consequently, such shortfalls were met through disproportionate distributions (the period 1999-2003) to the decedent's revocable trust for the purpose of paying his expenses. For these reasons, the Court determined that the value of decedent's estate should include the value of the assets transferred to PLP LP.

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

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COMPUTER FORENSIC & eDISCOVERY CASES OF INTEREST

Court Orders Mirror-Imaging of Personal Computers for Purpose of Preservation - "...Turning then to the motion for mirror-imaging, UFFC was particularly concerned that ongoing use of the computer equipment at issue would result in information being overwritten or lost. Defendants objected, arguing that taking mirror-images of their personal computers would be unduly intrusive and would violate the federal rules because discovery had not yet commenced. "Considering the circumstances of this case," the court disagreed and found mirror-imaging to be "appropriate to maintain the status quo." The court's analysis also weighed the benefit and burden of the requested imaging considering 1) the needs of the case, 2) the amount in controversy, 3) the importance of the issues at stake, 4) the potential for finding relevant material, and 5) the importance of the proposed discovery in resolving the issues. The court determined that all factors weighed in favor of mirror-imaging. The court also noted plaintiff's willingness to bear the costs associated with the imaging."

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

Third Circuit Holds That E-Discovery Costs Are Largely Unrecoverable In Bill of Costs - In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316, 2012 WL 887593 (3d Cir. Mar. 16, 2012), the Third Circuit held that most e-discovery costs are not recoverable after trial under

either Fed. R. Civ. P. 54(d) or 28 U.S.C. § 1920. Although several other federal courts have authorized broader awards of e-discovery costs under those provisions, the Third Circuit read 28 U.S.C § 1920 strictly and held that costs for “exemplification” and “copies” must relate to the actual creation of images or duplicates. Therefore, while the court permitted the award of costs for scanning documents and for creating “TIFF” image files, the court disallowed costs for activities including the collection of electronic data, performing word-searches, and formatting data for review. As a result, the Third Circuit reduced the e-discovery costs award from \$365,000 to \$20,000. (Description by [Jenner & Block](#))
[\(Link to Decision\)](#)