The Rainbow Bridge and Res Judicata in Matrimonials

By Vesselin Mitev

Like decaying zombies shuffling along towards inexorable perpetuity (absent a well-placed stake to the head, according to what Netflix tells me), matrimonial/family law matters, to the exclusion of all other suits, are fertile grounds for the reanimation of claims that appear(ed) to have been resolved days, months, or even years ago.

Indeed, the concepts of finality and stare decisis — cornerstones of the jurisprudential system as we know it — are at constant flux and odds with the very nature of matrimonial litigation, which involves evolving, dynamic relationships and projected expectations of how they will culminate, e.g., under what circumstances will a child emancipate, or who is going to pay for college (if the child(ren)) go?

So where do matrimonial claims go to mercifully, finally, die? At first blush, it would appear that no matter how much preamble language we put in a stipulation of settlement to prevent against the re-litigation of claims, post-judgment matters with index numbers from the early 2,000s (bygone days of Motorola Razrs and when there was no such thing as a Twitter feed) pop up with alarming frequency.


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Of course, the majority of these claims are infused with illegitimate, yet compelling, appeals to the court's emotion, which give them a patina of credibility that other matters, say a contractor's dispute over unauthorized change orders, simply do not suffer from. A well-crafted application highlighting a spouse's debilities, encountered later in life, that can be somehow loosely tied to a questionable legal argument about why the separation agreement should be revisited perhaps gets one in the door. From then on, it's a well-known routine hybrid of foot-stomping, cajoling, and trying to get the court to "split the baby" (more on this later).

Two great weapons against such death-by-a-thousand-paper-cuts approaches: 1) know the law and insist upon it; 2) call out your adversary's use or overuse of clichés that are as tired as they are inapplicable.

To the first part, CPLR 3211(a)(5), is a potent tool. In full, it provides for dismissal where:

"5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."

Neatly packed into one quiver of a subsection are nearly all the arrows needed to dispose of all or some such reanimated claims. Collateral estoppel, most often defined as "issue preclusion" or a "subset" of res judicata is especially powerful, since that doctrine holds that claims or issues actually litigated in a prior proceeding — for obvious reasons — cannot be litigated again.

Additionally, and more importantly, the established case law is that not only litigated claims or issues but claims or issues that could have been raised in a prior proceeding but were not are also barred from re-litigation. See for example, *Valenti v. Clocktower Plaza Properties, Ltd.*, 118 AD3d 776 (2d Dept. 2014); *Abraham v. Hermitage Ins. Co.*, 47 AD3d 855 NYS2d 608 (2d Dept. 2008).

The doctrine *precludes the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief, which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding, Union St. Tower, LLC v. Richmond*, 84 AD3d 784 (2d Dept. 2011).

The case law especially recognizes cases that were resolved by stipulations of settlement as resolved on the merits, under the Court of Appeals rubric that a party charts its own litigation course but must be bound by it. Thus, recognizing a claim as either being absolutely or in part disposed of by res judicata or collateral estoppel can have great preclusive effect in submarining a repackaged, reanimated bogus claim for relief.

Second to knowing the cold, hard law, is the skill of fencing back against over-used maxims that serve as shorthand for actual thought and analysis (and which are prevalent). Favorites include "elephants don't marry giraffes;" "split the baby;" and "as a

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father, I know what's right…"

These are hoary clichés and should be called out as such. Elephants, in fact, do marry giraffes, and then have hybrid girelephant babies that inherit their parents' neuroses and are subject to a lifetime of weirdisms, which is why divorce law and custody disputes exist in the first instance; in the famous fable of King Solomon, when he vowed to split the baby, the real mother came forward, revealing herself to be the real mother because she was ready to give her child to another woman, rather than have it suffer the fate of being split in half; and, whenever an adversary (or the Court) attempts to invoke their own experience as a father/husband/wife/mother/parent, the only proper response is that anecdotes are the opposite of data, and the law, thankfully has removed any need for personal interpretation of the legislative intent behind a statute.

Note: Vesselin Mitev is a partner at Ray, Mitev & Associates, a New York litigation boutique with offices in Manhattan and on Long Island. His practice is 100 percent devoted to litigation, including trial, of all matters including criminal, matrimonial/family law, Article 78 proceedings and appeals.