

Drafting Matrimonial Agreements Requires Consideration of Possible Unconscionability Issues

BY PAUL BENNETT MARROW AND KIMBERLY S. THOMSEN

The doctrine of unconscionability presents unique challenges for the draftsman of any type of matrimonial agreement. Unconscionability issues affect what goes into and what is left out of the prenuptial agreement, the separation agreement and the stipulation of settlement as well as any amendments or modifications.

The rules governing actual application are unique to the different types of agreements encountered in the matrimonial law practice. An understanding of these complexities is essential to assuring that agreements withstand challenges based on the doctrine. The implications are far-reaching, even extending to circumstances involving gay and lesbian unions not otherwise recognized by New York law.

Overview

The theory of unconscionability is rooted in the common law and is incorporated into the statutory schemes governing marriages and divorce. In the eyes of the common law:

[An] unconscionable bargain has been regarded as one "such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other" (*Hume v. United States*, 132 US 406, 411), the inequality being "so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*Mandel v. Liebman*, 303 NY 88, 94).¹

The traditional method of making determinations about unconscionability is rooted in the common law analysis of commercial contracts. In the commercial environment, courts evaluate both procedural and substantive factors:

1. Procedural unconscionability is about the circumstances surrounding the negotiation and execution of an agreement.

2. Substantive unconscionability is about the operation of a given term.

The vast majority of cases hold that both forms of unconscionability must be involved for equity to intervene.²

Traditional common law also requires that a contract term be evaluated in light of the circumstances that

existed when the agreement was entered into, and it bars any consideration of changes in circumstances in the interval between contractual inception and a petition for relief in equity.³ These rules are cast against a backdrop that requires accountability for agreeing to any set of terms and permits equitable intervention only when there is a risk that the integrity of the contracting process will be undermined.

By contrast, matrimonial agreements of all types involve a relationship in which society has vested interests that go beyond a desire to preserve the integrity of the contract process. At the very least, the state has an interest in the statutory obligations assumed when people marry and an interest in discouraging contractual arrangements that might render a contracting party a ward of the state. With these interests in mind the New York Domestic Relations Law ensures continuing jurisdiction over matrimonial agreements of all types⁴ and permits consideration of an application for modification based on a showing of extreme hardship on either party.⁵ In addition, the Domestic Relations Law also mandates procedural safeguards in the form



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of mandatory disclosure with the result that the inquiry about unconscionability is limited to a great degree to just the substantive side of the equation.⁶

Specifically, in New York, matrimonial agreements operate in the statutory setting of § 236 of the Domestic Relations Law (DRL)⁷ and § 5-311 of the General Obligations Law (GOL).⁸

DRL § 236B(3) permits contractual arrangements dealing with four areas of interest to the draftsman:

1. testamentary dispositions and waivers of the right of election;
2. ownership, division or distribution of separate and marital property;
3. spousal maintenance; and
4. custody, care, education and maintenance of children of a marriage.

Only one portion of DRL § 236B(3), the subsection dealing with spousal maintenance, mentions unconscionability. It requires that all terms involving the amount and duration of maintenance be fair and reasonable when the agreement is made and not unconscionable at the time of entry of final judgment. These conditions are substantive in nature – *i.e.*, they speak to the operation of the terms of the agreement on the parties.

The maintenance provision directs that such terms must comply with the mandates of GOL § 5-311. That statute provides, in part, that contracts for support cannot be structured so as to cause either or both parties to become incapable of self-support so as to become a public charge.

DRL § 236B(3)(2), which grants parties the right to make provision for the ownership, division or distribution of any property, makes no mention of unconscionability.⁹ This does not mean that the doctrine is inapplicable. DRL § 236 was adopted in 1980. Three years earlier, the Court of Appeals decided *Christian v. Christian*,¹⁰ which holds that agreements for the division of any property are subject to the traditional doctrine because such agreements

... unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. There is a strict surveillance of all transactions between married persons, especially separation agreements.¹¹

In short, it appears that DRL § 236B(3)(2) authorizes property settlement agreements, while *Christian* and its progeny subject those agreements to scrutiny pursuant to the traditional application of the doctrine of unconscionability at common law.¹² This perspective is consis-

tent with the concerns of the state. Document posted at JDSUPRA
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ment agreement could result in the impoverishment of one of the parties.

But for all that these statutes do accomplish, they do not define what is meant by an “unconscionable” agreement. Courts are charged with making that determination on a case-by-case basis. Meeting that challenge, the courts have created a system of situation-specific applications that require the attention of the draftsman.

Agreement by Agreement

Prenuptial or antenuptial agreements and reconciliation agreements The vast majority of challenges to prenuptial agreements involve provisions dealing with ownership, division or distribution of separate and marital property and, to a lesser degree, spousal maintenance. Challenges can be made in connection with an action for separation or divorce or, if not merged, in a post-judgment action pursuant to the Domestic Relations Law.

Prenuptial agreements are presumed to be valid¹³ and to reflect the intentions of the parties, even if the terms turn out to be a bad deal for either one.¹⁴ Conclusory allegations of unconscionability are not sufficient to justify a hearing on the merits. Moreover, the standard set forth in *Christian* has been recognized to be

harder to meet than the criteria set forth in DRL § 236.¹⁵

Property disposition agreements authorized by the Domestic Relations Law are reviewed as of the time the parties enter into them. The *Christian* decision contains language suggesting a multi-faceted test, with the reviewing Court taking into account more than just the substantive consequences of the agreement, and yet the decision makes no reference to the procedural or substantive nomenclature. Nevertheless, a careful reading of the decision leads to the conclusion that the Court was concerned first and foremost with the procedural aspects of the doctrine.¹⁶ Subsequent decisions involving prenuptial agreements are unclear about exactly what is required, but even these decisions contain descriptive language portraying evidence of procedural or substantive factors.¹⁷ The *Christian* decision does mandate that “[i]f the execution of the agreement . . . be fair, no further inquiry will be made.”¹⁸ This declaration, which at first blush is chilling, is understandable in light of the same Court’s concern with the fiduciary relationship involved – “requiring the utmost of good faith.”

Spousal maintenance provisions are sometimes included in prenuptial agreements, and disputes are usually

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Checklist for Matrimonial Agreements

When drafting matrimonial agreements, consideration of the following issues can help the agreement survive a later claim of unconscionability.

1. Determine which areas of interest will be dealt with in the agreement.
2. Determine whether the commercial nomenclature for unconscionability is likely to come into play.
3. Recite the extent of all disclosure by the parties with respect to financial matters.
4. Indicate the details concerning counsel for all parties. If one party is not represented by counsel, indicate why and what efforts have been made concerning the retention of counsel. Both parties should be required to acknowledge that they were given full opportunity to seek the advice of counsel and both should disclaim that one attorney represented them both.
5. Where applicable, include a statement of acknowledgment by the parties that any imbalance in the distribution of separate and marital assets is deemed not to be an indication of unconscionability.
6. If an agreement for spousal maintenance relieves either or both of such an obligation, indicate that the parties are aware that the provision is subject to the terms of the General Obligations Law.

tied to those that call for a mutual renunciation of claims for support and maintenance. These agreements are, of course, subject to DRL § 236B(3) and (9), and GOL § 5-311. Conclusory allegations that such provisions create conditions that violate the GOL are not sufficient for a court to address the issue of unconscionability.¹⁹

Separation agreements and stipulations of settlement Challenges to separation agreements on grounds of unconscionability are broad and all-encompassing. Those involving only the disposition of separately owned and marital property are resolved by applying the principles set forth in *Christian*. These cases require some evidence of procedural mischief as a prerequisite to reviewing the substantive aspects of the agreement. Thus, agreements drafted with one attorney ostensibly representing both parties are sufficiently suspect to require further inquiry.²⁰

Similarly, preliminary evidence of mental distress is sufficient to create an inference of unconscionability, warranting a hearing to review the substantive operation of a separation agreement.²¹

Separation agreements are not *per se* unconscionable simply because of an unequal division of marital prop-

erty. Courts will look to the text of the agreement to determine issues such as whether both parties were represented by counsel and the extent of disclosure about the financial circumstances of the parties.

Procedural unconscionability is typified by overreaching. Overreaching has been defined to exclude self-delusion and disappointment.²² However, indicators such as one party's having full control over all marital assets and income, the dominant party's attorney drawing the agreement and the other party not having any independent counseling, little or no financial disclosure and an agreement that awards all of the marital assets to the dominant party, if found together, have been found to be as a matter of law evidence of overreaching.²³

Still, such indicators, taken individually, do not necessarily suggest overreaching. Individual factors have to be considered within the entire framework of a separation agreement, and it is the cumulative impact that eventually leads to a finding that a given separation agreement "shocks the conscience."²⁴ Where a party makes a conscious decision not to seek the advice of an attorney, that decision cannot be overlooked in determining the issues involved in overreaching.²⁵

Provisions in a separation agreement that prescribe spousal maintenance are subject to review at the time of a final judgment and, at that time, the court's evaluation is usually made entirely on the basis of the substantive provisions of the agreement.²⁶

Stipulations reached in open court during an ongoing proceeding can be attacked as being unconscionable, the immediacy of judicial review notwithstanding.²⁷ Thus, where a stipulation is arrived at in open court but is based on erroneous findings of a trial court, and that yields a substantively unconscionable result, the stipulation can be vacated.²⁸

Similarly, a stipulation can be vacated where a party appears *pro se* and is put under pressure from the court to settle under circumstances that should have alerted the court to the need to become actively involved to avoid an unconscionable result.²⁹

These rules notwithstanding, mere conclusory allegations that a stipulation is unconscionable are insufficient to justify judicial intervention of any kind.³⁰

And, finally, where a party to a stipulation has received a substantial benefit, such as the payment of cash or the transfer of property pursuant to the terms of a stipulation, that party is deemed to have ratified its terms and cannot claim unconscionability.³¹

Implications for Homosexual Unions

GOL § 5-311 reflects public policy, and yet is limited to support and maintenance arrangements made by a *husband and wife*. An agreement that conflicts with public policy is *per se* unconscionable.³² The basis for the pub-

lic policy as stated in the provision of the GOL is obvious: when a man and woman are united in marriage they accept the obligation to support one another in a manner that will not involve the state in the financial consequences of separation or divorce. Clearly public policy is to protect the state from having to assume financial responsibility for one or both parties to a marriage because of decisions made by the parties.

But this provision of the GOL is specific in the declaration that the stated public policy only applies to a man and woman who have been legally united in marriage. By its terms, homosexuals are not included in this statement of public policy. From this it seems reasonable to conclude that any agreement between homosexual partners for maintenance is not subject to the unconscionability provisions of the DRL, the GOL and the doctrine of *Christian*. This does not mean that such an agreement is *per se* void. It does mean that such an agreement would be interpreted in the same manner as a commercial agreement. Accordingly, it follows that, to establish unconscionability, the moving party would have to show evidence of both elements, procedural and substantive, to prevail. In short, the threshold for establishing unconscionability in situations involving homosexual unions is higher than that afforded a legally married heterosexual couple.

Does this make sense if the overriding concern embedded in the GOL is to protect society from being burdened by adverse consequences resulting from improvident private arrangements concerning support and maintenance? Moreover, does not such a double standard deny parties to a homosexual relationship equal protection under the law? These questions are for the moment unanswered, although recent decisions in Massachusetts and here in New York suggest that such double standards are inappropriate and unconstitutional.³³

Conclusion

When attempting to define pornography, Justice Stewart wrote: "I could never succeed in intelligibly doing so. But I know it when I see it."³⁴ Most matrimonial practitioners will probably agree that this statement seems equally apropos when it comes to trying to define what is meant by "unconscionable."

What is very clear is that the issue of unconscionability cannot be ignored. If an attorney pays careful attention to the details of the circumstances surrounding negotiation and acceptance of the terms of the agreement, as well as the operation of the terms on the parties and the state, he or she will be in a much better position to draft something that will withstand judicial scrutiny and adequately protect the client.

In the final analysis, unconscionability is not an issue if both parties can be shown to have made full disclosure

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of their respective circumstances and to have been given adequate opportunity to fully and objectively evaluate all the implications to be drawn from such disclosure.

1. *Christian v. Christian*, 42 N.Y.2d 63, 71, 396 N.Y.S.2d 817 (1977).
2. *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 537 N.Y.S.2d 787 (1988); *State v. Avco Fin. Serv. Inc.*, 50 N.Y.2d 383, 429 N.Y.S.2d 181 (1980).
3. In *Pennise v. Pennise*, 120 Misc. 2d 782, 787-88, 466 N.Y.S.2d 631 (Sup. Ct., Nassau Co. 1983), the court explained:

Maintenance agreements are intended to take effect in the future and hence are inherently weakened by the inability of the parties to accurately foresee their future circumstances. In addition, the level of maintenance can spell the difference between feast and famine and thus implicates very strong public concerns that a spouse not become a public charge.

On the other hand, property dispositions do not normally have the same impact on a spouse's standard of living as do maintenance agreements. Furthermore, the Legislature clearly intended to encourage property dispositions by contract, as an alternative to the previous disposition of property through title ownership. Obviously, the stability, and hence the efficaciousness, of such agreements would be severely undermined if they could be overturned years after execution upon a finding that an agreement was "unfair" when made or that it became "unconscionable" over time.

This has implications involving the statute of limitations, CPLR 213. Compare *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001), with *Frieman v. Frieman*, 178 Misc. 2d 764, 680 N.Y.S.2d 797 (Sup. Ct., Nassau Co. 1998), and *Zipes v. Zipes*, 158 Misc. 2d 368, 599 N.Y.S.2d 941 (Sup. Ct., Nassau Co. 1993).

4. See *Pintus v. Pintus*, 104 A.D.2d 866, 480 N.Y.S.2d 501 (2d Dep't 1984) (holding that arrangements sharing the contractual characteristics of a surviving separation agreement are included in the statutory use of the term "separation agreement").
5. DRL § 236B(9)(b); see *Beard v. Beard*, 300 A.D.2d 268, 751 N.Y.S.2d 304 (2d Dep't 2002); *Zinkiewicz v. Zinkiewicz*, 222 A.D.2d 684, 635 N.Y.S.2d 678 (2d Dep't 1995); *In re Alexander*, 203 A.D.2d 949, 612 N.Y.S.2d 97 (4th Dep't 1994).
6. *Klein v. Klein*, 246 A.D.2d 195, 676 N.Y.S.2d 69 (1st Dep't 1998); *Gilsten v. Gilsten*, 137 A.D.2d 411, 524 N.Y.S.2d 936 (1st Dep't 1988). See *Tuckman v. Tuckman*, 112 Misc. 2d 803, 447 N.Y.S.2d 654 (Sup. Ct., Rockland Co. 1982).
7. DRL § 236B(3):

Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. . . . Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate

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and marital property; (3) provision for the and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

8. GOL § 5-311:

Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce.

9. Does this imply that there was a legislative mistake and that what was really intended was that the entire of subpart (3) was intended to have application to the entirety of DRL § 236B(3)? The better answer would appear to be in the negative. See discussion in *Zipes v. Zipes*, 158 Misc. 2d 368, 376, 599 N.Y.S.2d 941 (Sup. Ct., Nassau Co. 1993).
10. *Christian v. Christian*, 42 N.Y.2d 63, 396 N.Y.S.2d 817 (1977).
11. *Id.* at 72 (citations omitted).
12. *Goldman v. Goldman*, 118 A.D.2d 498, 500 N.Y.S.2d 111 (1st Dep't 1986); *Pennise v. Pennise*, 120 Misc. 2d 782, 466 N.Y.S.2d 631 (Sup. Ct., Nassau Co. 1983); compare *Zipes*, 158 Misc. 2d 368.
13. There are five indispensable requirements for a valid prenuptial agreement:

1. There must be complete financial disclosure by each party to the other. See *In re Greiff*, 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998).

2. Each party must be separately represented by counsel of his or her choosing and without any suggestion by the other as to the choice. However, the failure of one party to be separately represented is not *per se* fatal if the independent selection is knowingly waived. See *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26 (1982).

3. Duress and emotional anxiety can't be a factor in the acceptance of the agreement.

4. The document must be acknowledged in the same form as is required for a deed to be recorded. *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997).

5. The agreement must comply with the DRL and the GOL.

14. *Clermont v. Clermont*, 198 A.D.2d 631, 603 N.Y.S.2d 923 (3d Dep't 1993), appeal dismissed, 83 N.Y.2d 953, 615 N.Y.S.2d 877 (1994).

15. *Zipes*, 158 Misc. 2d 368; *Pennise*, 120 Misc. 2d 782. See *Panossian v. Panossian*, 172 A.D.2d 811, 569 N.Y.S.2d 182 (2d Dep't 1991).

16. See *Zagari v. Zagari*, 191 Misc. 2d 733, 735, 736, 746 N.Y.S.2d 235 (Sup. Ct., Monroe Co. 2002):

The *Christian* test is a two part test. There must be manifest unfairness coupled with overreaching. That the Court of Appeals was more concerned with the circumstances surrounding the execution of a marital agreement rather than the substance of the agreement itself is borne out in these passages from *Christian*: "These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." Also, "when there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, and there has been an absence of inequitable conduct or other infirmity which might vitiate the execution of the agreement, courts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided." (citations omitted)

Christian and the cases decided thereafter clearly are focusing on procedural unconscionability. The inquiry is whether there was any fraud, overreaching or duress exhibited in the execution of the agreement which caused the bargain to be manifestly unfair. The overall circumstances between the parties existing at the time the agreement was entered into is of paramount concern. Usually, this type of determination can only be made after trial. It certainly cannot be made simply by only looking at the agreement itself. It is for this reason that all of the cases except two cited by defendant were decided after trial. In the two cases where no triable issues of fact were found, the courts had some proof of the parties' relative circumstances at the time of the agreement before it.

But see *Clermont*, 198 A.D.2d 631.

17. Compare cases cited in note 3 *supra*.
18. *Christian v. Christian*, 42 N.Y.2d 63, 73, 396 N.Y.S.2d 817 (1977).
19. *Valente v. Valente*, 269 A.D.2d 389, 703 N.Y.S.2d 206 (2d Dep't 2000); *Clanton v. Clanton*, 189 A.D.2d 849, 592 N.Y.S.2d 783 (2d Dep't 1993).
20. *Vandenburg v. Vandenburg*, 194 A.D.2d 957, 599 N.Y.S.2d 328 (3d Dep't 1993); see *Pennise v. Pennise*, 120 Misc. 2d 782, 788-89, 466 N.Y.S.2d 631 (Sup. Ct., Nassau Co. 1983):

Moreover, a clear inference of overreaching arises since it is undisputed that the document was drafted by plaintiff's attorney and signed by defendant when she was not represented by counsel. Although the agreement contains a provision which states that the parties had consulted with counsel prior to its signing, plaintiff's attorney admits that he was aware that defendant had not consulted

with any other attorney before the document was executed. Under these circumstances, defendant is entitled to a hearing at which she can seek to prove that the second stipulation was so unconscionable when made that it should not be enforced. (citations omitted)

21. Compare *Cardinal v. Cardinal*, 275 A.D.2d 756, 713 N.Y.S.2d 370 (2d Dep't 2000), with *Lyons v. Lyons*, 289 A.D.2d 902, 734 N.Y.S.2d 734 (3d Dep't 2001) (where a party's claim of chronic alcoholism was rejected as being unsubstantiated).
22. *Groper v. Groper*, 132 A.D.2d 492, 496, 518 N.Y.S.2d 379 (1st Dep't 1987).
23. *Tal v. Tal*, 158 Misc. 2d 703, 601 N.Y.S.2d 530 (Sup. Ct., Nassau Co. 1993).
24. *Lounsbury v. Lounsbury*, 300 A.D.2d 812, 752 N.Y.S.2d 103 (3d Dep't 2002); *McCaughey v. McCaughey*, 205 A.D.2d 330, 612 N.Y.S.2d 579 (1st Dep't 1994).
25. *Croote-Fluno v. Fluno*, 289 A.D.2d 669, 734 N.Y.S.2d 298 (3d Dep't 2001).
26. *Tuckman v. Tuckman*, 112 Misc. 2d 803, 447 N.Y.S.2d 654 (Sup. Ct., Rockland Co. 1982).
27. *Grunfeld v. Grunfeld*, 123 A.D.2d 64, 68-69, 509 N.Y.S.2d 928 (3d Dep't 1986):

A litigant, in the highly charged atmosphere of a matrimonial action, when faced with the immediate choice of extended public proceedings or stipulation of settlement, will oftentimes opt for the latter course. Once reached, however, the open-court stipulation should not serve to spring the trap that will catch the unwary or the uninformed and bind the litigant forever in an unconscionable situation from which our courts will not relieve him or her. If no relief for unconscionability is available from an open-court stipulation in a matrimonial action, which by its very nature should be concerned with "equitable distribution," stipulations of settlement will be few indeed, for the competent attorney will not allow his or her client into a potential trap.

28. *Id.*
29. Compare *Yuda v. Yuda*, 143 A.D.2d 657, 533 N.Y.S.2d 75 (2d Dep't 1988), with *Hardenburgh v. Hardenburgh*, 158 A.D.2d 585, 551 N.Y.S.2d 552 (2d Dep't 1990).
30. *Sippel v. Sippel*, 241 A.D.2d 929, 661 N.Y.S.2d 366 (4th Dep't 1997); *Enright v. Enright*, 205 A.D.2d 732, 614 N.Y.S.2d 909 (2d Dep't 1994); *Hunt v. Hunt*, 184 A.D.2d 1010, 585 N.Y.S.2d 259 (4th Dep't 1992).
31. *Golfinopoulos v. Golfinopoulos*, 144 A.D.2d 537, 534 N.Y.S.2d 407 (2d Dep't 1988).
32. *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 413 N.Y.S.2d 135 (1978); *Rowe v. Great Atlantic & Pacific Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827 (1978); *Boga v. Case Catering Corp.*, 86 Misc. 2d 1052, 383 N.Y.S.2d 535 (Civil Ct., Queens Co. 1976); see *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001).
33. Compare *Goodrich v. Dep't of Health*, 2003 Mass. LEXIS 814 (2003); *Langan v. St. Vincent's Hosp. of N.Y.*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct., Nassau Co. 2003); *Storrs v. Holcomb*, 168 Misc. 2d 898, 645 N.Y.S.2d 286 (Sup. Ct., Tompkins Co. 1996), *dismissed*, 245 A.D.2d 943, 666 N.Y.S.2d 835 (3d Dep't 1997).
34. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).