

**SEPTEMBER 2010****CASES AND TOPICS OF INTEREST:****Smith v. Winter – Appellate Division, Fourth Judicial Department**

In [Smith v. Winter](#), the Appellate Division concluded that the court properly determined that only 10% of the appreciation of the value of a Company acquired by Plaintiff's company during the marriage that was owned prior to marriage was marital property subject to distribution. It was undisputed that Plaintiff was the sole shareholder of the Company prior to marriage, and thus the original Company remained Plaintiff's separate property. It was further undisputed that the new Company appreciated in value by over \$20 million during the course of the marriage and that Defendant's contributions to that appreciation were minimal. The Appellate Division determined that the lower court properly considered the "active efforts of others and any additional passive or active factors" in determining the percentage of total appreciation that constitutes marital property subject to distribution.

**Fleischman v. Fleischman – Supreme Court, Westchester County**

In [Fleischman v. Fleischman](#), in connection with the valuation of Defendant's partnership interest in a large law firm and his law license, the Court concluded that Plaintiff was entitled to twenty-five percent (25%) of Defendant's interest in the law practice and ten percent (10%) of the marital component of his law license.

**Estate & Gift Tax Planning**

The court rejected Plaintiff's unconscionability argument in the [Estate of Claudia L. Cohen](#) and concluded that "full and true value" equals "net book value" as defined by the Agreement.

**Computer Forensics: Use of Surveillance Software**

According to Peter Theobald of KLG Computer Forensics, there has been a dramatic rise in cases where they have been retained to detect, document, and remove remote surveillance software from computer systems.

There are several applications available that send snapshots of all computer activity

every few seconds. Some of these applications can even be remotely installed without the computer user's knowledge. Use of this type of software is risky and can result in information gathered by such being suppressed or worse - civil or criminal charges for its use.

In a Florida divorce case, [O'Brien v. O'Brien](#) (So.2d , 2005 WL 322367 (Feb. 11, 2005) the Circuit Court for Orange County, Florida excluded the evidence gathered because it had been intercepted -- an offense under federal and state wiretapping laws. On appeal, the court affirmed that the evidence was properly excluded, because the wife had obtained it illegally.

In California [Larry Lee Ropp](#) installed a key-logger (a device which records keystrokes) on a computer at his employer, The Bristol West Insurance Group, in an effort to gather evidence for a class action lawsuit. The key-logger was discovered and Mr. Ropp was indicted under federal wiretapping laws which carry a maximum prison sentence of five years. Mr. Ropp was later cleared of the charges when the court decided that the physical key-logger, installed between the keyboard and the computer, did not capture communications "in interstate or foreign commerce" but rather captured them locally.

Even a law firm can be at risk. In a recent case, a \$2 million civil lawsuit was filed against a Tennessee law firm, [Berke, Berke and Berke](#) for violations of federal and state wiretapping laws for allegedly using emails gathered by covert surveillance software called "eBlaster" in a divorce proceeding.

How can these programs be legal? They do have some legal applications, such as monitoring your children's activity. However, the State of California indicted Carlos Enrique [Perez-Melara](#) for writing, advertising and selling a surveillance computer program called "Loverspy," which allows for the remote surveillance of computer activity. Several purchasers and users of that software have also been indicted.

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