LGBTQ

Divorce for Long Term Same-Sex Relationships That Become Short Term Marriages Under the Marriage Equality Act

By: Christopher J. Chimeri

This is part 1 of a 3-part series.

It is virtually common legal knowledge that in July 2011, same sex couples were granted the right to marry in New York under Domestic Relations Law § 10-A. Less widely discussed has been the aftermath of such enactment, and many couples living in unions otherwise resembling a family unit or marriage immediately, or shortly after July 2011, married. Consequently, a few short years later, divorce courts are now seeing a new fact pattern. For example, a couple that had been living together for 20 years, structured their household reminiscent of a "traditional" marriage, often having children, and in many ways, living as an economic partnership in which one spouse was a primary earner and the other making his or her contributions in less fiscal, quantifiable ways, but instead, in valuable yet immeasurable ways as a homemaker and parent.

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For the practitioner, there are many questions that arise beyond the "standard" inquiry when representing either party to such a union. This three-part series focuses primarily on representing the individual who would be, in a traditional heterosexual long-term marriage, the homemaker spouse, battling the challenges of presumptively correct post-divorce spousal maintenance calculations and guideline duration, as well as the classification and distribution of marital property under New York's current statutory schemes. This first article raises the factual issues and the general law applicable in such circumstances, with a more focused examination to follow in parts two and three.

Concerning spousal maintenance, as of January 2016, there is a statutory formula that provides a guideline amount that is said to be "presumptively correct." The court may deviate from the guidelines if it finds the guidelines unjust or inappropriate. In deviating, however, the court is required to state the reasons on which it relied in making its determination. Of equal or greater importance is the duration of maintenance, which is statutorily based on a non-mandatory advisory schedule, as follows: for a marriage of 0 to 15 years: 15 to 30 percent of the length of marriage; for a marriage over 15 years to 20 years: 30 to 40 percent of the length of marriage; and, for a marriage over 20 years: 35 to 50 percent of the length of marriage. The court is required to state if it used the advisory schedule and is also required to use the factors provided in the statute for deviation, which will be explored in part two of this series.

Certain of these factors to be discussed include: the age and health of the parties; the present or future earning capacity of the parties, including a history of limited participation in the workforce; the need of one party to incur education or training expenses; the existence and duration of a pre-marital joint household or a pre-divorce separate household; acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employ-

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INTERNATIONAL LAW

U.S. Supreme Court Delivers a Death Knell to the Alien Tort Statute

By Jack Harrington

On April 24, 2018, Justice Kennedy, writing the plurality opinion in *Jesner et al. v. Arab Bank, Plc.*, 584 U.S. __ (2018), placed what might be the final nail in the coffin of the Alien Tort Statute (ATS). In *Jesner*, the court affirmed the U.S. Court of Appeals for the Second Circuit's dismissal, which held that aliens cannot sue foreign corporations pursuant to the ATS. While *Jesner* certainly is not the highest-profile decision of the October Term, it has a significant impact on the enforcement of international human rights.

The ATS is a little-known U.S. statute enacted as part of the Judiciary Act of 1789. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. As was concluded by the Supreme Court in 2004, Congress passed the ATS to provide jurisdiction for violations of the law of nations (i.e. international law) that existed in the late 18th century and listed by Blackstone in his *Commentaries on the Laws of England*, namely offenses against ambassadors, violations of safe-conducts, and piracy. However, international law evolved, and new rights and duties become codified in international treaties. Arguably, as time went on, the ATS granted U.S. courts jurisdiction to an ever-growing list of "violations of the law of nations or a treaty of the United States."

As international law grew, the ATS sat dormant until 1980 when the Second Circuit decided *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and international lawyers began to laud the ATS as a legal mechanism to enforce international human rights through tort claims in U.S. courts. *Filartiga* involved a teenager from Paraguay who was kidnapped and tortured to death by Pena-Irala, a high-ranking police officer, in retaliation for the family's political activities. The family later moved to the United States and applied for political asylum. Pena-Irala would later move to the United States and be arrested for visa violations. While in custody, the Filartiga family brought a civil action for wrongful death, arguing that Pena-Irala's actions violated the U.N. Charter, the Universal Declaration of Human Rights, and other customary international laws. The Second Circuit upheld a $10 million damages award and the holding was interpreted as granting U.S. courts jurisdiction to decide tort cases for alleged violations of international law that occurred overseas between foreign parties.

Jack Harrington

In 1995, the Second Circuit issued a ruling against Bosnian Serb politician Radovan Karadzic for his role in the human rights violations in the former Yugoslavia, which for the first time extended the ATS beyond government officials. The Karadzic decision in turn opened the door for ATS actions against corporations, led by the 1996 case against the oil company UNOCAL for complicity in human rights abuses by the Myanmar government. Seen as a bell curve, the ATS' reach as a tool for the enforcement of human rights peaked in the late 1990s and early 2000s and well over 100 ATS actions have been filed against corporations since the Karadzic decision.

Then, in 2004, a Supreme Court more skeptical of the role of customary international law in U.S. courts decided *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and began to chip away at the breadth and power of the ATS. *Jesner* is the Supreme Court's most significant ATS decision since *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), which held that the ATS does not presumptively apply extraterritorially, and consistent with a court that is reluctant to extend judicially created private rights of action.

The *Jesner* petitioners were either injured or the family members of those killed by terrorist acts abroad. Petitioners alleged that the terrorist acts were in part caused or facilitated by Arab Bank, PLC by allowing the bank to transfer funds to terrorist organizations in the Middle East, including Hamas. The attacks at issue occurred between 1995 and 2005 and allegedly involved transactions in U.S. dollars that had moved through the Bank's New York office. Petitioners had lost at the district and circuit courts and filed certiorari on the grounds that the court's decision in *Kiobel* left open the question of whether the ATS allows for corporate liability. Justice Kennedy posed the question before the court as "whether the Judiciary has the authority, in an ATS action, to [] determine[]" if a corporation has liability if its "human agents use the corporation to commit crimes in violation of international laws that protect human rights."

In answering the question in the negative, Justice Kennedy cited, among other justifications, judicial efficiency and the negative impact to U.S.-Jordanian relations caused by the lawsuit. The essence of Kennedy's opinion, however, is that such suits should not be allowed without explicit congressional authorization. Continuing to apply the reasoning set forth in *Sosa*, Justice Kennedy was unwilling to state that the allegations against Arab Bank were violations of international norms with "definite content and acceptance among civilized nations" or that the court "has authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so."

Jesner produced a fractured series of concurring and dissenting opinions, treatment of which is beyond the scope of this article. However, the decision may represent the final bottoming out of the ATS bell curve.

Note: Jack Harrington, Esq. leads the Cybersecurity and International Regulation, Enforcement & Compliance groups at Campolo, Middleton & McCormick, LLP. A lieutenant in the U.S. Navy Reserve, Jack was deployed this month to Afghanistan in support of Operation Resolute Support.

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actually lower than most. The Nassau County Bar charges $225.00 for someone admitted 6 years, up to $385.00 for lawyers admitted 10 years and up. The New York State Bar Association charges $275.00. Brooklyn charges $310.00 for lawyers admitted 6 to 9 years, and then $370.00 for attorneys admitted 10 years or more. Our Bar Association charges only $285.00 for lawyers who fall into this category.

I will readily admit that these are not insignificant expenses, especially for solo and small firm practitioners, which make up the bulk of our membership. In fact, you would be hard-pressed to find someone who hasn't had to make the decision whether to pay bar dues or pay some other, perhaps more essential bill. We can all sympathize with that predicament.

The bar recently addressed this issue in two very important ways. First, it began accepting credit card payments online, which helps with cash flow (and gives you valuable points or miles which you can use for that much-needed vacation). Second, the bar has instituted a program where you can pay your dues in quarterly installments, again with an eye toward easing cash-flow problems.

So that is one thing the bar is doing for you — recognizing that every last dollar counts to each of our members, and that whatever we can do to make membership easier and more convenient is a priority.

So okay, the expense side isn't so bad. What about helping me save money? Or even make more money? Many of our members are also members of the 18-B panels, whether in District Court, County Court or Family Court. And as I mentioned in my inaugural address, the pay scale for lawyers is woefully inadequate. Compounding the problem is the fact that it takes virtually forever for lawyers to get paid once their vouchers have been submitted. This is a very common refrain and has even caused some lawyers to consider leaving, and actually leaving, the 18-B panel.

The simple fact is that lawyers should be paid more, and more quickly, for time spent on 18-B cases. And your next question is: So, what is the bar doing about it?

We have had a Task Force in place, working closely with Nassau County, seeking to address the issue of pay rates for 18-B lawyers. And lest you think they are simply meeting and spinning their wheels, significant progress is being made, and the possibility of an increase in the rate is within sight. Now we are joining forces with the New York State Bar Association, and a vote on a resolution asking the legislature to raise the rates is scheduled for November. Stay tuned.

I was also fortunate enough to speak with Suffolk County Comptroller John Kennedy, who was more than apologetic about the time it takes to get lawyers paid and was genuinely interested in trying to streamline the process. Please know that we are attempting to set a time to get together to try to make this happen.

Your bar has taken an active leadership role in trying to get these things done.

Okay, great. You're saving me money. What about saving me time? Well, thanks to great cooperation with our judiciary, membership in the Suffolk Bar can save you some time as well. Our members were the first to receive the new telephone listings for the courthouse in Central Islip. And that's not all.

We all know the anxiety of having to be in multiple places at the same time, and the frustration of planning our morning, only to find out that the judge isn't taking the bench until 10:30, if at all. Or that the judge is on trial, there was only one calendar call at 9:30, and now you have to wait for a break in the trial to find out what happened to your case. Again, owing to the cooperation between the judiciary and the Suffolk Bar, many judges will notify the Bar Association of any scheduling changes that may arise. Our members receive emails that will often make the difference between gaining a productive hour or losing two otherwise useful hours.

And looking up telephone numbers, whether for judges, lawyers, courts or other governmental entities, is easy, even without the internet, just by looking in our directory, another benefit to our members.

So what else? We all have expenses, you know. Well, membership in the Suffolk County Bar Association has other benefits besides the opportunities for networking and camaraderie. Many of our colleagues have gone to virtual offices or are working out of their home. And some of our members have offices outside Suffolk County, but need a place to meet with clients or conduct meetings, depositions, arbitrations/mediations, or other events where a larger space is required. The Bar Association offers private rooms to its members for just such purposes. No need to pay rent for space in your office that gets used infrequently.

One of our newest benefits will allow lawyers to expand their client base. JP Language Institute, located in Melville, is offering a 15 percent discount on a 16-session program. With our population becoming ever more diverse, it is in every lawyer's best interest to speak at least conversationally in another language, not to mention the fact that it opens up a whole new demographic. Learn Spanish, French, Mandarin Chinese, Japanese, Italian, Hebrew, Russian, Korean, or other languages. It will make your clients more comfortable, and perhaps it might put a few more dollars in your pocket. Even if you use this benefit for personal benefit, it is something again, that the bar is doing for you.

And talk about increasing your client base . . . the Lawyer Referral Service has gone 21st century. Where there used to be limited hours for access to Lawyer Referral, it is now a 24 hour a day, 7 day a week online service where clients can reach lawyers, and lawyers can reach potential clients, at any time of the day or night. This is available only to members of our bar association, and by paying a small fee to belong, you could wind up with a big fee, or fees, on cases that otherwise would have gone to someone else.

Members also get discounts on CLE programs, whether they choose to buy individual programs or become members of the various clubs offered by the Suffolk Academy of Law. Our CLE programs are second to none in terms of quality, and are diverse, innovative and filled with useful information. They also give insight into practicing in the courts in our county, and work with our committees to develop CLE programs relevant to real world practice.

We have discounts on car rentals, and our preferred providers in the areas of health insurance, office equipment and other essentials will help reduce expenses while making sure that office and personal needs are being met.

In other words, there are plenty of reasons to join the Suffolk County Bar Association, to renew your membership every year, or even to re-join if your membership has lapsed, for whatever reason. We are coming to neighborhoods near you this year, with membership meetings at various locations away from our headquarters in Hauppauge. Join us. And join us. We welcome you, or welcome you back, with open arms.

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ment (such as domestic violence); the standard of living of the parties established during the marriage; the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment or career opportunities during the marriage; the equitable distribution of marital property and the income or imputed income on the assets so distributed; the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and any other factor which the court shall expressly find to be just and proper.

As will be reviewed in part three, which will concern equitable distribution, a court may only distribute marital property. Under DRL § 236(B)(5), 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 definition of separate property, which is to say that all property acquired between the date of marriage until the date of filing of a divorce action is presumed marital, unless it is: acquired before marriage or inherited or gifted from someone other than the spouse; personal injury awards; property acquired in exchange for other separate property; or passive appreciation on existing separate property. We will also discuss in part three the numerous considerations behind a court's equitable distribution determination, the interplay of equitable distribution with a maintenance award, and the court's broad discretion in distributing property (for example, if one spouse will largely benefit from separate property classifications, the court may award a greater share of the marital property to the other spouse).

In practice, generally, the shorter the marriage, the less maintenance, if any, to be awarded, and the smaller the inventory of marital property or active appreciation on separate property that could or would be distributable by a court. This begs the question — how to ensure fairness and equity where your homemaker client has sacrificed his or her career potential during this long-term relationship in reliance on the household unit, where the law presumptively restores them simply to the position they were on the day they said their vows, just a few short years ago, and sends them on their way?

Stay tuned for parts two and three for a detailed discussion surrounding how to answer this question for the courts.

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."