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## MARCH 2013 NEWSLETTER

### **MATRIMONIAL NEWS**

A Brooklyn Appellate Court panel unanimously affirmed two Nassau County Court decisions to vacate a pre-nuptial agreement on the basis of a verbal promise.

[LINK TO ARTICLE](#)

### **MATRIMONIAL & ENHANCED EARNINGS CASE OF INTEREST**

**Vertucci v. Vertucci (Appellate Division, Third Department)** - The Supreme Court determined that the husband's 49% interest in the family business, Gabriel Contractors was not marital property. Despite having been gifted this interest between the years of 1988 through 1990 (the parties were married in August 1988), the Court determined that the interest was a gift from the husband's father and only awarded the wife \$173,186 for the appreciation of the company's value during the marriage. This determination was supported by testimony and evidence which the Appellate Court also deemed sufficient and that the awarding of the appreciation of the company's value was equitable.

Additionally, the Court had awarded the husband 15% of the wife's enhanced earnings capacity as a lawyer and 15% of her law practice which husband considered too low. While there is conflicting testimony regarding the extent of the husband's involvement in matters that contributed to the wife's law degree and subsequent starting of a law practice (the parties were married during the wife's entire third year of law school and the practice was started during the marriage). In light of the conflicting testimony, the Appellate Court determined that the Supreme Court's 15% award for the enhanced earnings capacity and the law practice was well within its discretion.

[LINK TO DECISION](#)

### **ESTATE CASE OF INTEREST**

**Estate of Virginia Kite v. Commissioner of Internal Revenue (U.S. Tax Court)** - Several issues were discussed in this decision including a determination of whether the sale of Mrs. Kite's own interest in Kite Family Investment Company in 2001 to her children or their trusts for three private annuity agreements due in 2011 was a disguised gift subject to gift tax or if it was a bona fide sale with adequate and full consideration. The Court agreed that such sale of her interest constituted a sale as the annuity agreement between Mrs. Kite and her children were enforceable and the parties demonstrated an intention to comply to the annuity agreement. Mrs. Kite also demonstrated an expectation that she would receive

payments through her active participation in her finances as well as her history as an acute business woman. Mrs. Kite had maintained sufficient assets for her lifestyle in other forms aside from KIC and as such, made her interest in KIC dispensable and available for a potentially risky investment in an annuity.

[LINK TO DECISION](#)

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### **COMPUTER FORENSIC & eDISCOVERY ARTICLES OF INTEREST**

**Use of Work Computer Results in Waiver of Marital Communication Privilege** - "On appeal, the defendant argued that the Trial Court erred by admitting into evidence incriminating emails he had sent to his wife. The defendant claimed that the marital communications privilege, which generally provides that private communications between spouses are confidential, protected the emails from disclosure. The Fourth Circuit affirmed, relying in large part on the employer's written computer policy. The policy stated that employees had "no expectation of privacy in their use of the Computer System" and that all information "created, sent, received, accessed, or stored . . . [was] subject to inspection and monitoring." Although the defendant argued that the emails were sent before the computer policy was enacted, the Court found that he waived the marital communications privilege because he took no steps to protect the previous emails even after the computer policy was enacted."

[LINK TO ARTICLE](#)

**Family Law Judge Discounts Tweets That Threatened Children and Discussed Alcohol Use** - "We've seen countless examples of litigants zinged by their social media posts. A family law judge recently took a different approach, giving minimal weight to tweets from a family member that threatened harm to kids and talked about drinking with one of the parents. . . It's unclear whether the court here relied on the medium, the context, or the age of the individual who wrote the posts in question. In either event, this is another example of courts taking into account the hyperbolic nature of online posts. Interestingly, the court goes to the other extreme, and discounts the tweets entirely, not even according them minimal probative value."

[LINK TO ARTICLE](#)

**Court Considers the "Pernickety, but Persistent Question" of What Qualifies as "Content" Under the Stored Communications Act** - "'Before the court in this case was 'the pernickety, but persistent, question of exactly what qualifies as 'content,' whose disclosure by service providers is prohibited under the Stored Communications Act.' Specifically, the court considered Defendant's motion to quash a subpoena served by the plaintiff upon Google,

Inc. to obtain discovery for use in a foreign proceeding. The subpoena sought information related to 'a number of electronic communications sent or received by certain Gmail accounts allegedly used by employees of Tibra,' including metadata related to messages containing certain search terms and the subject lines of those messages and others which met certain criteria (e.g. sent within a certain time frame, received by certain people)."

[LINK TO ARTICLE](#)

[LINK TO DECISION](#)

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