Schenectady County Bar Association

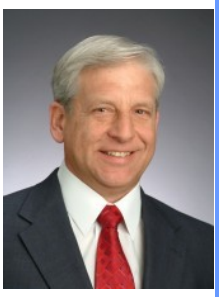
Newsletter

November 2015

On the Calendar

November

12 **Luncheon Meeting and CLE**



Doors open at 11:30 a.m.
Meeting at noon
followed by 1 CLE hour
—area of practice
CLE: Labor Law
and Personal Injury
Speaker: Daniel Santola
Water's Edge Lighthouse, Glenville
SCBA—$25; others—$30
Scholarships available based on financial need; contact info@schenectadycountybar.org

17 **Brown Bag: Facially Sufficiency of Criminal Charges**

Noon-1 p.m.
Schenectady County Courthouse
Speaker: Steven Signore
1 credit hour—area of practice
SCBA members: no charge; others—$10

Got Old Photos?

The Schenectady County Bar Association is marking its 100th anniversary in 2016. We are seeking the loan of photos or other memorabilia relating to SCBA that go back in time, for our celebrations. Please contact us at:

info@schenectadycountybar.org

to describe what you may have on your wall or tucked away. We will then be in touch. Much appreciated!

December

15 **Brown Bag: Surrogate's Court Procedures and Practice**

Noon-1 p.m.
Schenectady County Courthouse
Speaker: Frederick Killeen
1 credit hour—area of practice
SCBA members: no charge; others—$10

15 **Annual Holiday party**

5:30-7:30 p.m.
Glen Sanders Mansion—see page 13

2016 Programs

Luncheon Meetings and CLE
Doors open 11:30 a.m.; meeting at noon;
followed by 1-hour CLE
Water's Edge Lighthouse, Glenville

- **January 21, 2016**
  Professional ethics—Michael Gaynor
- **April 21, 2016** (CLE TBA)

March 10, 2016—Trusts, Estates and Elder Law Seminar
8:30 a.m.-4:30 p.m. (8 a.m. registration)
Glen Sanders Mansion, Scotia

May 12, 2016—Real Estate Seminar
8:30 a.m.-4:30 p.m. (8 a.m. registration)
Glen Sanders Mansion, Scotia

June 16, 2016—Annual Meeting
Doors open 11:30 a.m.; noon meeting
Water's Edge Lighthouse, Glenville

INSIDE

President's Message:

A Mission to Educate, Inform

You will note that the newsletter has several articles, one by our own Eric Tepper advising us about the new maintenance guidelines, the other by Dennis Duggan about the interplay between John Marshall and Thomas Jefferson behind the *Marbury v. Madison* decision that evolved into the concept of judicial review. This article was published in another journal in 2003, but is reprinted here because of its timeless relevance.

We are still attempting to arrange a speaker for the 100th anniversary celebration of the Schenectady County Bar Association, to be held in February (the date of incorporation was February 1916). We have approached the President of the New York Bar, David Miranda, and he may be able to address our association.

Last year, we hosted the Medical Legal Dental Dinner. With Gilbert King as speaker, it was a huge success. This year, the dinner is being hosted by the Dental Society. We are trying to assist them in repeating the success by reaching out to William Kennedy, noted Albany author of such distinguished works of fiction as *Ironweed, Billy Phalen's Greatest Game*, and *Legs*, along with several nonfiction tomes. Thanks to Phil Rodriguez, who has graciously agreed to represent our bar association for the combined event

One of the important missions of our bar is to provide information of significance to the profession in a collegial atmosphere. We do this through the speakers we present, the events we hold, and the outings we sponsor in the community. We have much to offer; our members work hard to deliver. However, we could use the participation of a greater cross-section of the legal community in Schenectady County. I would like to increase our membership by contacting those individuals who were formerly members, together with those who should consider joining us. Whatever suggestion you might have to accomplish this goal would be appreciated.

Your community involvement

I would also like to know about matters affecting you and the community. If you are on a community board, volunteer, or give of your time to a worthy endeavor, let us know. We'd like to recognize you.

Our holiday social event will be held on December 15, 2015 at Glen Sanders Mansion. This popular annual event is a great opportunity for us to gather as friends and colleagues at this most festive time of year. In the holiday spirit of giving, we ask those who plan to attend to bring a food item to be donated to the Schenectady City Mission.

Please plan to attend our November 12, 2015 meeting of our association at the Water's Edge Lighthouse restaurant. We will have Daniel Santola as our speaker. He will discuss labor law and personal injury law and provide a handout. The meeting will start at 12:00 with lunch. We will then hold our meeting during lunch and continue it with our speaker so that we can conclude by 1:30 p.m.

We hope to see you involved.

Mark Powers

Around the Horn:

Interesting news and pointers in practice areas

Litigation Committee

Dealing With Your Witness' Prior Criminal Record

By Paul DeLorenzo, Chair

The following is a simple checklist to use when dealing with this difficult issue.

1. Determine the date of conviction. The longer the period of time between the conviction and trial, the more likely a motion in limine will be granted excluding the evidence of conviction.

2. Determine the type of conviction. For example, an argument which resulted in a minor charge would not be as damaging as a theft or fraud charge. Obviously crimes going to the witness' veracity are the most harmful and you should do whatever you can to keep that from coming into the case.

3. Did your client plead guilty or did the case proceed to trial? If your client pled guilty, then you can argue to the jury that he or she owned up to the crime and paid a debt to society.

4. Did the offense involve children, such as reckless endangerment of a child or some form of abuse? If so, such evidence is extremely damaging and prejudicial. New York courts apply the same principle as is followed by the federal courts that being Rule 403.

> *Relevant evidence may be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury.*

It is important to note that any witness who has been convicted of a crime involving dishonesty and/or false statements can be impeached by use of the convictions. Therefore always check with your witness before testimony as to any prior convictions. Even a minor conviction for filing a false police report can be extremely detrimental to your witness' credibility.

Court of Claims Judge Richard Sise , above, and Attorney E. Stewart Jones spoke at the Litigation Committee's Fast Track CLE in September in Saratoga on Using Expert Witnesses in Municipal Liability matters.

In addition, it is important to note that prejudice alone will not suffice in an effort to exclude. The crucial term is ***unfairly*** prejudice. Therefore, you must demonstrate to the court that the evidence's probative value is much less than its prejudicial effect.

(Continued on Page 4)

.

Dues Are Due

Thank you for your membership and your participation in the Schenectady County Bar Association.

Dues notices for the 2015-16 program year have been sent to members and dues are now due.

If dues have not already been submitted, members can pay by check to SCBA, PO Box 1728, Schenectady NY 12301-1728 or by PayPal at www.schenectadycountybar.org.

Need a copy or have a question?
Contact us at: info@schenectadycountybar.org.

(Continued from Page 3—Around the Horn)

Young Lawyers Committee

DWI Practice Update

By Matthew Simone

The new DMV regulations that became effective on September 25, 2012 have an *Ex Post Facto* effect that could be a surprise for the unwary attorney. It may be appropriate to request your client's lifetime driving record from the DMV before advising them about potential dispositions, especially if your client has a potential history of alcohol- or drug-related incidents.

One revision, 15 NYCRR § 136.5(b)(1), provides for a new lifetime license revocation, which is triggered when an individual who is revoked (not suspended), applies for a license. The triggering event is the application for relicensure, which prompts the DMV to conduct a lifetime review of the applicant's driving record. If the record reveals five or more alcohol or drug related driving convictions or incidents, the applicant will be denied a license for the remainder of his lifetime.

Another way a lifetime review is triggered is by a conviction for a high-point driving violation. See 15 NYCRR § 132.2. Pursuant to 15 NYCRR § 132.1(c), a high-point driving violation means any violation for which five or more points are assessed. For example, if your client has a valid license and is convicted of a violation involving the use of a mobile telephone (a 5-point violation), he or she will be subjected to a lifetime driving record review by the DMV. Upon the review, if the record reveals five or more alcohol- or drug-related driving convictions or incidents, the driver will be advised of the proposed revocation of his license, revocation date and will be advised of his right to a hearing.

Additionally, the Legislature recently modified Leandra's Law and Vehicle & Traffic Law § 1193(1)(b)(ii) when they discovered that less than one third of DWI offenders were installing the ignition interlock device (IID). It became clear that many of these DWI offenders were selling or transferring ownership of their vehicles in order to avoid installation of the ignition interlock device—thus, avoiding the condition for six months and applying for relicensure without the IID condition.

In order to discourage this result, the Legislature modified Leandra's Law and Vehicle & Traffic Law § 1193(1)(b)(ii). The new legislation became effective in November of 2013 and now requires first-time offenders convicted of DWI to either install an ignition interlock device in their vehicle for a minimum of *12-months* or wait a year before their driver's license can be reinstated without the IID requirement.

More importantly, the legislature built in an incentive for offenders who do install the ignition interlock device by giving the court authority upon application to *remove* the interlock restriction after six months if the offender demonstrates that he/she has installed and maintained the ignition interlock device for six months. This effectively penalizes the DWI offenders who do not install the device by *raising* the minimum amount of time drivers must wait to have their driver's license restored without the IID requirement from six months *to one year.*

Lastly, Vehicle & Traffic Law § 1193(1)(b)(ii) states that the ignition interlock period may start running from the earlier of the date of sentencing or the date that the device was installed in advance of sentencing. Consequently, if an individual installed the device before sentencing, whether voluntarily or by court order/condition, he/she would be credited that amount upon making the application for removal.

Appellate Division Offers Twitter Alerts

The Appellate Division, Third Department, has opened a Twitter feed to alert interested parties of arguments, calendars, decisions and other news from and about the court. Obtain the alerts in either of two ways (or both): If you have a Twitter account, follow NYAppDiv3; if you don't have and don't want a Twitter account, send a text to address **40404** that reads **follow NYAppDiv3.** That way, you will receive alerts directly on your smartphone.

Several months ago, the Court of Appeals began "tweeting" about its argument calendar and decisions and has more than 1,300 followers. Follow NYCourtsCOA or, as with the Appellate Division, you can follow the Court of Appeals with smart phone alerts by sending a message to 40404 that reads **follow NY-CourtsCOA**). Also, if you haven't yet you might want to download the Court of Appeals' new "app," which is available for free in both the iTunes (https://itunes.apple.com/us/app/court-of-appeals/id1018841044?mt=8) and Google Play (https://play.google.com/store/apps/developer?id=NYS+Court+of+Appeals) stores.

Additionally, OCA has a general news Twitter feed (NYSCourtsNews) as well as the emergency closing (NYCourtsNotice), and a job listing (NYCourtsCareers) feed, an Instagram account (NYCourts) and a presence on YouTube (NYS Courts).

Newly Enacted Maintenance Guidelines Legislation Chapter 269, Laws of 2015

By Eric Tepper, Chair
Family and Matrimonial Law Committee

The maintenance guidelines bill passed the Assembly on June 15, 2015 with just one dissenting vote (A 7645). It passed the Senate unanimously on June 24, 2015 (S 5678). The legislation was signed into law by Governor Cuomo on September 25, 2015 (Chapter 269, Laws of 2015). The following is a summary of key provisions of the new legislation:

Effective Date and Applicability

Temporary Maintenance Guidelines—30 days after the act becomes law and applies to actions commenced on or after the effective date. Specifically, 30 days from signing was Sunday, October 25, 2015. Therefore, the temporary maintenance provisions are applicable to matrimonial actions commenced on or after Monday, October 26, 2015.

All other provisions (Post-divorce maintenance, Family Court spousal support, elimination of enhanced earning capacity)—120 days after the act becomes law and applies to matrimonial actions and Family Court spousal support proceedings commenced on or after the effective date. 120 days from signing is Saturday, January 23, 2016. Therefore, all of these remaining provisions will be applicable to matrimonial actions commenced on or after Monday, January 25, 2016.

Note—Nothing in the act affects the validity of agreements made prior to the effective date of the legislation.

Nothing in the act prohibits parties from entering into validly executed agreements that deviate from the maintenance guidelines.

Unlike the CSSA, which contains strict requirements for agreements which deviate from the child support guidelines, the new maintenance guidelines legislation contains no such provisions. Thus, where parties enter into separation or marital settlement agreements that deviate from the maintenance guidelines, there is no requirement that the parties set forth calculations in their agreements.

Further, there is no requirement that settlement agreements set forth the reason for deviation from the guidelines. This is the case for both temporary and post-divorce maintenance.

The existence of the new statute, itself, will not constitute a change of circumstances warranting modification of maintenance awards made prior to the effective date of the new legislation, whether by court order or the parties' agreement. Further, the existence of the statute, itself, does not change the standard for modification of maintenance awards made in unmerged agreements (extreme hardship).

Elimination of Enhanced Earning Capacity

DRL 236 B (5) (d) (7) is amended to provide the following:

> "The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement."

Caveat: The new legislation states that, in determining equitable distribution, the court shall consider a spouse's direct or indirect contributions during the marriage toward the other spouse's development of enhanced earning capacity.

Thus, while enhanced earning capacity no longer will be a marital asset, it can be a "factor" for equitable distribution.

Further, a spouse's contributions toward the other's career or career potential can be a factor for varying from the maintenance guidelines (presumably upwards). All of that being said, it is not intended by the statute that experts be hired to "value" enhanced earning capacity.

Definition of Income

For purposes of maintenance guidelines, "income" shall mean income as defined in the Child Support Standards Act ("CSSA") but without subtracting maintenance

(Continued on Page 5)

(Continued from Page 5—Matrimonial)

paid to a party spouse in the instant action or proceeding. Maintenance is subtracted as part of the child support calculation, not the maintenance calculation.

In addition, for post-divorce maintenance, the term "income" also includes "income from income-producing property distributed or to be distributed" in the action. Therefore, if an investment account is being distributed as part of equitable distribution, the investment income which each party will be receiving should be factored into each party's income calculation for purposes of post-divorce maintenance. The same is true for other income producing property which will be distributed such as rental real estate.

Determine Maintenance Before Child Support

The statute expressly states that maintenance (temporary or post-divorce) shall be calculated ***prior to*** child support because the amount of maintenance shall be subtracted from the payor's income and added to the payee's income as part of the child support calculation.

Guidelines Also Applicable To Spousal Support

The new legislation establishes guidelines for both temporary maintenance and post-divorce maintenance. Based on the recommendation of the Law Revision Commission, the guidelines also apply to Family Court spousal support proceedings. The same formulas apply for temporary maintenance, post-divorce maintenance and Family Court spousal support.

The new legislation continues existing case law providing that Family Court spousal support awards are non-durational in nature and continue until the parties enter into an agreement for spousal support, the issuance of a judgment of divorce or other order in a matrimonial action, or the death of either party, whichever first occurs.

Notwithstanding the above, Family Court may modify a prior Family Court spousal support order upon a showing of a "substantial change in circumstances." FCA 412 (10).

Cap

The income cap for temporary maintenance is lowered from the current $543,000 to $175,000 of the payor's income. The $175,000 cap also applies to post-divorce maintenance and spousal support.

There is a COLA provision which adjusts the cap every 2 years beginning January 31, 2016.

Unlike the CSSA which takes into consideration "combined parental income," the new maintenance guidelines only apply to the payor'***s*** income up to the $175,000 cap.

> ***'The statute expressly states that maintenance (temporary or post-divorce) shall be calculated prior to child support….'***

Two Sets of Formulas

A. **For Income Below the Cap**

Where the payor's income is lower than or equal to the income cap ($175,000), there are two different maintenance formulas. One formula is used where no child support is being paid by the maintenance payor to the recipient spouse. For this formula, there either are no unemancipated children or the maintenance payor is also the custodial parent for child support purposes.

A different maintenance formula is used where the maintenance payor is also the non-custodial parent paying child support to the recipient spouse.

Where the Maintenance Payor Is Also the Non-Custodial Parent Paying Child Support to the Recipient Spouse:

- **Step 1**—**20%** of Payor's income up to $175,000 MINUS **25**% of Payee's income.
- **Step 2**— Payor's income up to $175,000 PLUS Payee's income X 40% MINUS Payee's income.
- **Step 3**—The lower of the two amounts above is the guidelines figure.

Hypothetical:

Payor, the non-custodial parent, has $100,000 in income as defined in the statute (after subtracting social security and Medicare taxes). Payee, the custodial parent, has $50,000 in income (after subtracting social security and Medicare taxes).

(Continued on Page 7)

(Continued from Page 6—Matrimonial)

Step 1—$100,000 x 20% = $20,000
$ 50,000 x 25% = $12,500
$20,000 - $12,500 = **$7,500**

Step 2—$100,000 + $50,000 = $150,000 x 40% =$60,000
$60,000 - $50,000 = **$10,000**

Step 3—Compare the two figures above. The lower figure ($7,500) is the guidelines amount.

Where No Child Support Is Being Paid by the Maintenance Payor to the Recipient Spouse:

But for the amount of the income cap, this is the same formula used in the previous temporary maintenance guidelines.

Step 1—30% of Payor's income up to $175,000 MINUS **20**% of Payee's income.

Step 2— Payor's income up to $175,000 PLUS Payee's income X 40% MINUS Payee's income.

Step 3—The lower of the two amounts above is the guidelines figure.

Hypothetical

Payor has $100,000 in income, as defined in the statute (after subtracting social security and Medicare taxes). Payee has $50,000 in income (after subtracting social security and Medicare taxes). There either are no unemancipated children or the payor is the custodial parent—so no child support is being paid by the payor to the payee.

Step 1—$100,000 x 30% = $30,000
$50,000 x 20% = $10,000
$30,000 - $10,000 = **$20,000**

Step 2—$100,000 + $50,000 = $150,000 x 40% =$60,000
$60,000 - $50,000 = **$10,000**

Step 3—Compare the two figures above. The lower figure ($10,000) is the guidelines amount.

B. **For Income Above the Cap**

Where the payor's income exceeds the $175,000 cap:

Step 1—First, determine the guidelines amount up to and including the $175,000 cap using the appropriate formula (see above).

Step 2—For income above the cap, the amount of additional maintenance, if any, shall be within the discretion of the court taking into consideration one or more of the numerous factors set forth in the statute. These are also the "deviation factors" (see below).

The court shall set forth the factors it considered and the reasons for its decision in writing or on the record. This requirement may not be waived by either party or counsel. There are "13" factors for temporary maintenance and "15" for post-divorce maintenance.

The court should set forth a reason for whatever it does for income above the cap. Therefore, whether it awards an amount of additional maintenance on the excess income or not, the court must set forth a rationale for its decision based upon consideration of the deviation factors.

The intent of the statute is not that temporary or post-divorce maintenance simply be "capped" at $175,000 of the payor's income regardless of the extent of payor's income. Rather, the intent is that courts use their discretion in making maintenance awards on the excess income through a factor-based analysis tailored to the facts of the case. It is not intended that the "formula" be applied to any portion of excess income unlike what often occurs with child support.

Deviation from Guidelines:

The court shall award the guideline amount of temporary or post-divorce maintenance up to the $175,000 cap in accordance with the appropriate formula unless it finds that the guideline amount is "unjust or inappropriate," which finding shall be based upon consideration of any one or more of numerous factors. These are the same factors which are used for determining the amount of maintenance, if any, awarded on payor's income in excess of the cap.

Where the court finds that the guideline amount is unjust or inappropriate and where it adjusts the amount, the court shall set forth, in a written decision or on the record, the guideline amount, the factors it considered, and the reasons the court adjusted the guideline amount. The requirement that this be done on the record or in writing shall not be waived by either party or counsel.

(Continued on Page 8)

(Continued from Page 7—Matrimonial)

Unrepresented Party

Where either or both parties is unrepresented, the court shall not make a maintenance order unless it informs the unrepresented party of the temporary or post-divorce guideline obligation. If you represent a party and the other side is unrepresented, the best practice is to insert the guideline obligation in the marital settlement agreement. That way, when the divorce judgment is submitted to the judge, the court will have "complied" with the notice requirement by virtue of incorporating the settlement agreement into the Judgment of Divorce.

OCA is also working on a notice form which will be part of the uncontested divorce packet. The form that is being developed could also arguably meet the notice requirement if attached to the divorce summons or provided to the unrepresented party at a preliminary conference or at some point in the action prior to signing of an order or judgment.

Default or Insufficient Evidence of Income

Where a payor has defaulted, or where the court is presented with insufficient evidence to determine income, the maintenance award shall be based upon the **needs** of the payee or the parties' **standard of living** prior to the commencement of the divorce action, **whichever is greater**. The award may be retroactively modified upward, without a showing of a change in circumstances, upon presentation of newly discovered evidence.

Temporary Maintenance —Allocation of Expenses

In determining temporary maintenance, the court shall consider and allocate, where appropriate, the parties' respective responsibilities for the family's expenses during the pendency of the action.

The statute clearly intends that, in every case where temporary maintenance is ordered, the court shall determine which spouse is to be paying the carrying charges on a marital and the household expenses—and the manner in which those expenses are to be allocated between the parties.

Temporary Maintenance—Duration

Temporary maintenance shall terminate no later than the issuance of a judgment of divorce or the death of either party. Supreme Court has the power to limit the duration of temporary maintenance.

Further, the temporary maintenance award shall not prejudice the rights of either party regarding a post-divorce maintenance award.

Post-Divorce Maintenance—Duration

The statute sets forth an **advisory** durational schedule for post-divorce maintenance tied to the length of the marriage.

The "length of the marriage" is defined as running from the date of the marriage until the date of commencement of the divorce action.

In determining the duration of post-divorce maintenance, the court must set forth, in writing or on the record, the factors it considered. This is true, regardless of whether or not it follows the advisory schedule. These are the same factors used for determining maintenance on payor's excess income and whether there should be a deviation from the maintenance guidelines.

The following is the advisory schedule for post-divorce maintenance:

Length of the Marriage	***Percentage of the Length of the Marriage for Which Post-Divorce Maintenance Will Be Payable***
Zero to 15 Years	*15% to 30%*
More than 15 to 20 yrs	*30% to 40%*
More than 20 yrs 3	*5% to 50%*

Nothing in the statute prevents the court from awarding non-durational maintenance in an appropriate case.

Retirement and Maintenance

In determining the duration of post-divorce maintenance, the court shall take into consideration:

- anticipated retirement assets;
- benefits; and
- the retirement eligibility ages of both parties if ascertainable at the time of the decision.

If not ascertainable at the time of the decision, the actual **full *or* partial retirement** of the payor with a **substantial diminution** of **income** shall be a basis for modification of maintenance. *Note*—this provision regarding retirement only applies to maintenance awards that are made after trial, not pursuant to an agreement.

(Continued on Page 9)

How It All Got Started

John Marshall, Tom Jefferson and the Birth of Judicial Review

By W. Dennis Duggan, FCJ and AJSC

They were two of the great persons who formed America. A footnote from either of their resumes would be a lifetime of accomplishments for most of us. They were second cousins who despised each other and they were locked in the biggest legal political battle of our Nation's early history. At stake was the future of the authority of the Supreme Court of the United States.

On one side was Thomas Jefferson, the President of the United States. On the other side was John Marshall, the Chief Justice of the United States. In the middle was William Marbury, an insignificant office seeker looking for his commission as a Justice of the Peace. Would "the least dangerous branch," as Alexander Hamilton described the Supreme Court in Federalist #78, become an adjudicatory wimp or would it get game? In *Marbury v. Madison* (5 U.S. 137 [1803]), the issue was joined, the stakes were set, the bets were in. It would take 150 years to see how big a win it was.

John F. Kennedy once told a group of Nobel laureates who were dining at the White House that they represented the greatest assemblage of intellect in that room with the exception of when Thomas Jefferson dined alone. But, if you had a choice of having a beer with someone, you would pick Marshall over Jefferson — hands down.

> ***'At stake was the future of the authority of the Supreme Court of the United States'….***

Marshall's resume was as long and as impressive as Jefferson's. He was an accomplished lawyer. A Revolutionary War soldier who, at age 22, had suffered through that terrible winter of 1777 at Valley Forge as Washington's aide. He marshaled the Constitution through the Virginia State convention — getting the best of the opposition led by Patrick Henry, who was then considered America's greatest orator. He served as a member of the House of Representatives, was a diplomat and John Adams' Secretary of State. He held only one judicial post before becoming Chief Justice—Recorder of the City Court of Richmond. In that position, he would have been sort of a combination of mayor and small claims court judge.

Mayors' courts were a common feature of local governments then and well into the Twentieth Century. However, in addition to having a first rate legal mind, he could charm the pants off most anyone. When President Madison appointed Joseph Story to the Supreme Court, a nervous Jefferson was insured by Madison that Story would be loyal to Jeffersonian principles of small government. Within a short time, Story would become - Marshall's most loyal water carrier.

The prelude to *Marbury y. Madison* was the election of 1800. The election produced a deadlock between Jefferson and Aaron Burr, Jefferson's vice presidential running mate. It would take a Constitutional amendment to later straighten out this little quirk in the system but then it

(Continued on Page 10)

(Continued from Page 8—Matrimonial)

As previously noted, the existence of the new statute does not open the door to modification of prior maintenance awards, whether arising by court order or the parties' agreement. In addition, the statute does not change the standard for modification of maintenance awards made in unmerged agreements (extreme hardship).

In addition, if a party, in the future, moves to modify a maintenance award made prior to the effective date of the new statute, the guidelines shall not apply. This is true whether the maintenance obligation arose in an agreement or by court order after trial.

DRL 248 Made Gender Neutral

DRL 248 was modified to provide that a court may modify maintenance upon proof that the "payee" is holding "himself or herself" out as the spouse of another person, although not married to such other person.

(Continued from Page 9—How It Started)

took the House of Representatives six days and 36 ballots to settle things. Jefferson prevailed because Alexander Hamilton finally swung his support to him. Hamilton hated Jefferson but he hated Burr more. The thing to note here is that this is probably the first peaceful transfer in history of the governmental power of a large country to an opposing group.

The election of 1800 was a complete repudiation of the Federalists. The Democrats now held the presidency and both houses of Congress. The Federalists, to survive, would have to burrow into the judiciary and that's exactly what they did. For the Democrats, it would be pay-back time. In 1800, inauguration day was in March. These five lame-duck months, from Election Day in November to March, provided plenty of time for Federalist mischief. In the Judiciary Act of 1801, the Federalist Congress created forty-two justices of the peace — the today equivalent of a Federal Magistrate Judge.

On Adams' last day in office, the appointments were sent to the Secretary of State. Adams left town, Jefferson was sworn in as President but the signed and sealed commissioners that sat in the Secretary of State's office and were never delivered. There lies the rub. When Adams signed the commissions, his Secretary of State was John Marshall but Marshall had also been sworn in as Chief Justice of the United States, holding both positions at the same time. There lies a bigger rub. The die was cast.

On March 5, 1801, John Marshall, Chief Justice of the United States and, by then, ex-Secretary of State, swore in Thomas Jefferson as the third President of the United States. Later that day, according to Jefferson, he went to visit the offices of the new Secretary of State, James Madison. He noticed the pile of commissions and Jefferson ordered that they not be delivered.

Meanwhile, Marbury had grown tired of waiting for his judgeship to be certified and, after 10 months, petitioned the Supreme Court for a Writ of Mandamus. He was able to do this because Article 13 of the Judiciary Act of 1789, gave the Supreme Court original jurisdiction over Writs of Mandamus. This maneuver had the Democrats (back then they were actually called Republicans) foaming at the mouth. They abolished the 1802 term of the Supreme Court (yes, Congress can do that) so that Marbury's case could not be heard and they commenced impeachment proceedings against Federal District Judge John Pickering and Supreme Court Justice Samuel Chase.

In 1800, the political wall of separation between judges and the rest of government was not very high. No more proof is needed than to note Marshall's two-hat status. One of the articles of impeachment against Justice Chase was that he was several weeks late for the start of the Court's term because he was back in Virginia campaigning for candidates for political office—which he was.

> ***'In 1800, the political wall of separation between judges and the rest of government was not very high'***

So, on for trial comes *Marbury v. Madison* before the then six justices of the Supreme Court. At trial, Marshall first asks how the Petitioner can prove he was ever appointed. This was completely disingenuous on Marshall's part. He was Secretary of State at the time and knew well of the appointments. By any measure he should have recused himself but Marbury wasn't about to ask the greatest Federalist judge of the times to take himself off the case. Marbury had a rough time on this most basic factual point. He called Secretary of State, Madison, who was no help.

The Senate Democrats would produce no confirmation records. Two State Department clerks lost their memories after being sworn in. How about the acting Secretary of State when the commissions were "lost"? That would be Levi Lincoln, the Attorney General of the United States. He took the Fifth Amendment! Marbury had one chance left to prove his case. He called a person who was helping John Marshall wrap up his business at the end of the Adams' administration and who had actually delivered some of the commissions—James Marshall, the Chief Justice's brother. So, the Chief Justice was a potential witness, the brother of a witness, the certifier of the commissions in question but recusal seems never to have crossed Marshall's mind.

Jefferson must have thought he had Marshall twisting in the wind. If Marshall ordered the commissions delivered, Jefferson could ignore the order and there was not much Marshall could do about it. Or, Jefferson's pit bulls could use the decision as a basis for impeachment proceedings. On the other hand, Marshall could deny the petition and appear to have caved in to his political enemies. An effete Supreme Court or one laid prostrate to raw political power? A Hobson's choice indeed.

(Continued on Page 11)

(Continued from Page10—How It All Started)

Jefferson should have known not to underestimate John Marshall. He once remarked:

> "When conversing with Marshall I never admit any -thing. So sure as you admit any position to be good no matter how remote the c*onclusion he seeks to establish — you are gone. So great is his sophistry, you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me whether it was day light or not, I'd reply, 'Sir, I don't know. I can't tell.*"

In his unanimous opinion, Marshall held that Marbury had a right to his commission but that the Supreme Court had no right to order anyone to deliver it to him. Jefferson could flout the law but his Court would not. The reason the Supreme Court had no right to make such an order is that it had no jurisdiction to do so. The law that granted the Court jurisdiction was unconstitutional. The Constitution explicitly listed the types of cases in which the Supreme Court had original jurisdiction and Congress could not amend the Constitution by a legislative enactment that increased that jurisdiction.

While Marshall's logic seems quite obvious now, it was not so then. Neither side had raised or briefed this expanded jurisdiction issue. Indeed, Marshall had used Article 13 of the Judiciary Act in other cases to uphold jurisdiction. So had Oliver Ellsworth, former Chief Justice, framer of the Constitution and author of Article 13. But Marshall was not through. He stated that, "It is emphatically the province and duty of the judicial department to say what the law is." There is nothing about that in the Constitution. It's not contained in any law nor in any judicial oath of office. Judges must apply the law to facts and sometimes that includes ambiguous laws to uncertain facts. But, are judges suppose to "say what the law is," or what the words of the law mean? I guess it depends on what the meaning of the word "is" is.

Marshall had discovered that by taking a small step backward, he could make a giant leap forward. Marshall would extend the Court's power of judicial review, established in *Marbury*, to cover State legislation in *Fletcher V. Peck* (10 U.S. 87 [1810]) but otherwise this principle of law would hibernate until Chief Justice Roger Brooke Taney and his court overruled the Missouri Compromise in the Dredd Scott Decision in 1857. 54 years' worth of *stare decisis* was a powerful thing.

Other Judges would discover the power of the one small step backward—one giant leap forward principle. That is, tucking a little cookie virus in a majority opinion where one side wins the battle but will eventually lose the war. Justice Holmes did this in *Schenck v. U.S.* (249 U.S. 47 [1919]), the Draft Riot case.

He was able to replace the "bad tendency" test with one that called for "a clear, and present danger" in the case of incendiary political language. The convictions of the rioters were upheld but free speech got a stronger shield.

'**Strict Scrutiny Test'**

The development of the "strict scrutiny test" to determine if a law denies a member of a suspect category the equal protection of the laws followed a similar trajectory. This principle was first suggested by Justice Stone in what is, no doubt, the most famous footnote in all of American jurisprudence. In *U.S. v. Carolene Products* (304 U.S. 144 [19381), a case that involved the regulation of margarine, Justice Stone, in footnote #4, suggested that the presumption of constitutionality would have a narrow focus if the law impinged on fundamental rights or "discreet and insular minorities."

Six years later, up for review comes a discreet minority case, *Korematsu v. U.S.* (323 U.S. 214 [1944]) involving the internment of West Coast Japanese--American citizens. The Japanese, as we know, lost. However, majority set firmly as constitutional law the footnote #4 strict scrutiny test.

A third example involves the case of *Everson v. Board of Education* (330 U.S. 1 [1947]), which involved transportation subsidies to parents of children who did not attend public schools. Up until WWII, religion infused public proceedings and facilities in all sorts of ways and it got scant judicial attention. In *Everson*, the Court took a little step backward in approving the subsidy but a giant leap forward in prohibiting the mixing of government and religion. The Court quoted Jefferson with approval, saying: "*the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.*"

You may have noticed that whether the steps and leaps are viewed to be forward or backward can depend which side of the political fence you stand.

(Continued on Page 12)

Member Meeting Proceedings

Meeting – September 17, 2015
Glen Sanders Mansion, Scotia, New York

The meeting was called to order at 12:00 p.m. by Honorable Mark Powers with a sufficient number of members of the Association being then present to constitute a quorum.

1. The minutes from the June 2015 membership meeting had been published and presented to the members. A motion to approve was made by Andrew Healey, seconded by Patricia Rodriguez and unanimously approved.

2. Tim Wilkens and Pat Rodriguez have agreed to chair the SCBA 100th Anniversary Committee. Planning information will follow.

3. Tara Moffett has agreed to Chair the Committee on Law Day.

4. CLE @ Track- Sold out this year; it was a great success.

5. Frank Tedeschi- not present for his report.

(Continued on Page 13)

(Continued from Page 11—How It Started)

The concept of the judiciary having the last — and final — word has so infused American jurisprudence for so long that there is no turning back. However, this result was not inevitable. Jefferson never agreed with the principle of unquestioned judicial review and neither did Lincoln.

And, there are other ways to approach this issue. England has done well for several hundred years without judicial review. The "Law Lords" of Great Britain are without power to declare an act of Parliament unconstitutional. Indeed, Great Britain has no written constitution. In Canada, the Parliament can certify a question to the Supreme Court for an advisory opinion. Judicial review exists in American jurisprudence because John Marshall was determined to create a strong — supreme federal judiciary. He also knew that good things come to he who waits.

Sources

1. Glennon, Michael J. "The Case That Made the Court." The Wilson Quarterly, (Summer 2003): p. 20-28.
2. Taylor, Michael J.C., "*A More Perfect Union. Adleman v. Booth and the Culmination of Federal Sovereignty*." Journal of Supreme Court History, 28, no. 2, (2003): p. 102-115.3. 3.
3. Lemieuix, Scott E., "*The Exception That Defines The Rule: Marshall's Marbury Strategy and the Development of Supreme Court Doctrine.*" Journal of Supreme Court History, 28, no. 2, (2003): p. 197-211.
4. Smith, Jean Edward., "*John Marshall: Definer of a Nation*." New York: Henry Holt and Company, Inc., 1998.

1. It is ironic that Marshall ended up with Jefferson's law practice. When Jefferson headed off to Washington, he turned his law practice over to Edmund Randolph who, when heading off to Washington, turned the practice over to Marshall. Jefferson once courted Marshall's mother-in-law and that resulted in some bad feelings between the men. However, the main gulf between them was politics. It got so bad that Jefferson would refer to Marshall as "his honorable malignancy" and Marshall referred to Jefferson as "that llama on the hill," referring to Jefferson's raising of that breed at his home in Monticello.

2. Aaron Burr is one of the most interesting figures of early post-Revolutionary politics. Until he went off the deep end, killing Hamilton in a duel and then getting wrapped up in a conspiracy to conquer New Orleans, (of which he was acquitted in a trial presided over by John Marshall) he had the presidency clearly in his sights. He was selected as Jefferson's running mate because he was able to deliver New York for Jefferson. He did this by out-organizing Hamilton in New York City, securing for Jefferson a majority in the New York Legislature who, under existing rules, selected the electors who voted for President. Burr used a tontine trust to pack the vote. A residence would be purchased and then divided into, say, 100 shares of ownership. This allowed 100 persons to meet the property ownership qualifications needed to vote.

3. Congress also has the authority to set the size of the Supreme Court. Over the years, the number has varied from five to ten. Since 1869, the number has been nine.

Schenectady County Bar Association

You're invited to
An Evening of Good Cheer
SCBA Holiday Party

December 15
5:30-7:30 p.m.
Glen Sanders
Mansion, Scotia

*Tasty treats and more
*Cash bar

$20/person

RSVP—December 7
info@schenectadycountybar.org

Checks: SCBA
PO Box 1728
Schenectady, NY 12301-1728

(Continued from Page 13—Minutes)

6. Committees chairs were present and reported:
   a. Elder Law and Trusts and Estates: Deborah Slezak
   b Family Law: Eric Tepper (maintenance guidelines)
   c. Real Estate: Michelle Wildgrube (real estate contract revisions and seminar)
   d. Membership: Andrew Healey (no new members)
   e. Young Lawyers: Corey Dalamata – advised the membership they are sponsoring a series of CLEs monthly at noontime at the courthouse, free to members. You don't have to be a young lawyer to go; please volunteer if you have a topic.
7. Old Business – None

There being no additional business to come before the membership, the meeting was adjourned, following motion and second, was unanimously passed.

The next Membership Meeting is set for November 12, 2015 at 11:30 a.m. at the Water's Edge.

Respectfully submitted.
Deborah A. Slezak, Secretary.

Professor Michael Hutter of Albany Law School provided an Update on Evidence in the CLE that followed the September luncheon member meeting.

Schenectady County Bar Association

P.O. Box 1728
Schenectady NY 12301-1728

518-393-4115
www.schenectadycountybar.org
info@schenectadycountybar.org

SCBA @ Your Service

Will repository:

Looking for a will drafted by an attorney no longer in active practice? The Schenectady County Bar Association maintains a repository of a number of such wills, categorized by the draftsperson and listing the firm or attorney presently holding the documents. Contact info@schenectadycountybar.org if seeking to locate a particular will.

www.schenectadycountybar.org:

The SCBA's web site provides updates on CLE and other events, news of professional and community projects, and resource links, as well as a new member-only area with a member directory and court, practice and other notices.

Modest means panel:

The SCBA Modest Means Panel provides reduced fee service to Family Court and Matrimonial litigants with cases pending in Schenectady County—available to those eligible under income guidelines. Attorneys are encouraged to apply to the panel. For further information, visit the SCBA web site or contact Barbara King at bking@tullylegal.com.

(