

# CLIENT ADVISORY

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## A MUTUAL FRIEND NO MORE

More than 20 years after their divorce, a mutual friend tried to help close the last chapter in his or her friends' divorce, namely the ownership of a cooperative apartment, by persuading the former husband to make an offer to the former wife for her interest in the apartment. At stake was fifty (50%) percent of the appreciated value of a cooperative apartment perhaps now worth more than \$1,000,000, for which the couple paid \$86,000 in 1973.

In Abramson v. David (NYLJ, 1/11/02, p. 18, col.3), Plaintiff, the former husband, and Defendant, the former wife, purchased an apartment at 870 Fifth Avenue in 1973, a month before they were married, for \$86,000. In April 1979, the Defendant wife apparently left the marital abode and moved to Florida. Plaintiff then removed all of his former wife's possessions and changed the locks to the apartment. The parties were divorced by a Florida court later that year. It is uncontested that since April 1979, Plaintiff husband has lived exclusively in the apartment and paid all costs of carrying the apartment. At the time of the divorce, the parties did not resolve ownership of the apartment or their respective interests, nor did either of the parties allege at that time that they were the sole owner of the apartment.

Plaintiff husband brought this action based upon adverse possession claiming that through the passage of time, twenty-one years had passed since the divorce, he had become the sole owner of the apartment. However, to sustain a claim of Adverse Possession, one must prove first their possession was hostile and under a claim of right; second, that it was actual; third, that it was open and notorious; fourth, that it was exclusive; and fifth, that it was continuous. Plaintiff clearly had actually lived openly, exclusively and continuously in the apartment since April 1979. Thus, the only question for this court was whether his possession was "hostile and under a claim of right". Since the basis for the dispute was a matrimonial case, the court followed existing law and presumed "hostility" and applied a 20-year statutory period, running from the date of the divorce.

The Defendant wife tried to show that the Plaintiff husband had acknowledged her interest in the apartment several times after the date of the divorce. If the Defendant wife could demonstrate that the Plaintiff husband had acknowledged her interest in the apartment at any time during the 20-year period, then his possession would no longer be considered hostile to her interest and the claim that he owned the apartment by adverse possession would fail. Most compelling was Plaintiff's recent offer to pay her \$200,000 for her interest in the apartment. Because the Plaintiff husband, apparently at the request of their mutual friend, had made an offer for the Defendant wife's interest in order to amicably resolve the dispute between them, the court denied Plaintiff's motion for summary judgment, leaving the questions of the starting date, and the adequacy and timing of the Defendant husband's acknowledgement of the former wife's interest, for a jury.

We can only speculate that this mutual friend may have thought that enough time had passed to allow his or her friends to resolve their dispute to their mutual benefit, the apartment having appreciated substantially. Ironically, the only thing that both sides may now agree upon, for entirely different reasons, is that, in fact, not enough time had passed.

### **ENLIGHTENMENT ON “QUALIFIED PRIVILEGE”**

A common theme in our newsletters, and in our litigation practice, is advice to cooperative and condominium boards and board members on how to protect themselves from damage claims arising out of a board member's actions or statements to which someone has taken offense. We continually advise our clients that statements about persons made in their capacity as board members, during and outside of meetings, must be carefully considered and crafted to ensure that the statement is entitled to a “conditional” privilege. Even if a statement is in fact defamatory, one which exposes the person to whom it is aimed to ridicule, aversion or disgrace, a board and its members *may be protected* if the statement is made to persons who have a common interest in the subject matter of the statement so that the free flow of good faith information between those persons sharing the common interest, such as cooperative and condominium association members, should not be impeded. However, be forewarned that no statement or board action will be protected if it can be demonstrated that the board or its member(s) acted out of either spite or ill-will, or that the statement was made with a high degree of awareness of its probable falsity.

Berger v. Temple Beth-El of Great Neck (NYLJ 01/14/2002, p. 23, col. 3), is an excellent example of a defamatory statement made in good faith, resulting in a dismissal of the offended person's claim. During a board meeting, the Temple's President read a prepared statement to the Board of Trustees in which he announced that the Temple had taken the unusual step of barring a member from all access to the Temple, its facilities and its clergy. Apparently, the temple member had begun sending poems to the Temple's female Rabbi, poems which the Rabbi found inappropriate. Asking this member to stop did not work and other Temple and clergy members interceded when the female Rabbi felt threatened and unsafe in the Temple late at night. Other temple members attempted to help resolve this problem to no avail. The Rabbi ultimately opened a file with the local police when the temple member insisted upon attending temple events frequented by the female rabbi over the objections and requests of the rabbi and board members. The Temple even hired a private security guard for the female rabbi while she was at the temple. The Board's efforts did not seem to work, ultimately resulting in the extraordinary action of barring the member from the Temple's grounds. The temple member sued the Board of Trustees alleging that the statement read at the board's meeting, which was reprinted in the minutes *without* the former member's name, was defamatory.

The court found that the President's announcement, even if defamatory, was protected by a qualified privilege because it was a conversation between persons who share a common interest in the Temple and the well being of its members and staff. If the Plaintiff was harassing and threatening not only the temple's clergy, but also members of the Board, and interfering with or preventing the performance of their duties, those actions would be contrary to the Temple's interests and should be discussed and dealt with accordingly. Now, we do not suggest that board members must exhibit the

patience and tolerance of a member of the clergy to demonstrate good faith, but sometimes the clergy cannot help but show us the path to enlightenment, even in the law.