

## FAMILY

# Back to the Future; Traps for the Unwary

By Vesselin Mitev

A new form in Family Court has stirred up controversy among practitioners, as it presents a hidden-in-plain-sight trap for the unwary, and appears to be directly against established precedent.

Under CPLR 4301, court-attorney referees possess “all the powers of a court” except they lack the ability to hold someone in contempt, unless that person is a “witness before [them].”

Via an “order of reference” that can only be made upon the parties’ consent, referees are either there to “hear and report” or “hear and determine” an action or an issue (CPLR 4311, CPLR 4320); in the former circumstance, either party then has to move to either “confirm” or “reject” the report within 15 or 30 days, depending on who you represent.

In Family Court, since there is no “order of reference,” the typical practice is that certain court-attorney referees are automatically assigned to hear visitation and family offense petitions, wherein the parties are presented, at the first appearance, with a “consent form” that they are, in effect, told to sign so that the referee may hear and determine their case.

Although the standard language used by each court varies, to the extent that they must advise the parties that they are

not a judge, but will be acting as a judge upon the parties’ consent, the parties are then immediately presented with a consent form to sign, a pen to do so with, and the cumulative effect of the proceeding is to leave little room for a party to decline to sign the consent form (and then be subject to possible adverse consequences, by dint of the ephemeral effects of human nature); and this is especially true when a litigant is unrepresented.

For a practitioner, whether or not to agree to let a certain referee hear and determine the case is, of course, an important part of trial strategy that’s equal parts experience, gut feeling, and pure rolling the dice, with the sour benefit of knowledge that sometimes the very act of declining to have your case heard before a certain referee may have known and unknown consequences for you and your client down the road; i.e., the devil you know, etc.

The new “consent to referee” form provides that the parties agree (if they sign) that the referee “shall hear and determine the above captioned matter and all future matters filed by the parties herein, unless otherwise limited by Rule 4301 of the [CPLR].” (my emphasis).

To be sure, CPLR 4301 itself ab-



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solutely does not provide for “all future matters” to be heard by the same referee (practically, because future matters necessarily have not yet happened, and are thus premature); but the very existence of that phrase should be a red flag.

To use the absurd to illustrate the obvious, agreeing to this would mean that if the referee demonstrated extreme bias/prejudice against one party, and was reversed on appeal, the matter could not be remanded to a different referee (as is the case where orders are reversed because of judicial bias/prejudice/abuse of discretion) but would go back in front of that same referee.

Ditto for parties who are embroiled in litigation for years (a large contingent of Family Court litigants) who, say, settled a custody dispute in the past, and now one party seeks to modify it; or for parties bringing or defending orders of protection petitions.

The real trap here, of course, is for the unwary lawyer, who agrees to this *ad infinitum* clause on behalf of his or her client, either out of fear of not rocking the boat, or simply not paying attention, and is later hit with a malpractice suit, because of the dearth of authority construing the CPLR referee provisions very narrowly and to the point: absent

an order of reference, on consent, for each case or action, a referee lacks the jurisdiction to hear and determine a matter, see *Matter of Stewart v Mosley*, 85 AD3d 931 [2011]; *Fernald v Vinci*, 302 AD2d at 355; *McCormack v McCormack*, 174 AD2d 612 [1991]).

What to do, then? If you don’t wish to decline to have a referee hear your case, simply strike the part of the form wherein it says, “all future matters,” sign it, and hand it back to the court. The form itself is a stipulation, and not an order, and therefore is a contract strictly between the parties, not the court. If the referee balks at this, that’s respectfully not your problem.

In the off-chance you run into some roadblocks as a result of this, say, getting DFLd, remember that the aggravation now is well worth the raised insurance premiums later, when you get sued for malpractice for blindly signing a stipulation, binding your client to having “all future matters” determined by the same referee.

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## REAL ESTATE

# Top 10 Real Estate Laws of 2017

By Andrew Lieb

Now that 2018 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2017, but instead, a list that highlights the new legal landscape that you face as real estate attorneys in 2018. Being familiar with these laws, regulations and opinions may help you to better address your client’s goals and make you money while helping you avoid malpractice.

## SALT and Mortgage Deductions

26 United States Code §163 has been amended by lowering the mortgage debt that can be utilized as an itemized deduction from \$1,000,000 to \$750,000. Additionally, 26 United States Code §164 has been amended by capping the State and Local Tax Deduction at \$10,000, while completely eliminating foreign real property tax deductions. It is noted that property taxes, as well as state and local sales taxes, may nonetheless be deducted if paid or accrued in carrying on a trade or business. As such, clients should be counseled to allocate their resources to income producing property rather than to residential / vacation property.

## Estate Tax Exemptions

Pursuant to amended 26 United States Code §2010(c)(3), the unified credit against federal estate tax has increased from a “basic exclusion amount” of \$5,000,000 to a new exclusion of \$10,000,000. Now, married couples can pass assets of up to \$20,000,000 without exposure to federal estate tax. However, the New York State exemption remains at \$5,250,000 in 2018. As such, estate tax planners should concentrate their practice in educating New Yorkers of the need to avoid state estate tax.

## Familial Exception to Summary Proceeding

In *Heckman v. Heckman*, the Appellate Division, Second Department, rejected the existence of a blanket “familial exception” to the validity of a summary proceeding brought pursuant to Real Property and Proceedings Law 713(7). In *Heckman*, the licensee was the daughter-in-law of the deceased former owner and therefore a familial relationship existed. However, the Appellate Division differentiated *Heckman* from the First Department’s precedent in *Rosenstiel v. Rosenstiel* because unlike *Rosenstiel*, *Heckman* did not involve a support obligation. As



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such, the availability of summary proceedings to familial licensees has been clarified and clients should be counseled to proceed with such evictions immediately.

## Title Insurance Regulated

The New York Department of Financial Services, by way of Insurance Regulations 206 and 208, has capped title company’s ancillary search fees, created fee disclosure requirements, mandated affiliated referral requirements, eliminated tips provided to title closers, limited the availability of payoff fees to title closers and redefined the long-understood interpretation of Insurance Law §6409(d), which is the anti-inducement statute. Shockwaves have resonated throughout the title industry causing the introduction of new legislation, which is expeditiously making its way through the legislature. Expect many more changes to the title industry in 2018 as the industry’s lobbyists and attorneys respond to the department. Title counsel is going to have a busy year.

## Residential Lease CO Disclosure Requirement

Pursuant to new Real Property Law

§235-bb, owners of real property, with three or fewer units, are required to provide notice to their tenants as to whether a certificate of occupancy is currently valid for the dwelling unit subject to the lease. This requirement cannot be waived by the parties in their lease or otherwise. As a result, landlords must update their leases immediately.

## Rescission Action – Anticipatory Repudiation

In *Princes Point LLC v. Muss Development LLC, et al.*, the New York Court of Appeals, held that the mere commencement of an action seeking “rescission and/or reformation” of a contract does not constitute an anticipatory breach of such agreement. In so holding, the court reiterated the “positive and unequivocal” standard that it utilizes to find the existence of an anticipatory repudiation. As a result, real estate transactional counsel should collaborate with litigation counsel to leverage client’s positions while negotiating major real estate purchase / sale transactions.

## Videotaping Neighbor Cause of Action

Pursuant to new Civil Rights Law §52-a, residential property owners and

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## Appropriate Dispute Resolution: The Time Has Come (Continued from page 8)

client with the most comprehensive understanding of the range of options from which to make informed decisions.

### Resources: Process and provider

ADR services and resources are widely available. Training, credentials, and experience of the mediator or ADR provider is key. A trained, skillful, and experienced ADR practitioner can provide the appropriate forum and facilitate a process to help attorneys and clients reach resolutions as a stand-alone process or as a complimentary process in the course of litigation.

Quality services are available with private, independent mediators with the expertise to mediate cases in general practice, or in specialty areas including construction mediation, divorce mediation, employment cases, and mediation of commercial and business disputes.

Commercial providers as well, such as JAMS and the American Arbitration Association, with panels of specialized mediator and arbitrators offer a range of ADR options.

Every county in New York State is served by a Community Dispute Resolution Center, all of which offer training for qualified mediators, and ADR services to address a range of issues including community or quality of life disputes (e.g., noise and land use matters), disputes involving voluntary organizations, disputes involving government agencies and communities, as well as family mediation, divorce mediation, special education mediation, elder law mediation, school-based mediation, veterans mediation, agricultural mediation, mediation for business and partnership disputes, and small claims and other court-related mediation programs.

The New York State Dispute Resolu-

tion Association, a not-for-profit professional membership and advocacy organization, provides resources and training, manages several state-wide mediation contract programs through the CDRCs, and promotes and supports the use and quality of ADR processes and provider practitioners.

### Options, solutions, resolutions

Doctors are healers but do not *create* health. Similarly, attorneys are dispute resolvers, but do not *create* resolution. The doctor diagnoses the problem, suggests a course of treatment from a range of traditional and modern approaches, and with the patient's consent puts in place systems to create the right conditions for healing and health. The attorney analyzes the conflict, advises on the law, and with the client, determines a course of action. Where the attorney can choose from an array of ap-

propriate dispute resolution processes — including mediation, arbitration and litigation — the attorney can best work with the client to remove barriers, establish the proper forum, and create the right conditions for resolution.

Why limit the options for reaching the most comprehensive, cost-effective, and long-lasting resolution? Understanding the spectrum of options and approaching conflict and client representation with a view toward Appropriate Dispute Resolution will lead to a more satisfying, more comprehensive result. In short, true conflict resolution.

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## Top 10 Real Estate Laws of 2017 (Continued from page 9)

tenants enjoy a private right of action for damages against their neighbor(s) when such neighbor(s) install(s) video equipment on the neighbor(s) property “for the purpose of videotaping or taking moving digital images of the recreational activities which occur in the backyard of such owners’ or tenants’ property if the video recording is done “with the intent to harass, annoy or alarm” or threaten such owners or tenants. Expect counterclaims to trespass actions to follow.

### Condominium / Cooperative Conflict of Interest Disclosure

Pursuant to both new Not-For-Profit Corporation Law §519-a and new Business Corporation Law §727, at least once a year, condominiums and cooperatives directors must both receive a copy of the law concerning related party transactions / interested directors and disclose to their

members / shareholders of such transactions that were undertaken by the building in the prior year. Such disclosure shall include the “contract recipient, contract amount, and the purpose of entering into the contract,” “record of each meeting including director attendance, voting records for contracts, and how each director voted on such contracts,” the dates for the vote, commencement of the contract and its termination. Counsel must promptly notice their client’s managing agents of these new disclosure requirements to facilitate compliance. More so, all votes concerning conflicted transactions must be 100 percent above-board because members/shareholders will be dissecting every transaction moving forward.

### First Time Home Buyer’s Savings

Pursuant to new Private Housing Finance Law Article 28, the New York

State First Home Savings Program was established. Such Program is like a 529 College Savings Account, providing tax incentivization in the form of exemptions from personal income tax for monies saved towards the purchase of a first home within the state. Annual tax-deductible deposit limits are \$5,000 per individual and \$10,000 per married couple. The total account contribution limit is set at \$100,000, excluding interest.

### Vaping is Smoking

Public Health Law §1399-o was amended to prohibit vaping, in addition to the existing prohibition against smoking, subject to expressly set forth exceptions, at places of employment, bars, food service establishments, enclosed public indoor swimming areas, mass transit, public transportation terminals, youth centers, child care facilities, group

homes, residential treatment facilities, colleges, hospitals, commercial establishments, arenas, zoos, bingo facilities, MTA platforms, and elementary / secondary schools. Additionally, Public Health Law §1399-p was amended to include vaping on no smoking signage and policies for hotels / motels, which had each previously been required. Counsel must be reminded that business law is all about compliance. Counsel will be called upon to develop business policies, language for signage and trainings for staff.

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## Elder Law Roundup (Continued from page 10)

peal with the MLTC plan. Importantly, if the enrollee requested aid continuing with their request for a Fair Hearing within 10 days from the date of the notice, their current service level was maintained during the pendency of the Fair Hearing. As it can take several months for a Fair Hearing to be scheduled and many more months for a decision to be issued, the provision of services at current levels during that pendency period is critical.

As of March 1, 2018, before a managed Medicaid recipient can request a Fair Hearing, she/he must first “exhaust” the internal appeal process of the

managed care plan and receive an adverse appeal decision from the plan and only then will be permitted to request a Fair Hearing from the Department of Health. A narrow exception exists for “deemed exhaustion” in cases where the managed care plan fails to adhere to federally prescribed notice and timing requirements.

The MLTC’s truncated notice requirements will be extremely detrimental to clients. The managed Medicaid plan need only mail notice to the client 10 days before the effective date of the intended action (i.e. the reduction or termination of services). The client must

request the internal plan appeal within these same 10 days in order to preserve their appeal rights and secure aid continuing. Surprisingly, the 10 days includes the mailing time and includes weekends and holidays. This could potentially leave a single business day within which a Medicaid recipient must reach an appropriate person at the managed care plan in order to protect their appeal rights and aid continuing.

As always, changes in the law brings opportunity for advocacy, innovation and creativity on behalf of our clients and this year will be no different. Happy lawyering!

*Note: Jennifer B. Cona, is the managing partner of the Elder Law firm Genser Dubow Genser & Cona, LLP, located in Melville. Ms. Cona practices exclusively in the field of Elder Law, including asset protection planning, Medicaid planning, representation in Fair Hearings and Article 78 proceedings, estate planning, trust and estate administration, guardianships and estate litigation. For further information, call (631) 390.5000 or visit www.genserlaw.com.*

<sup>1</sup> While the regulations are effective in New York State on April 1, 2018, New York State Department of Health intends to put them in effect on March 1, 2018.

<sup>2</sup> 42 C.F.R. 438.402(c)(1)(i).

<sup>3</sup> 42 C.F.R. 438.402(c)(1)(i)(A).